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THE
SUPREME COURT REPORTER

VOLUME 37

PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1916

WITH KEY-NUMBER ANNOTATIONS

DECEMBER, 1916 — AUGUST, 1917

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THE

SUPREME COURT REPORTER

VOLUME 37

THIRTY-SEVENTH EDITION

CASES ARGUED AND REPORTED IN THE

UNITED STATES SUPREME COURT

FOR THE YEAR 1916

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VOLUME OF THE SUPREME COURT
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OF THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1916

CHIEF JUSTICE:

HON. EDWARD D. WHITE.

ASSOCIATES:

HON. JOSEPH McKENNA.

HON. OLIVER WENDELL HOLMES.

HON. WILLIAM R. DAY.

HON. WILLIS VAN DEVANTER.

HON. MAHLON PITNEY.

HON. JAMES C. McREYNOLDS.

HON. LOUIS D. BRANDEIS.

HON. JOHN H. CLARKE.¹

ATTORNEY GENERAL:

HON. THOMAS WATT GREGORY.

SOLICITOR GENERAL:

HON. JOHN WILLIAM DAVIS.

¹Appointed July 24, 1916.

ALLOTMENT OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

FIRST CIRCUIT.

Comprising Maine, Massachusetts, New Hampshire, and Rhode Island.

JUSTICE OLIVER WENDELL HOLMES, of Massachusetts. Appointed December 4, 1902, by President Roosevelt.

SECOND CIRCUIT.

Comprising Connecticut, New York, and Vermont.

JUSTICE LOUIS D. BRANDEIS, of Massachusetts. Appointed June 1, 1916, by President Wilson.

THIRD CIRCUIT.

Comprising Delaware, New Jersey, and Pennsylvania.

JUSTICE MAHLON PITNEY, of New Jersey. Appointed March 13, 1912, by President Taft.

FOURTH CIRCUIT.

Comprising Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

JUSTICE EDWARD D. WHITE, of Louisiana. Appointed February 19, 1894, by President Cleveland; appointed Chief Justice December 12, 1910, by President Taft.

FIFTH CIRCUIT.

Comprising Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.

JUSTICE JAMES C. McREYNOLDS, of Tennessee. Appointed August 29, 1914, by President Wilson.

SIXTH CIRCUIT.

Comprising Kentucky, Michigan, Ohio, and Tennessee.

JUSTICE WILLIAM R. DAY, of Ohio. Appointed February 25, 1903, by President Roosevelt.

SEVENTH CIRCUIT.

Comprising Illinois, Indiana, and Wisconsin.

JUSTICE JOHN H. CLARKE, of Ohio. Appointed July 24, 1916, by President Wilson.

EIGHTH CIRCUIT.

Comprising Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming.

JUSTICE WILLIS VAN DEVANTER, of Wyoming. Appointed December 16, 1910, by President Taft.

NINTH CIRCUIT.

Comprising Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

JUSTICE JOSEPH McKENNA, of California. Appointed January 21, 1898, by President McKinley.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1916.

(242 U. S. 1)

INTER-ISLAND STEAM NAVIGATION
COMPANY, Limited, Plff. in Err.,

v.

GEORGE E. WARD.

COURTS $\Leftrightarrow$ 387(1) — ERROR TO CIRCUIT
COURT OF APPEALS—CASE BROUGHT FROM
HAWAIIAN SUPREME COURT.

The change in the provisions of the Judicial Code, § 246,¹ specifically governing appeals from, and writs of error to, the Hawaiian supreme court which is made by the amendatory act of January 28, 1915 (38 Stat. at L. 803, chap. 22), taking from the Federal Supreme Court its existing jurisdiction to review any judgment of the Hawaiian supreme court if the amount involved exceeds a certain sum, and conferring such jurisdiction upon the circuit court of appeals for the circuit to which Hawaii belongs, compels the conclusion that the Federal Supreme Court may not, by virtue of the general provisions of the Judicial Code, § 241,² governing the appellate jurisdiction of that court over the circuit courts of appeals, review a final decision of the circuit court of appeals on writ of error to the Hawaiian supreme court in a case in which there was no Federal question and no diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1033-1036; Dec. Dig. $\Leftrightarrow$ 387(1).]

[No. 638.]

Submitted October 9, 1916. Decided October
30, 1916.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Supreme Court of the territory of Hawaii, affirming on a second writ of error a judgment of the Circuit Court of the First Judicial Circuit of that territory, in

favor of plaintiff in a personal-injury action. Dismissed for want of jurisdiction.

See same case below, 232 Fed. 809.

The facts are stated in the opinion.

*Mr. W. O. Smith for plaintiff in error. *

Mr. Alexander Britton, in behalf of Mr.
E. A. Douthitt, for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

On writ of error prosecuted from the court below to a judgment of the supreme court of Hawaii, rendered in a case where there was no Federal question and no diversity of citizenship, the judgment was affirmed and the case was brought here. By a motion to dismiss, our jurisdiction is disputed, and to dispose of it requires a consideration of § 246 of the Judicial Code, as amended by the act of January 28, 1915 (38 Stat. at L. 803, chap. 22).

That amendment provides, first, that "writs of error and appeals from the final judgments and decrees of the supreme court of the territory of Hawaii and of the supreme court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States . . . in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a state in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States . . ." And this is immediately followed by a provision giving power to this court to review by certiorari "in all other cases, civil or criminal, in the supreme court of the territory of Hawaii or the supreme court of Porto Rico." The next and separate sentence which follows these provisions and which concludes the amend-

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

37 S. C.—1.

¹ Comp. St. 1913, § 1223.

² Comp. St. 1913, § 1218.

ment is this: "Writs of error and appeals from the final judgments and decrees of the supreme courts of the territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, . . . exceeds the value of \$5,000, may be taken and prosecuted in the circuit courts of appeals."

22 The argument supporting jurisdiction is that as, by the general provisions of the judiciary act of 1891 [26 Stat. at L. 828, chap. 517], now embraced in § 241 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1218], power exists in this court to review by error or appeal the final decisions of the circuit courts of appeals in all cases where the jurisdiction of the trial court did not depend upon diversity of citizenship, or where the case was not otherwise by provisions of law expressly made final in the circuit courts of appeals, therefore power to review exists, since this case is not in one of the excepted classes. But the contention overlooks the fact that from the beginning and continuously up to the adoption of the amendment of 1915, appeals and writs of error to the supreme courts of Hawaii and of Porto Rico were not left to be controlled by the law generally applicable to courts of the United States, as expressed in the judiciary act of 1891, or as found in the provisions of the Judicial Code, re-adopting that act, but were governed by special provisions controlling the subject,—a purpose which is exemplified by

the terms of the amendatory act of 1915. This is plain when it is considered that the two classes of cases enumerated in the amendment of 1915 were practically in the same terms expressed in the prior acts, which conferred reviewing jurisdiction in both classes exclusively upon this court, and that the only substantial change made by the amendatory act was to take from this court the jurisdiction to review in the second enumerated class and confer it upon the circuit court of appeals to which Hawaii belonged. And, indeed, there is nothing in the context of the statute which countenances the view that the statute intended to merely take away the jurisdiction of this court in one class of cases, and, at the same time, to restore jurisdiction as to the same class by means of a power conferred or contemplated to exist to review on error or appeal the judgments and decrees of the circuit court of appeals. Besides, as the remedy intended to be afforded by the amendment of 1915 was evidently the restricting of the jurisdiction of this court, to the end that the burden on its docket might be lightened, we cannot construe that amendment as frustrating the purpose which it was adopted to accomplish. *American Secur. & T. Co. v. District of Columbia*, 224 U. S. 491, 495, 56 L. ed. 856, 857, 32 Sup. Ct. Rep. 553.

Dismissed for want of jurisdiction.

(242 U. S. 7)

PORTUGUESE-AMERICAN BANK OF
SAN FRANCISCO, Appt.,
v.

PAUL I. WELLES, John Daniel, Trustee of
Metropolis Construction Company, Bank-
rupt, and Thomas F. Boyle.

MUNICIPAL CORPORATIONS — 373(1) —
LIENS — ASSIGNMENT—BY PUBLIC CON-
TRACTOR — VALIDITY AS AGAINST SUB-
CONTRACTOR—PROGRESS PAYMENT.

An assignment of a progress payment for work done under a contract for a public improvement is valid—the municipality not objecting—as against any rights of a subcontractor who thereafter served notice on the municipality to withhold payment, as permitted by Cal. Code, Civ. Proc. § 1184, although such assignment did not receive the consent of the board of public works, and the contract expressly provided that without such consent the contractor shall not “either legally or equitably assign any of the moneys payable under the contract or his claim thereto.”

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 913; Dec. Dig. 373(1).]

[No. 45.]

Argued October 27, 1916. Decided November 13, 1916.

A PPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which reversed a decree of the District Court for the Northern District of California, approving the report of a referee adverse to the claim of a subcontractor upon a public work of a lien upon a progress payment due to the principal contractor. Reversed.

See same case below, 128 C. C. A. 161, 211 Fed. 561; on rehearing, 131 C. C. A. 389, 215 Fed. 81.

The facts are stated in the opinion.

Messrs. William R. Harr, George A. Knight, Charles J. Heggerty, James B. Feehan, and Joseph W. Beretta for appellant.

Messrs. Harold Remington, F. H. Dam, R. T. Devlin, W. H. Devlin, A. F. Morrison, P. F. Dunne, W. I. Brobeck, Milton J. Green, and George J. Hatfield for appellees.

*Mr. Justice Holmes delivered the opinion of the court:

This is a suit brought by the appellee Welles to establish a lien upon a debt of \$6,330.85, due under a construction contract from the city of San Francisco, represented by the appellee Boyle, to the bankrupt, Metropolis Construction Company. The district court approved the report of the referee against the claim and in favor of the appellant, but this decree was reversed by the circuit court of appeals. 128 C. C. A. 161, 211 Fed. 561; 131 C. C. A.

389, 215 Fed. 81. The subject-matter is the fourth progress payment, which, on December 5, 1910, had been authorized by the board of public works of the city. On that day the Construction Company applied to the appellant bank for a loan of \$30,000, secured by an order on the auditor of the city, authorizing the bank to draw from the city for the above and other amounts not in controversy here. The bank declined until the order should be accepted by the auditor, whereupon, on the next day, the order was presented to the auditor's office and stamped as received on December 6. The order was intended and taken as an assignment, and, after it had been stamped, was accepted by the bank as security and the money was advanced. The next day \$5,000 more was advanced on the same security, notes being given for each sum. The appellee Welles was a subcontractor, and on December 12 and 16 served notice on the city to withhold payment, as permitted by § 1184 of the Code of Civil Procedure of the state of California. It is admitted by Welles that if the assignment was valid, his rights are subordinate to it (Newport Wharf & Lumber Co. v. Drew, 125 Cal. 585, 58 Pac. 187); and the only question argued on his behalf is whether the terms of the contract between the bankrupt and the city made the assignment void.

The contract provided that the contractor should keep the work under his personal control, and should not assign or sublet the whole or any part thereof without the consent of the board of public works. It further declared that no subcontract should relieve the contractor of any of his obligations, and that he should not, “either legally or equitably, assign any of the moneys payable under the contract or his claim thereto unless with the like consent.” The city has made no objection to the assignment to the bank, and the money now awaits the decision of this court as between the claimant of the lien and the prior assignee.

There is a logical difficulty in putting another man into the relation of the covenantor to the covenantor, because the facts that give rise to the obligation are true only of the covenantee,—a difficulty that has been met by the fiction of identity of person and in other ways not material here. Of course, a covenantor is not to be held beyond his undertaking, and he may make that as narrow as he likes. Arkansas Valley Smelting Co. v. Belden Min. Co. 127 U. S. 379, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308. But when he has incurred a debt, which is property in the hands of the creditor, it is a different thing to say that, as between the creditor and a third person, the debtor can re-

strain his alienation of that, although he could not forbid the sale or pledge of other chattels. When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a horse. It is not illogical to say that the debt is as liable to sale as it is to the acquisition of a lien. To be sure, the lien is allowed by a statute subject to which the contract was made, but the contract was made subject also to the common law, and if the common law applies the principle recognized by the statute of California that a debt is to be regarded as a thing, and therefore subjects it to the ordinary rules in determining the relative rights of an assignee and the claimant of a lien, it does nothing of which the debtor can complain. See further, Cal. Civ. Code, §§ 954, 711. The debtor does not complain, but stands indifferent, willing that the common law should take its course.

The circuit court of appeals relied largely upon *Burck v. Taylor*, 152 U. S. 634, 38 L. ed. 578, 14 Sup. Ct. Rep. 696, some expressions in which, at least, seem to warrant the conclusion reached. But that case, as understood by the majority of the court, was quite different from this. A contract for the building of the Capitol of Texas was made not assignable without the consent of the governor and certain others. The contractor assigned an undivided three-fourths interest to Taylor, Babcock, & Company, with the required assent, and then three sixteenths without assent to three others severally, one of whom conveyed one thirty-second to the plaintiff. The contractor made another conveyance of all his rights under the contract to Taylor, Babcock, & Company, and Taylor, Babcock, & Company made what purported to be a transfer of the entire contract to Abner Taylor, the defendant. Both of these transfers were assented to. In the latter, Taylor purported to bind himself to the state to perform the original contract, and, in the assent to the same, the governor and other authorities stated that they recognized Taylor as the contractor, bound as the original contractor was bound. The court held that there was a novation (p. 650), and that Taylor acted without notice of the plaintiff's claim (p. 653). Upon those facts it would be hard to make out any right of the plaintiff to proceeds of the new contract that Taylor had performed.

The assignability of a debt incurred under a contract like the present sometimes is sustained on the ground that the provision

against assignment is inserted only for the benefit of the city. Whether that form of expression is accurate or merely is an indirect recognition of the principle that we have stated hardly is material here. It is enough to say that we are of opinion that, upon the facts stated, the assignment was not absolutely void, that therefore the bank got a title prior to that of Welles, and consequently that the decree must be reversed. See *Hobbs v. McLean*, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; *Burnett v. Jersey City*, 31 N. J. Eq. 341; *Fortunato v. Patten*, 147 N. Y. 277, 41 N. E. 572.

Decree reversed.

Mr. Justice McKenna dissents for the reasons stated by the circuit court of appeals.

(242 U. S. 13)

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,

v.

NATHAN PARKER, as Administrator of the Estate of Edward Parker.

COMMERCE — 27(7) — EMPLOYERS' LIABILITY — WHEN SERVANT IS ENGAGED IN "INTERSTATE COMMERCE."

1. A railway fireman on a switching engine, who was killed by striking a caboose on the main track while his engine was transferring an empty car from one switch track to another, was employed in interstate commerce, although the car was not itself moving in such commerce, if this movement was simply for the purpose of reaching and moving an interstate car.

[Ed. Note.—For other cases, see *Commerce*, Dec. Dig. — 27(7).]

For other definitions, see *Words and Phrases*, First and Second Series, *Interstate Commerce*.]

APPEAL AND ERROR — 213—QUESTION NOT RAISED BELOW.

2. A judgment against a railway company, in favor of the administrator of a deceased employee, will not be reversed because of the erroneous assumption below that a railway fireman, who was killed by striking a caboose on the main track while his engine was transferring from one switch track to another, for the ulterior purpose of interstate commerce, an empty car, not itself moving in interstate commerce, was not engaged in such commerce, although it is admitted that there could be no recovery if the deceased was so engaged, where the railway company did not ask to go to the jury on the question whether the deceased was engaged in interstate commerce, but simply asked the court to direct a verdict on the ground, among others, that it appeared as matter of law that he was so engaged, since, if that question had been left to the jury, and they had disbelieved the testimony that the empty car was moved for the ulterior purpose of interstate commerce, there would have been no error of

law in allowing the verdict for the plaintiff to stand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1165, 1304-1308; Dec. Dig. ¶ 213.]

[No. 330.]

Submitted November 1, 1916. Decided November 13, 1916.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Knox County, in that state, in favor of plaintiff in an action against a railway company to recover damages for the negligent killing of an employee. Affirmed.

See same case below, 165 Ky. 658, 177 S. W. 465.

The facts are stated in the opinion.

Mr. Benjamin D. Warfield for plaintiff in error.

Messrs. Edward C. O'Rear, J. M. Robison, and B. G. Williams for defendant in error.

*Mr. Justice Holmes delivered the opinion of the court:

The plaintiff's intestate was a fireman upon a switching engine which was moving upon a switch track. A caboose stood upon the main track so near to where the engine moved that the deceased struck it and was killed. His administrator brought this action against the railroad, the plaintiff in error, for causing the intestate's death, and got a verdict, which, it is admitted, cannot be sustained if the deceased was engaged in interstate commerce. The dealings of the state courts with that question are the ground for the present writ of error. The judgment for the plaintiff was affirmed by the court of appeals. 165 Ky. 658, 177 S. W. 465.

The business upon which the deceased was engaged at the moment was transferring an empty car from one switch track to another. This car was not moving in interstate commerce, and that fact was treated as conclusive by the court of appeals. In this the court was in error, for if, as there was strong evidence to show, and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate. The difference is marked between a mere expectation that the act done would be followed by other work of a different character, as in *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, 478, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, ¶ 163, 10 N. C. C. A. 153, and doing the act * for *the purpose of furthering the later

work. See *New York C. & H. R. R. Co. v. Carr*, 238 U. S. 260, 263, 59 L. ed. 1298, 1299, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; *Pennsylvania Co. v. Donat*, 239 U. S. 50, 60 L. ed. 139, 36 Sup. Ct. Rep. 4; *Kalem Co. v. Harper Bros.* 222 U. S. 55, 62, 63, 56 L. ed. 92, 95, 96, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285.

But it is necessary to see how the case was dealt with in the trial court. The railroad company did not ask to go to the jury on the question whether the deceased was engaged in interstate commerce. It simply asked the court to direct a verdict, on the ground, among others, that it appeared as matter of law that he was so engaged. But if the question had been left to the jury, and they had disbelieved the testimony that the empty car was moved for the ulterior purpose of interstate commerce, there would have been no error of law in allowing a verdict for the plaintiff to stand. It is true that the judge seems to have assumed that the business in hand was intrastate, but the only objection indicated was to his not ruling the contrary; and, as the railroad did not ask to go to the jury, and the only ruling requested was properly denied, the judgment must stand.

Judgment affirmed.

(242 U. S. 4)

WILLIAM P. CROSS, Appt.,

v.

UNITED STATES.

CLERKS OF COURTS ¶ 23—FEES—NATURALIZATION PROCEEDINGS.

A charge by a clerk of a Federal district court of fees for making, on the direction of the Bureau of Immigration and Naturalization, triplicate copies of original declarations of intention for naturalization, and attaching the seal of the court, is not authorized by the general provisions of U. S. Rev. Stat. § 828, Comp. Stat. 1913, § 1383, since if the duty to render such services was expressly commanded by the naturalization act of June 29, 1906 (34 Stat. at L. 596, chap. 3592, Comp. Stat. 1913, §§ 4371, 4372, 4377), § 12, the right to charge therefor would be clearly forbidden by the prohibitory provision of § 21, such services not having been included in the enumeration of fees in § 13, and if such duty only arose in consequence of the general provisions of § 12, the prohibition of § 21 would equally be applicable.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 33, 34, 54; Dec. Dig. ¶ 23.]

[No. 78.]

Submitted October 23, 1916. Decided November 13, 1916.

A PPEAL from the Court of Claims to review the rejection of the claim of the clerk of the District Court of the United States for the District of Rhode Island, to be paid fees for making triplicate copies of declarations of intention for naturalization, and attaching the seal of the court. Affirmed.

See same case below, 50 Ct. Cl. 413.

The facts are stated in the opinion.

Messrs. Frank B. Crosthwaite and Edward F. Colladay for appellant.

Assistant Attorney General Thompson for appellee.

Mr. Chief Justice White delivered the opinion of the court:

The question for decision is, did the court below err in rejecting the claim of ¹²the plaintiff, who is the appellant,* to recover an amount based upon his asserted right as clerk of the United States district and circuit courts for the district of Rhode Island to be paid fees for making, on the direction of the Bureau of Immigration and Naturalization, triplicate copies of original declarations of intention for naturalization, and attaching the seal of the court to the same?

The solution of the inquiry depends upon a consideration of §§ 12, 13, and 21 of the Naturalization Act of June 29, 1906 (34 Stat. at L. 596, chap. 3592, Comp. Stat. 1913, §§ 4371, 4372, 4377), and the relation to those provisions of § 828, Revised Statutes, Comp. Stat. 1913, § 1383.

By § 12 it is provided that it shall be the duty of the clerk of every court exercising jurisdiction in naturalization matters "to keep and file a duplicate of each declaration of intention made before him and to send to the Bureau of Immigration and Naturalization at Washington, within thirty days after the issuance of a certificate of citizenship, a duplicate of such certificate, and to make and keep on file in his office a stub for each certificate so issued by him. . . . It shall also be the duty of the clerk of each of said courts to report to the said Bureau, within thirty days after the final hearing and decision of the court, the name of each and every alien who shall be denied naturalization, and to furnish to said Bureau duplicates of all petitions within thirty days after the filing of the same, and certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization of aliens as may be required from time to time by the said Bureau."

By § 13 provision is made for the following fees: "For receiving and filing a declaration of intention and issuing a du-

plicate thereof, one dollar. For making, filing, and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars."

In their ultimate analysis all the arguments for reversal must come to one or the other or both of the following propositions:

(a) That the declarations of intention were not proceedings in naturalization covered by § 12, and therefore the services rendered were outside of that section, and governed, not by the enumeration of fees in § 13, but by the general provisions of § 828, Rev. Stat. Comp. Stat. 1913, § 1383, authorizing a charge by clerks of 10 cents per folio "for a copy of any entry or record, or of any paper on file," and a fee of 20 cents "for affixing the seal of the court to any instrument, when required." Or (b) if the declarations of intention of which triplicate copies were furnished were proceedings in naturalization and within the requirements of § 12, payment for such copies was not embraced by the fees enumerated in § 13, and therefore the charge for them must be considered as being provided for in § 828, Rev. Stat. Comp. Stat. 1913, § 1383.

But we are of opinion that both of these propositions are incompatible with §§ 12 and 13, and, moreover, that to sanction them would disregard the express prohibition of § 21, which is as follows:

"That it shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings, or to demand, charge, collect, or receive any other or additional fees or moneys in naturalization proceedings save the fees and moneys herein specified."

We are of opinion the conclusion stated clearly follows from the the prohibition of this section for the following reasons: First, if, on the one hand, it be assumed that the duty to furnish the copies charged for was expressly commanded by § 12, the right to charge for them would be clearly prohibited by § 21, even if no provision for payment was embraced in the fees enumerated in § 13; *since it is apparent from the text that the purpose of the statute was to permit fees to be charged for the services expressly provided for in § 12 only when such fees were enumerated and authorized by § 13,—a conclusion which is additionally apparent since § 12 unmistakably imposes duties for which no fees are provided in § 13, but which are covered by the prohibition of § 21. Second, if, on the other hand, it be

assumed that there is no express provision for furnishing the copies in § 12, but that such duty only arose in consequence of the general provision of that section requiring clerks to furnish "certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization of aliens as may be required from time to time by the said Bureau," it is equally clear that the prohibition of § 21 would be applicable, since it was plainly intended to prevent resort to extraneous legislation for the purpose of supporting the right to charge a fee for services embraced within the general terms of § 12 when no fee was provided for such services by § 13.

Affirmed.

(242 U. S. 20)

DAN O'NEIL, Plff. in Err.,

v.

NORTHERN COLORADO IRRIGATION
COMPANY et al.

CONSTITUTIONAL LAW 308—"DUE PROCESS OF LAW"—PRESCRIPTION—OPPORTUNITY FOR HEARING.

1. The failure, if any, to accord an appropriator of water rights for irrigation purposes an opportunity to be heard in a suit in another water district over priority of appropriation does not make it a denial of due process of law for the state to provide, as is done by Colo. Act of February 23, 1881, § 35, that if he takes no steps to assert his rights within four years after the judicial assertion of an adverse title, the decree being a public fact, he shall lose those rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. § 925; Dec. Dig. 308.]

For other definitions, see Words and Phrases, First and Second Series, Due Process Of Law.]

CONSTITUTIONAL LAW 308—"DUE PROCESS OF LAW"—CONSTRUCTION OF PRESCRIPTION STATUTE—SURPRISE.

2. Construing as applying to parties in different water districts the provisions of Colo. Act of February 23, 1881, § 35, that after four years from the rendition of a final decree in any water district in a suit over priority of appropriation of water rights for irrigation purposes all parties whose interests are thereby affected shall be deemed and held to have acquiesced in the same, and that thereafter all persons shall be forever barred from setting up any claim to priority of rights to water for irrigation in such water district adverse or contrary to the effect of such decree, does not take without due process of law, contrary to U. S. Const. 14th Amend., the property of an appropriator in another district than the one in which a decree establishing a priority of appropriation in another appropriator was rendered, although such construction was first announced after the period of limitation had expired, where there had been no different construction of the

statute before the limitation had run that might have lulled him to repose.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 925; Dec. Dig. 308.]

CONSTITUTIONAL LAW 278(1)—DUE PROCESS OF LAW—DEPARTURE FROM RULE OF PROPERTY.

3. A mere departure by the courts of the state from a rule of property established by prior decisions does not violate any rights under the 14th Amendment to the Federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. 278(1).]

[No. 68.]

Argued November 6, 1916. Decided November 20, 1916.

IN ERROR to the Supreme Court of the State of Colorado to review a decree which affirmed a decree of the Park District Court, in that state, dismissing the complaint in a suit to quiet title to alleged water rights, and to enjoin the closing of plaintiff's irrigation ditch. Affirmed.

See same case below, 56 Colo. 545, 139 Pac. 536.

The facts are stated in the opinion.

Messrs. Fred R. Wright, Charles D. Hays, Clyde C. Dawson, and G. K. Hartenstein for plaintiff in error.

Messrs. La Fayette Twitchell, Luther M. Goddard, Paul M. Clark, and Fred Farrar, Attorney General for the state of Colorado, for defendants in error.

Mr. Justice Holmes delivered the opinion of the court:

This is a complaint brought by the plaintiff in error to quiet his title to alleged water rights on Tarryall creek, a tributary of the South Platte river, and to enjoin the defendant Irrigation Company and the state officials from closing the plaintiff's ditch under an assertion of the Irrigation Company's superior right. The defendants justified under a decree establishing the Irrigation Company's priority and a statute making the decree conclusive after four years. The plaintiff replied and argued that the statutes, if construed to have the alleged effect, took his property without due process of law, contrary to the 14th Amendment. The defendants demurred and the state courts upheld the defense. 56 Colo. 545, 139 Pac. 536.

The case is this: In 1879 the state established water districts, the plaintiff's water rights being in district 23 and the defendant's in district 8, directly below 23, upon the South Platte. Jurisdiction was conferred upon the district courts for the proper county to adjudicate all questions concerning priority of appropriation and other questions of right between "owners of ditches drawing water for irrigation purposes from the same stream or its tributaries within the same water district."

Laws of 1879, Feb. 19, § 19, p. 99. Rev. Stat. 1908, § 3276. The provisions were enlarged by an Act of February 23, 1881, p. 142, but still seemingly confined to controversies between parties in the same district, until they came to the sections of limitation. By § 34 the act was not to prevent suits within four years, and by § 35 after "four years from the time of rendering a final decree, in any water district, all parties whose interests are thereby affected shall be deemed and held to have acquiesced in the same . . . and thereafter all persons shall be forever barred from setting up any claim to priority of rights to water for irrigation in such water district adverse or contrary to the effect of such decree." Laws of 1881, pp. 159, 160. Rev. Stat. 1908, §§ 3313, 3314. Later statutes were enacted in 1887 and 1903, creating divisions, and requiring the irrigation division engineers to tabulate the priorities and rights as established by decree in the different districts of their divisions, and to administer the use of water accordingly. But these statutes are not material. The parties' rights were held to be fixed under the Act of 1881.

On December 10, 1883, the proper court for the defendant company's district made a decree that the company was entitled to a priority of right to the use of water for irrigation purposes of 1184 cubic feet of water per second from the South Platte and its tributaries, dated January 18, 1879, which was prior to the date of the plaintiff's rights. It will be observed that the Act of 1881 was in force when this decree was made. The plaintiff contends that the construction of § 35 of the act, as applying to parties in a different district, this construction having been first announced after the period of limitation had gone by, had the effect of a new statute declaring his rights barred by time already elapsed, and attempted to make conclusive against him a proceeding to which he was not a party and in which he would not have been heard.

So far as the last objection goes the answer is that if it be true that the plaintiff was not entitled to be heard on the defendant's decree, still there was nothing to hinder the state from providing that, if he took no step to assert his rights within a reasonable time after the judicial assertion of an adverse title, the decree being a public fact, he should lose those rights. See *Barker v. Harvey*, 181 U. S. 481, 45 L. ed. 963, 21 Sup. Ct. Rep. 690; *Soper v. Lawrence Bros. Co.* 201 U. S. 359, 367, 368, 50 L. ed. 788, 791, 26 Sup. Ct. Rep. 473; *American Land Co. v. Zeiss*, 219 U. S. 47, 60, 55 L. ed. 82, 94, 31 Sup. Ct. Rep. 200; *Montoya v. Gonzales*, 232 U. S. 375, 378, 58 L. ed. 645,

650, 34 Sup. Ct. Rep. 413. The answer to the first half of the plaintiff's contention is no less plain. It is that the construction of a statute does not take a party's property without due process of law simply because it takes him by surprise, and when it is too late for him to act on the construction and save his rights. That is all that the plaintiff has to complain of. There was no different construction of the statute by the court before the limitation had run, that might have lulled him to repose. The only decisions relied upon by the plaintiff as tending to favor him are *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 278, and *Sterling Irrig. Co. v. Downer*, 19 Colo. 595, 36 Pac. 787, which were not rendered until 1893 and 1894, and both of which are consistent with *Ft. Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irrig. Land Co.* 39 Colo. 332, 90 Pac. 1023, establishing the construction followed in this case. It should be added that, however strong the argument for a different interpretation, the one adopted also was strongly supported, so that there can be no pretense that a perverse reading of the law was used as an excuse for giving a retrospective effect to the law of 1903. The decision was absolutely entitled to respect.

It is suggested that the cases cited established a rule of property, and that any departure from it violated the plaintiff's rights under the 14th Amendment. But we already have said that the cases do not establish the rule supposed, and if they did, something more would be necessary before the plaintiff could come to this court. *Sauer v. New York*, 206 U. S. 536, 547, 548, 51 L. ed. 1176, 1182, 27 Sup. Ct. Rep. 686; *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 59 L. ed. 1204, 1210, 35 Sup. Ct. Rep. 678.

Judgment affirmed.

(242 U. S. 15)

SEABOARD AIR LINE RAILWAY, Appt.,
v.

CITY OF RALEIGH and James I. Johnson,
O. G. King, and R. B. Seawell, Commis-
sioners of the City of Raleigh.

CONSTITUTIONAL LAW § 134—IMPAIRING
CONTRACT OBLIGATIONS—LICENSE—RAIL-
WAY OCCUPATION OF CITY SIDEWALK.

No contract rights to occupy a city sidewalk with a spur track which would unconstitutionally be impaired by a city ordinance directing its removal can be implied from a resolution of the board of aldermen, adopted long after the creation of the railway company and the construction of its road, granting such railway company permission—without any contract as to time—to occupy the sidewalk for the purpose of

running a track, nor from the railway company's possession under such permission, no matter how long continued.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 344; Dec. Dig. ¶134.]

[No. 59.]

Argued November 1, 1916. Decided November 20, 1916.

APPPEAL from the District Court of the United States for the Eastern District of North Carolina to review a decree which dismissed the bill in a suit to restrain the enforcement of a municipal ordinance directing the removal of a railway spur track from a city sidewalk. Affirmed.

See same case below, 219 Fed. 573.

The facts are stated in the opinion.

Mr. Murray Allen for appellant.

Mr. John W. Hinsdale, Jr., for appellees.

*Mr. Chief Justice White delivered the opinion of the court:

Upon the assumption that contract rights protected by the Constitution of the United States would be violated, the bill sought to restrain the enforcement of an ordinance which directed the removal of a spur track on a sidewalk on a designated street and block. On the bill, answer, and on agreed facts the court refused an injunction on the ground that there was no contract right in existence, and, treating this conclusion as going to the vitals of the whole case, dismissed the bill, and a direct appeal was taken.

Although there are fourteen assignments of error, but one question arises: Was there a contract? since, leaving out mere forms of statement, all the assignments concern this single question, and we come to its solution. In doing so, to avoid that which is superfluous, we concede, for the sake of the argument only, that the city had the lawful authority to make a contract concerning the track on the street and sidewalk in question. With this argumentative concession the question then is, not what there was power to do, but what was done; and to solve it requires a brief statement.

In 1835 the Raleigh & Gaston Railroad Company, to whose rights it is conceded the complainant and appellant succeeded, was authorized to and shortly afterwards built a railroad from Gaston to Raleigh, North Carolina. Entering the latter city through its streets with its consent, and building therein machine shops, a railroad yard, and other facilities, the main tracks of the railroad curved into a block which the company had bought and upon which it established its terminals, bounded on the front

or west by Salisbury street, on the rear or east by Halifax street, and on the north and south by North and Lane streets. Many years subsequently, in 1881, on the block just below and on the same side of Salisbury street, a cotton compress had been built, fronting on Salisbury street and abutting on the sidewalk on that street. In that year the railroad company asked permission of the city authorities to extend a track to and along the sidewalk on the block in front of the compress, which was granted, the official record of the consent of the city having been manifested by the following entry in the minutes of the board of aldermen: "Upon application of John C. Winder, General Superintendent, the Raleigh & Gaston Railroad Company was granted permission to occupy the sidewalk on the east side of Salisbury street, between Jones and Lane streets, for the purpose of running a track." In virtue of this consent a spur track projecting from the main tracks as they curved into the terminal block was built which ran down to and upon the sidewalk in front of the compress. For many years this track was used for business going in and out of the compress, as well as for the general purposes of the railroad. In 1906, however, the compress ceased to be operated, and subsequently (about 1910 or 1911) the railroad company, owning the block on which the compress was situated, removed the same and built upon the block a warehouse. It was not possible, however, from the track on the sidewalk to directly reach such warehouse, as, along the block where it fronted on Salisbury street, tracks were laid between the warehouse and the spur track, which, for the purposes of the railroad, were depressed below the level of the street and sidewalk, and thus the spur track on the sidewalk was only available for parking cars, or as a team track, and was alternately in use for one or the other of these purposes when the city adopted the assailed ordinance directing the removal of the spur track.

Under this statement it becomes at once apparent that the court below rightly decided that the contract right asserted had no existence, since, on the very face of the consent which was given, a mere right to occupy was conveyed, without any contract as to time, and which therefore, taking the best view for the railroad, amounted to conferring upon it a mere license to put and use a track upon the sidewalk, and therefore subject to the power of the city to revoke whenever it deemed the municipal interest required it to do so.

But the contention is that, although it be conceded that the well-settled rule is that general implications may not be resorted to

for the purpose of converting a grant of a municipality which is, upon its face, a mere license, into a contract for a stated period or in perpetuity, nevertheless that rule is subject to a well-defined limitation or exception which, as presented in the argument in various forms, may be stated as follows:

*19 That where general powers are conferred and duties are imposed upon a corporation which, from their nature and essential character, presuppose the right to exert them or the duty to perform them during a specified time or in perpetuity, and a particular power or right is conferred on the corporation which has a necessary relation thereto or an essential connection therewith, although such particular power or right may not have expressly taken the form of contract or grant for a stated time or in perpetuity, nevertheless such result may be implied by considering the essential relation which the particular power or right granted bears to the general powers and duties possessed and the necessary connection between the two for the purpose of giving a common duration to both. *Louisville v. Cumberland Teleph. & Teleg. Co.* 224 U. S. 649, 663, 56 L. ed. 934, 940, 32 Sup. Ct. Rep. 572; *Owensboro v. Cumberland Teleph. & Teleg. Co.* 230 U. S. 58, 65, 66, 57 L. ed. 1389, 1393, 1394, 33 Sup. Ct. Rep. 988; *Boisé Artesian Hot & Cold Water Co. v. Boisé City*, 230 U. S. 84, 91, 57 L. ed. 1400,

1406, 33 Sup. Ct. Rep. 997; *New York Electric Lines Co. v. Empire City Subway Co.* 235 U. S. 179, 191-194, 59 L. ed. 184, 191, 192, L.R.A. —, —, 35 Sup. Ct. Rep. 72, Ann. Cas. 1915A, 906.

But while the general rule is well founded and the exception or limitation by which it is asserted to be qualified is well settled, it has no relation to the case in hand, since the particular action of the city in question concerned a mere permission to exercise a facility as a license, given long after the creation of the railway corporation, and not inherently or in any degree necessarily controlling its power to discharge its corporate attributes. Indeed, so much is this the case on the face of the situation here presented that it becomes apparent that to apply the limitation to a case like this would destroy the general rule itself.

The contention that even though this be the case, in as much as the railroad had for a long time operated the spur track on the sidewalk and used it for its general railroad purposes with the assumed knowledge and assent of the city, thereby the existence of a contractual and permanent right must be inferred, is manifestly without merit. Indeed, it amounts to saying that possession under a mere license was capable of causing that which was revocable and precarious to become contractual and permanent.

Affirmed.

FOLLOWING ARE MEMORANDA
OF
CASES DISPOSED OF AT OCTOBER TERM, 1916,

WITHOUT OPINIONS AND NOT ELSEWHERE OR OTHERWISE DISPOSED OF IN THIS EDITION.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Plaintiff in Error, v. STATE OF KANSAS. EX REL. S. M. BREWSTER, Attorney General, et al. [No. 191.]

In Error to the Supreme Court of the State of Kansas.

Mr. Joseph M. Bryson for plaintiff in error.

Mr. James P. Coleman for defendants in error.

June 26, 1916. Dismissed pursuant to the Twenty-eighth Rule, per stipulation of counsel.

DULUTH STREET RAILWAY COMPANY, Plaintiff in Error, v. RAILROAD COMMISSION OF WISCONSIN. [No. 274.]

In Error to the Supreme Court of the State of Wisconsin.

Mr. Edwin S. Mack for plaintiff in error.

Messrs. Walter Drew and Walter C. Owen for defendant in error.

June 29, 1916. Dismissed pursuant to the Twenty-eighth Rule, per stipulation of counsel.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error, v. MARY C. SMITH, Administratrix of William M. Smith, Deceased. [No. 193.]

In Error to the Supreme Court of the State of Kansas.

Mr. R. R. Vermilion for plaintiff in error.

Messrs. A. M. Keene and E. C. Brandenburg for defendant in error.

July 6, 1916. Dismissed pursuant to the Twenty-eighth Rule, per stipulation of counsel.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Plaintiff in Error, v. UNITED STATES OF AMERICA TO THE USE OF WILLIAM T. FOWDEN, etc. [No. 424.]

In Error to the Circuit Court of Appeals for the Third Circuit.

Mr. Thomas A. Whelan for plaintiff in error.

Mr. George Harbaugh Stein for defendant in error.

July 7, 1916. Dismissed pursuant to the Twenty-eighth Rule, per stipulation of counsel.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error, v. F. H. COOPER. [No. 455.]

In Error to the Court of Appeals of the State of Kentucky.

Messrs. E. L. Worthington, W. D. Cochran, and LeWright Browning for plaintiff in error.

Mr. Allan D. Cole for defendant in error.

July 10, 1916. Dismissed pursuant to the Twenty-eighth Rule, per stipulation of counsel.

C. C. CHESNUT, Plaintiff in Error, v. MARGARET CAPEY. [No. 134.]

In Error to the Supreme Court of the State of Oklahoma.

Mr. O. L. Rider for plaintiff in error.

Messrs. C. B. Stuart, A. C. Cruce, and M. K. Cruce for defendant in error.

August 22, 1916. Dismissed pursuant to the Twenty-eighth Rule, per stipulation of counsel.

JOHN Z. LOWE, JR., Collector of Internal Revenue, Plaintiff in Error, v. SAMUEL T. HUBBARD et al. [No. 309.]

In Error to the District Court of the United States for the Southern District of New York.

The Attorney General for plaintiff in error.

Messrs. David Hunter Miller and Gordon Auchincloss for defendant in error.

October 9, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

JOHN Z. LOWE, JR., Collector of United States Internal Revenue, etc., Plaintiff in Error, v. STEPHEN M. WELD et al. [No. 388.]

In Error to the District Court of the United States for the Southern District of New York.

The Attorney General for plaintiff in error.

Messrs. David Hunter Miller and Gordon Auchincloss for defendants in error.

October 9, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

STATE OF MINNESOTA, Complainant, v. STATE OF WISCONSIN. [No. 5, Original.]

Messrs. George T. Simpson and C. Louis Weeks for complainant.

No appearance for respondent.

October 9, 1916. Dismissed on motion of counsel for the complainant.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Plaintiff in Error, v. STATE OF KANSAS EX REL. S. M. BREWSTER, Attorney General, etc., et al. [No. 137.]

In Error to the Supreme Court of the State of Kansas.

Mr. Robert Dunlap for plaintiff in error.

No appearance for defendants in error.

October 9, 1916. Dismissed with costs, on authority of counsel for the plaintiff in error.

TERRE HAUTE, INDIANAPOLIS, & EASTERN TRACTION COMPANY, Plaintiff in Error, v. ELMIRA C. WEDDLE, Administratrix, etc. [No. 199.]

In Error to the Supreme Court of the State of Indiana.

Messrs. Ferdinand Winter and W. H. Latta for plaintiff in error.

Mr. Richard M. Milburn for defendant in error.

October 9, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

FLORIDA EAST COAST RAILWAY COMPANY, Plaintiff in Error, v. STATE OF FLORIDA EX REL. R. HUDSON BURE et al., etc. [Nos. 224, 225.]

In Error to the Supreme Court of the State of Florida.

Messrs. Frederick C. Bryan and Alexander St. Clair-Abrams for plaintiff in error.

No appearance for defendants in error.

October 9, 1916. Dismissed with costs on motion of counsel for plaintiff in error.

WALTER BOWEN & COMPANY, INC., Plaintiff in Error, v. STATE OF WASHINGTON. [No. 238.]

In Error to the Supreme Court of the State of Washington.

Messrs. W. H. Bogle and Carroll B. Graves for plaintiff in error.

Mr. W. V. Tanner for defendant in error.

October 9, 1916. Dismissed per stipulation.

S. B. HOVEY et al., Receivers, etc., Plaintiffs in Error, v. FAYETTE TANKERSLEY. [No. 261.]

In Error to the Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas.

Mr. Herbert S. Garrett for plaintiffs in error.

No appearance for defendant in error.

October 9, 1916. Dismissed with costs, on motion of counsel for the plaintiffs in error.

SERAPION CRIBE et al., Appellants, v. R. E. MANLY et al. [No. 352.]

Appeal from the Supreme Court of the Philippine Islands.

Mr. A. D. Gibbs for appellants.

No appearance for appellees.

October 9, 1916. Dismissed with costs, on motion of counsel for the appellants.

JOHN GRANT LYMAN, Appellant, v. THOMAS D. MCCARTHY, Marshal, etc. [No. 448.]

Appeal from the District Court of the United States for the Southern District of New York.

Messrs. Henry A. Wise and Frederick S. Tyler for appellant.

No appearance for appellee.

October 9, 1916. Dismissed with costs, on motion of counsel for the appellant.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Plaintiff in Error, v. W. C. ELLENWOOD. [No. 517.]

In Error to the Supreme Court of the State of Arkansas.

Messrs. A. L. Burford and Edward A. Haid for plaintiff in error.

No appearance for defendant in error.

October 9, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error, v. B. B. SAUNDERS, Administrator, etc. [No. 117.]

In Error to the Supreme Court of the State of North Carolina.

Mr. L. E. Jeffries for plaintiff in error.

Messrs. James S. Manning and W. W. Kitchen for defendant in error.

October 12, 1916. Dismissed with costs on motion of counsel for the plaintiff in error.

MEMPHIS STREET RAILWAY COMPANY, Petitioner, v. J. W. BOBO, Administrator, etc. [No. 622.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Luke E. Wright and Roane Waring for petitioner.

Messrs. Caruthers Ewing and Ike W. Crabtree for respondent.

October 16, 1916. Granted.

MEMPHIS STREET RAILWAY COMPANY, Petitioner, v. S. C. MOORE, Administrator, etc. [No. 623.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Luke E. Wright and Roane Waring for petitioner.

Messrs. Caruthers Ewing and Ike W. Crabtree for respondent.

October 16, 1916. Granted.

MRS. LAURA L. BUNCH, Petitioner, v. J. S. MALONEY, as Trustee, etc. [No. 639.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. W. E. Hemingway, G. B. Rose, J. F. Loughborough, and V. M. Miles for petitioner.

Mr. J. M. Moore for respondent.

October 16, 1916. Granted.

SUPREME COUNCIL OF THE ROYAL ABCANIAN, Petitioner, v. SUE B. BEHREND. [No. 665.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. Philip Walker and Howard C. Wiggins for petitioner.

Mr. W. Gwynne Gardiner for respondent.

October 16, 1916. Granted.

JOHN H. FRIEDRICHSEN, Petitioner, v. G. H. RENARD, etc., et al. [No. 669.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. William V. Allen and W. C. Bibb for petitioner.

Messrs. R. E. Evans and William D. Funk for respondents.

October 16, 1916. Granted.

GRINNELL WASHING MACHINE COMPANY, Petitioner, v. E. E. JOHNSON COMPANY. [No. 675.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Charles C. Linthicum and Melville Church for petitioner.

Messrs. Taylor E. Brown and Clarence E. Mehlhope for respondent.

October 16, 1916. Granted.

JOHN J. MEYERS et al., Petitioners, v. UNITED STATES. [No. 506.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Gilbert D. Lamb for petitioners.

Mr. Solicitor General Davis for respondent.

October 16, 1916. Denied.

LEHIGH VALLEY RAILROAD COMPANY, Petitioner, v. CARL KILMER. [No. 513.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Daniel W. Baker, Frederick M. Pelzman, and David Wiener for petitioner.

Mr. Walter W. Magee for respondent.

October 16, 1916. Denied.

LEHIGH VALLEY RAILROAD COMPANY, Petitioner, v. EDGAR A. EMENS, as Executor, etc. [No. 514.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Daniel W. Baker, Frederick M. Pelzman, and David Wiener for petitioner.
Mr. Walter W. Magee for respondent.
October 16, 1916. Denied.

LEHIGH VALLEY RAILROAD COMPANY, Petitioner, v. EDGAR A. EMENS, as Executor, etc. [No. 515.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Daniel W. Baker, Frederick M. Pelzman, and David Wiener for petitioner.
Mr. Walter W. Magee for respondent.
October 16, 1916. Denied.

MONTGOMERY TRACTION COMPANY, Petitioner, v. MONTGOMERY LIGHT & WATER POWER COMPANY. [No. 518.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Gregory L. Smith and Ray Rush-ton for petitioner.
Messrs. Benjamin P. Crum, R. E. Steiner, and John R. Tyson for respondent.
October 16, 1916. Denied.

MILLER RUBBER COMPANY et al., Petitioners, v. CITIZENS' TRUST & SAVINGS BANK, as Trustee, etc. [No. 566.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Edwin A. Krauthoff and Winfield Scott Bicksler for petitioners.
Mr. Henry S. Van Dyke for respondent.
October 16, 1916. Denied.

SILVER KING COALITION MINES COMPANY, Petitioner, v. CONKLING MINING COMPANY. [No. 574.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. William Howard Dickson, Curtis H. Lindley, Thomas Marioneaux, and A. C. Ellis, Junior, for petitioner.
Messrs. Edward B. Critchlow, W. D. McHugh, and William H. King for respondent.
October 16, 1916. Denied.

CHICAGO TITLE & TRUST COMPANY, Trustee, etc., Petitioner, v. FRED J. ZUTTERMEISTER. [No. 579.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Charles L. Bartlett and George Gillette for petitioner.
Mr. Harry C. Kinne for respondent.
October 16, 1916. Denied.

WILLIAM W. CRAWFORD, Trustee, Petitioner, v. WASHINGTON NORTHERN RAILROAD COMPANY et al. [No. 583.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. James A. Kerr and E. S. McCord for petitioner.
Messrs. Zera Snow and Wallace McCa-mant for respondents.
October 16, 1916. Denied.

AIMEE L. HANSON, Petitioner, v. WALTER L. HANSON. [No. 588.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Nash Rockwood and Frederic D. McKenney for petitioner.
Mr. Ralph S. Rounds for respondent.
October 16, 1916. Denied.

WILLIAM L. TAYLOR et al., Petitioners, v. CHARLES H. KIMMERLE, Trustee, etc. [No. 592.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Harris F. Williams for petitioners.
Mr. Clyde W. Ketcham for respondent.
October 16, 1916. Denied.

STURM & DILLARD COMPANY, Petitioner, v. MIKE MERKO. [No. 614.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Edward S. Jouett for petitioner.
No counsel appeared for respondent.
October 16, 1916. Denied.

BEVERLY R. ROBINSON, as Trustee, etc., Petitioner, v. CHARLES F. ROE. [No. 640.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Walter C. Noyes and B. W. B. Brown for petitioner.

Mr. Henry W. Taft for respondent.

October 16, 1916. Denied.

DAISY M. LINKOUS, Administratrix, etc., Petitioner, v. VIRGINIAN RAILWAY COMPANY. [No. 648.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. W. J. Henson and Walter L. Welborn for petitioner.

Mr. Walter H. Taylor for respondent.

October 16, 1916. Denied.

GILCHRIST COMPANY, Petitioner, v. ERIE SPECIALTY COMPANY. [No. 666.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Charles E. Riordon for petitioner.

Mr. J. C. Sturgeon for respondent.

October 16, 1916. Denied.

SPRING GARDEN INSURANCE COMPANY OF PHILADELPHIA, PA., Petitioner, v. T. Gilbert Wood, etc., et al. [No. 670.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. George Bryan and Gustavus Remak, Jr., for petitioner.

Mr. Fred Harper for respondents.

October 16, 1916. Denied.

DAVID CLEMENT, as Administrator, etc., Petitioner, v. CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY et al. [No. 671.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Burton K. Wheeler and H. Lowndes Maury for petitioner.

No counsel appeared for respondents.

October 16, 1916. Denied.

FLORENCE C. DINWIDDIE et al., Petitioners, v. NATHAN HAZEL METZGER et al. [No. 673.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. A. A. Hoehling, Jr., Stanton C. Peelle, and C. F. R. Ogilby for petitioners.

Messrs. Victor H. Wallace and J. J. Darlington for respondents.

October 16, 1916. Denied.

ATLAS PORTLAND CEMENT COMPANY, Petitioner, v. FRED W. HAGEN. [No. 674.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. George A. Mahan and Dulany Mahan for petitioner.

Mr. Elliott W. Major for respondent.

October 16, 1916. Denied.

W. A. GAGE & COMPANY et al., Petitioners, v. ROBERT WILSON, etc., as Trustee, etc. [No. 678.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Walter P. Armstrong for petitioners.

Mr. Ike W. Crabtree for respondent.

October 16, 1916. Denied.

COMMERCIAL TRUST & SAVINGS BANK et al., Petitioners, v. ROBERT WILSON, etc., as Trustee, etc. [No. 702.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. H. J. Livingston, William P. Metcalf, and William H. Fitzhugh for petitioners.

Mr. Ike W. Crabtree for respondent.

October 16, 1916. Denied.

INTERSTATE BANKING & TRUST COMPANY, Petitioner, v. ROBERT WILSON, etc., as Trustee, etc. [No. 703.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Luke E. Wright, J. W. Cutrer, and Roane Waring for petitioner.

Mr. Ike W. Crabtree for respondent.

October 16, 1916. Denied.

FRANK LEDVINKA, Petitioner, v. UNITED STATES. [No. 687.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Alton B. Parker and John C. Palmer, Junior, for petitioner.

The Attorney General for respondent.

October 16, 1916. Denied.

JAMES OATES, Petitioner, v. UNITED STATES. [No. 688.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Alton B. Parker and John C. Palmer, Junior, for petitioner.

The Attorney General for respondent.

October 16, 1916. Denied.

HIRAM STEPHENS, Petitioner, v. UNITED STATES. [No. 689.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Alton B. Parker and John C. Palmer, Junior, for petitioner.

The Attorney General for respondent.

October 16, 1916. Denied.

FANNY SULLENS, Petitioner, v. UNITED STATES. [No. 690.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Alton B. Parker and John C. Palmer, Junior, for petitioner.

The Attorney General for respondent.

October 16, 1916. Denied.

UNITED DRUG COMPANY, Petitioner, v. THEODORE RECTANUS COMPANY. [No. 511.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Frederick L. Emery for petitioner.

No appearance for respondent.

October 16, 1916. Granted.

T. H. SYMINGTON COMPANY, Petitioner, v. NATIONAL MALLEABLE CASTINGS COMPANY et al. [No. 570.]

Petition for a Writ of Certiorari to the

United States Circuit Court of Appeals for the First Circuit.

Messrs. Melville Church and Gilbert P. Ritter for petitioner.

October 16, 1916. Granted.

HART STEEL COMPANY et al., Petitioners, v. RAILROAD SUPPLY COMPANY [No. 67]; RAILROAD SUPPLY COMPANY, Petitioner, v. ELYBIA IRON & STEEL COMPANY [No. 95].

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit; and

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Taylor E. Brown for respondent in No. 67, and for petitioner in No. 95.

October 16, 1916. Per Curiam: No ground is stated to support the motion to pass these cases other than the fact that the continuance asked for is assented to by the counsel for both parties. But, as the cases were called last term, and this is therefore the second term at which they are subject to call, under rule 19 the mere consent of counsel without an otherwise adequate showing is insufficient to justify the granting of the motion to pass, and it is therefore denied; without prejudice, however, to the right to renew the same upon the making of a proper showing.

ABRAHAM FEINBERG, Plaintiff in Error, v. JOHN QUINN, JR. [No. 122.]

In Error to the Supreme Judicial Court of the State of Massachusetts.

Mr. Lee M. Friedman for plaintiff in error.

Mr. Arthur D. Hill for defendant in error.

October 18, 1916. Dismissed without costs to either party, per stipulation, and mandate ordered to issue forthwith.

CITY OF MONROE, Plaintiff in Error, v. STATE OF LOUISIANA EX REL. PARISH BOARD OF SCHOOL DIRECTORS OF THE PARISH OF OUACHITA, LOUISIANA. [No. 6.]

In Error to the Supreme Court of the State of Louisiana.

Messrs. S. L. Herold and John C. Theus for plaintiff in error.

No counsel appeared for defendant in error.

October 18, 1916. Dismissed with costs, pursuant to the Nineteenth Rule.

JOHN F. COLBURN, Plaintiff in Error, v. CHARLES T. WILDER, Tax Assessor, etc. [No. 12.]

In Error to the Supreme Court of the Territory of Hawaii.

Mr. Clarence W. Ashford for plaintiff in error.

Mr. C. R. Hemenway for defendant in error.

October 18, 1916. Dismissed with costs, pursuant to the Nineteenth Rule.

OSWALD MEHLOS, Plaintiff in Error, v. CITY OF MILWAUKEE et al. [No. 173.]

In Error to the Supreme Court of the State of Wisconsin.

Mr. William B. Rubin for plaintiff in error.

No counsel appeared for defendants in error.

October 19, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error, v. GEORGE ROBERT KORNHOFF. [No. 397.]

In Error to the Court of Appeals of the State of Kentucky.

Mr. John Galvin for plaintiff in error.

No counsel appeared for defendant in error.

October 19, 1916. Dismissed with costs on motion of counsel for the plaintiff in error.

JOHN F. CUBBINS, Appellant, v. MISSISSIPPI RIVER COMMISSION et al. [No. 16.]

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Mr. Barnette E. Moses for appellant.

No counsel appeared for appellees.

October 19, 1916. Dismissed with costs, pursuant to the Tenth Rule.

JOHN F. CUBBINS, Appellant, v. COTTON BELT LEVEE DISTRICT No. 1 et al. [No. 17.]

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Mr. Barnette E. Moses for appellant.

No counsel appeared for appellees.

October 19, 1916. Dismissed with costs, pursuant to the Tenth Rule.

37 S. C.—2.

THOMAS PATRICK KEYES, Plaintiff in Error, v. PEOPLE OF THE STATE OF ILLINOIS. [No. 316.]

In Error to the Supreme Court of the State of Illinois.

Mr. Charles H. Soelke for plaintiff in error.

Messrs. Patrick J. Lucey and Lester H. Strawn for defendant in error.

October 23, 1916. Per Curiam: Dismissed for want of jurisdiction upon the authority of: 1. Bergmann v. Backer, 157 U. S. 655, 656, 37 L. ed. 845, 846, 15 Sup. Ct. Rep. 727; Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; Howard v. Fleming, 191 U. S. 126, 135, 48 L. ed. 121, 124, 24 Sup. Ct. Rep. 49. 2. Deming v. Carlisle Packing Co. 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Overton v. Oklahoma, 235 U. S. 31, 59 L. ed. 112, 35 Sup. Ct. Rep. 14.

JOSEPH W. BULL, Appellant, v. HUGH CAMPBELL, JR. [No. 346.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. John R. Van Derlip for appellant.

Mr. S. E. Ellsworth for appellee.

October 23, 1916. Per Curiam: Dismissed for want of jurisdiction upon the authority of: (1) Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; St. Anthony Church v. Pennsylvania R. Co. 237 U. S. 575, 59 L. ed. 1119, 35 Sup. Ct. Rep. 729; (2) Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; Hull v. Burr, 234 U. S. 712, 720, 58 L. ed. 1557, 1561, 34 Sup. Ct. Rep. 892; G. & C. Merriam Co. v. Syndicate Pub. Co. 237 U. S. 618, 621, 59 L. ed. 1148, 1149, 35 Sup. Ct. Rep. 708.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error, v. C. L. CROAN et al. [No. 453.]

In Error to the Court of Appeals of the State of Kentucky.

Messrs. Benjamin D. Warfield and Charles H. Moorman for plaintiff in error.

Mr. William W. Crawford for defendants in error.

October 23, 1916. Per Curiam: Judgment reversed with costs, upon the authority of Northern P. R. Co. v. Wall, 241 U. S. 87, 60 L. ed. 905, 36 Sup. Ct. Rep. 493; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 60 L. ed. 1022, L.R.A. 1917A. 265, 36 Sup. Ct. Rep. 555.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY OF TEXAS et al., Plaintiffs in Error, v. MRS. EMMA A. CASSADY, Administratrix, etc. [No. 484.]

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

Messrs. Joseph M. Bryson, Alex. Britton, and Evans Browne for plaintiffs in error.

Mr. H. L. Stuart for defendant in error.

October 23, 1916. Per Curiam: Judgment affirmed with costs upon the authority of Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 673, 674, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; Great Northern R. Co. v. Knapp, 240 U. S. 464, 60 L. ed. 745, 36 Sup. Ct. Rep. 399.

JOHN G. CHRISTOPHER et al., Plaintiffs in Error, v. JANE MUGEN and HENRY MUGEN, Her Husband. [No. 507.]

In Error to the Supreme Court of the State of Florida.

Messrs. George C. Bedell for plaintiffs in error.

Messrs. Nathan P. Bryan and J. T. G. Crawford for defendants in error.

October 23, 1916. Per Curiam: Dismissed for want of jurisdiction upon the authority of (1) Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 470, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Mellon Co. v. McCafferty, 239 U. S. 134, 60 L. ed. 181, 36 Sup. Ct. Rep. 94; (2) Deming v. Carlisle Packing Co. 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Parker v. McLain, 237 U. S. 469, 59 L. ed. 1051, 35 Sup. Ct. Rep. 632.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Petitioner, v. UNITED STATES. [No. 629.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. William G. Wheeler for petitioner.

The Attorney General for respondent.

October 23, 1916. Granted.

UNITED STATES, Petitioner, v. IVER ENGELBRETSSEN NESS. [No. 719.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Solicitor General Davis for petitioner.

No appearance for respondent.

October 23, 1916. Granted.

STATE OF OHIO, Petitioner, v. AARON A. FERRIS, Receiver, etc. [No. 691.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Edward C. Turner and Clarence D. Laylin for petitioner.

Mr. Aaron A. Ferris for respondent.

October 23, 1916. Denied.

TOWN OF NEWBERN et al., Petitioners, v. NATIONAL BANK OF BARNESVILLE, Ohio. [No. 693.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Marion G. Evans and Elias Gates for petitioners.

Mr. William R. Collins for respondent.

October 23, 1916. Denied.

CHARLES W. PARKER et al., Petitioners, v. EDGAR W. ROSS, Guardian, etc. [No. 694.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. John R. Montgomery and Louis E. Hart for petitioners.

Messrs. Harrison Musgrave and W. S. Oppenheim for respondent.

October 23, 1916. Denied.

KEYSTONE COAL & COKE COMPANY, Petitioner, v. MICHAEL FEKEIE, etc. [No. 704]; KEYSTONE COAL & COKE COMPANY, Petitioner, v. FRANK THRY, etc. [No. 705]; KEYSTONE COAL & COKE COMPANY, Petitioner, v. ANNA HELMLINGER, etc. [No. 706]; and KEYSTONE COAL & COKE COMPANY, Petitioner, v. ADAM MULLER [No. 707].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. James S. Moorhead, Berkeley Pearce, and William S. Rial for petitioner.

Mr. George H. Eichelberger for respondents.

October 23, 1916. Denied.

F. F. SLOCOMB & COMPANY, Inc., Petitioner, v. A. C. LAYMAN MACHINE COMPANY. [No. 708.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. E. Hayward Fairbanks for petitioner.

Messrs. Charles Howson and William Steel Jackson for respondent.

October 23, 1916. Denied.

ELLIOTT VARNISH COMPANY, Petitioner, v. SEARS, ROEBUCK, & COMPANY. [No. 711.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. C. C. Carlin, Walter H. Chamberlin, and D. S. Wegg for petitioner.

Mr. Lincoln B. Smith for respondent.

October 23, 1916. Denied.

SUN COMPANY, Petitioner, v. VINTON PETROLEUM COMPANY. [No. 501.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. William A. Vinson and E. E. Townes for petitioner.

Mr. W. D. Gordon for respondent.

October 23, 1916. Denied.

JAMES B. SMITH et al., Petitioners, v. UNITED STATES. [No. 537.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Peter F. Dunne and A. A. Hoehling, Jr., for petitioners.

Mr. Solicitor General Davis for respondent.

October 23, 1916. Denied.

WILLIAM LEWIS et al., Executors, etc., Petitioners, v. CALEDONIAN INSURANCE COMPANY et al. [No. 616.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. A. A. Moore for petitioners.

Mr. Carroll G. Walter for respondents.

October 23, 1916. Denied.

STANLEY LORD, Master, etc., Petitioner, v. WILLIAM LEDWITCH et al. [No. 701.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Robert M. Hughes for petitioner.

Messrs. J. Winston Read and Allan D. Jones for respondents.

October 23, 1916. Denied.

CLARENCE GRIGGS et al., etc., Petitioners, v. HON. PAGE MORRIS, United States District Judge, etc. [No. 709.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. William H. Boys and Frederic D. McKenney for petitioners.

Mr. Thomas Kneeland for respondent.

October 23, 1916. Denied.

E. CLEMENS HORST COMPANY, Petitioner, v. PABST BREWING COMPANY. [No. 716.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Leon P. Lewis for petitioner.

Messrs. Willett M. Spooner and Frederic D. McKenney for respondent.

October 23, 1916. Denied.

PITTSBURGH, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, Plaintiff in Error, v. FARMERS TRUST & SAVINGS COMPANY, Administrator, etc. [No. 228.]
In Error to the Supreme Court of the State of Indiana.

Mr. Frederic D. McKenney for plaintiff in error.

No counsel appeared for defendant in error.

October 23, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

UNITED STATES, Appellant and Plaintiff in Error, v. NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY. [No. 57.]

Appeal from and in error to the District Court of the United States for the Middle District of Tennessee.

The Attorney General for plaintiff in error.

Mr. Helm Bruce for defendant in error.

October 27, 1916. Dismissed, pursuant to the Nineteenth Rule.

MARY HELEN BROWN, Plaintiff in Error, v. CITY OF NEW YORK. [No. 3.]

In Error to the District Court of the United States for the Southern District of New York.

Messrs. Omri F. Hibbard and Nathan I. Sachs for plaintiff in error.

Mr. Terence Farley for defendant in error.

October 30, 1916. Per Curiam: Dismissed for want of jurisdiction upon the authority of: (1) *Deming v. Carlisle Packing Co.* 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; *Consolidated Turnp. Co. v. Norfolk & O. V. R. Co.* 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; *Ennis Waterworks v. Ennis*, 233 U. S. 652, 658, 58 L. ed. 1139, 34 Sup. Ct. Rep. 767; *Parker v. McLain*, 237 U. S. 469, 471, 472, 59 L. ed. 1051, 1053, 1054, 35 Sup. Ct. Rep. 632; (2) *Shoemaker v. United States*, 147 U. S. 282, 321, 37 L. ed. 170, 188, 13 Sup. Ct. Rep. 361; *Prosser v. Northern P. R. Co.* 152 U. S. 59, 38 L. ed. 352, 14 Sup. Ct. Rep. 528; *Bauman v. Ross*, 167 U. S. 548, 596, 42 L. ed. 270, 290, 17 Sup. Ct. Rep. 966; *Ramapo Water Co. v. New York*, 236 U. S. 579, 59 L. ed. 731, 35 Sup. Ct. Rep. 442.

RIGHT REVEREND LIBERT HUBERT BOEY-
NAEMS, Bishop of Zeugma, Vicar Apostolic of Hawaii, Trustee, Plaintiff in Error, v. L. AH LEONG. [No. 28.]

In Error to the Supreme Court of the Territory of Hawaii.

Mr. Lorrin Andrews for plaintiff in error.

Mr. David L. Withington for defendant in error.

October 30, 1916. Per Curiam: Judgment affirmed with costs upon the authority of *Lewers & Cooke v. Atcherly*, 222 U. S. 285, 294, 56 L. ed. 202, 205, 32 Sup. Ct. Rep. 94; *John Ii Estate v. Brown*, 235 U. S. 342, 349, 59 L. ed. 259, 265, 35 Sup. Ct. Rep. 106; *Kapiolani Estate v. Atcherley*, 238 U. S. 119, 136, 59 L. ed. 1229, 1237, 35 Sup. Ct. Rep. 832; *Cardona v. Quiñones*, 240 U. S. 83, 88, 60 L. ed. 538, 540, 36 Sup. Ct. Rep. 346.

SOUTHERN RAILWAY, CAROLINA DIVISION, Plaintiff in Error, v. FANNIE G. DRIGGS and her Husband, H. D. Driggs [No. 31]; and SOUTHERN RAILWAY, CAROLINA DIVISION, Plaintiff in Error, v. HUBERT DRIGGS, by His Guardian ad Litem, H. D. Driggs [No. 32].

In Error to the Supreme Court of the State of South Carolina.

Messrs. John K. Graves and Benjamin Lindsey Abney for plaintiff in error.

Mr. Stanwix G. Mayfield for defendants in error.

October 30, 1916. Per Curiam: Judgments reversed with costs upon the authority of *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 653, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; *Boston & M. R. Co. v.*

Hooker, 233 U. S. 97, 110-113, 58 L. ed. 868, 875, 876, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 97, 98, 59 L. ed. 853, 855, L.R.A.1915E, 665, P.U.R.1915C, 300, 35 Sup. Ct. Rep. 494.

MARTIN H. FREE, Plaintiff in Error, v. WESTERN UNION TELEGRAPH COMPANY. [No. 36.]

In Error to the Supreme Court of the State of Wisconsin.

Mr. Benjamin I. Salinger for plaintiff in error.

Mr. Rush Taggart for defendant in error.

October 30, 1916. Per Curiam: Dismissed for want of jurisdiction upon the authority of: (1) *Deming v. Carlisle Packing Co.* 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; *Consolidated Turnp. Co. v. Norfolk & O. V. R. Co.* 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; *Ennis Waterworks v. Ennis*, 233 U. S. 652, 658, 58 L. ed. 1139, 1141, 34 Sup. Ct. Rep. 767; *Parker v. McLain*, 237 U. S. 469, 471, 472, 59 L. ed. 1051, 1053, 1054, 35 Sup. Ct. Rep. 632; (2) *John v. Paullin*, 231 U. S. 583, 585, 586, 58 L. ed. 381-383, 34 Sup. Ct. Rep. 178; *McDonald v. Oregon R. & Nav. Co.* 233 U. S. 665, 669, 670, 58 L. ed. 1145, 1148, 34 Sup. Ct. Rep. 772; (3) *Simon v. Craft*, 182 U. S. 427, 437, 45 L. ed. 1165, 1171, 21 Sup. Ct. Rep. 836; *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620.

CITY OF MONTGOMERY, Plaintiff in Error, v. R. H. GREENE et al. [No. 41]; and CITY OF MONTGOMERY, Plaintiff in Error, v. W. R. MCDADE et al. [No. 42].

In Error to the Supreme Court of the State of Alabama.

Mr. W. A. Gunter for plaintiff in error.

No counsel appeared for defendants in error.

October 30, 1916. Per Curiam: Dismissed for want of jurisdiction upon the authority of: (1) *Deming v. Carlisle Packing Co.* 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; *Consolidated Turnp. Co. v. Norfolk & O. V. R. Co.* 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; *Ennis Waterworks v. Ennis*, 233 U. S. 652, 658, 58 L. ed. 1139, 1141, 34 Sup. Ct. Rep. 767; *Parker v. McLain*, 237 U. S. 469, 471, 472, 59 L. ed. 1051, 1053, 1054, 35 Sup. Ct. Rep. 632; (2) *Stewart v. Kansas City*, 239 U. S. 14, 16, 60 L. ed. 120, 121, 36 Sup. Ct. Rep. 15; *Sioux County v. Rule*, 241 U. S. 640, 60 L. ed. 1216, 36 Sup. Ct. Rep. 285.

MOTION PICTURE PATENTS COMPANY, Petitioner, v. UNIVERSAL FILM MANUFACTURING COMPANY et al. [No. 715.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Melville Church for petitioner.

Messrs. Edmund Wetmore and Oscar W. Jeffery for respondents.

October 30, 1916. Granted.

JOHN W. THOMPSON, Petitioner, v. FRANKLIN NATIONAL BANK. [No. 717.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. William E. Davis and George H. Lamar for petitioner.

Mr. John Ridout for respondent.

October 30, 1916. Denied.

ENNIS-BROWN COMPANY, Petitioner, v. CENTRAL PACIFIC RAILWAY COMPANY. [No. 728.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Burrell G. White for petitioner.

Messrs. W. H. Devlin, Robert T. Devlin, William R. Harr, and Charles H. Bates for respondent.

October 30, 1916. Denied.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. WILFRED L. GIFFORD. [No. 307.]

In Error to the Supreme Court of the State of Idaho.

Messrs. C. W. Bunn, James E. Babb, and Alexander Britton for plaintiff in error.

No counsel appeared for defendant in error.

October 30, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

(242 U. S. 190)

UNITED STATES OF AMERICA, Petitioner,
v.
NORTHERN PACIFIC RAILWAY COMPANY, Respondent.

MASTER AND SERVANT — 13 — GOVERNMENTAL CONTROL — REPORTS — HONEST MISTAKE — PENALTIES.

The penalty of \$100 per day prescribed by the Act of February 4, 1887 (24 Stat. at L. 386, chap. 104), § 20, as amended by the Act of June 18, 1910 (36 Stat. at L. 556, chap. 309, Comp. Stat. 1913, § 8592), for the failure of a carrier to file such reports as may be required by the Interstate Commerce Commission, will not be exacted because the names of several employees were omitted by the carrier from its sworn report of violations of the Hours-of-Service Act of March 4, 1907 (34 Stat. at L. 1415, chap. 2939, Comp. Stat. 1913, § 8677), which was required by an order of the Interstate Commerce Commission, where such omission was caused by an honest mistake in a genuinely doubtful case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. — 13.]

[No. 44.]

Argued October 27, 1916. Decided December 4, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which reversed a judgment of the District Court for the District of North Dakota in favor of the United States in an action to recover a penalty from a carrier for its failure to file a report of violations of the Hours-of-Service Act. Affirmed.

See same case below, L.R.A. 1917A, 1198, 129 C. C. A. 514, 213 Fed. 162.

This is a civil proceeding brought by the United States in the United States district court for the district of North Dakota, to recover \$500 from the Northern Pacific Railway Company for the claimed failure to file, for five successive days, with the Interstate Commerce Commission, a report of violations of the Hours-of-Service Act, as required by an order of the Commission issued June 28, 1911. The order was made under authority of § 20 of the Act to Regulate Commerce [24 Stat. at L. 386, chap. 104], as amended June 18th, 1910 (36 Stat. at L. 539, 556, chap. 309, Comp. Stat. 1913, § 8592), and has the force of statute law. It requires the carrier to report "under oath" within thirty days after the end of each month, all instances where employees have been on duty for a longer period than that provided in said act, which in this case was sixteen hours.

The district court rendered judgment for

the government, which was reversed by the circuit court of appeals for the eighth circuit (L.R.A. 1917A, 1198, 129 C. C. A. 514, 213 Fed. 162). The case is here for decision on writ of certiorari.

Statement by Mr. Justice Clarke:

The judgment of the district court was rendered on the pleadings, the admitted facts of the case being as follows:

Five employees of the defendant were called to take charge of a wrecking train at 8:10 o'clock P. M., October 29, 1911, but, before they reported at the place of duty, it was ascertained that such train would not be needed, and when they arrived they were notified that their services would not then be required, but that they should report for duty at 10:35 o'clock P. M. the same evening. From 8:10 to 10:35 o'clock they did not render any service "save that they kept alive the fire in the engine during said period." At 10:35 o'clock the five men entered upon a freight train run, which, because of hot boxes, was delayed so that it did not arrive at destination until 1:15 o'clock P. M. the next day.

If the service of the men were considered as beginning at 8:10 o'clock, the hour for which they were called, they were on duty for seventeen hours and five minutes; but if the time were reckoned from 10:35 P. M., when the men actually took charge of the freight train, they were on duty less than sixteen hours. It is admitted that the officials of the railway company believed in good faith that the time of the men should be reckoned from 10:35 P. M., and not from 8:10 P. M., and that, for that reason, when next after October 30th, 1911, they filed their report of employees*subject to the act who had been kept on duty for a longer period than sixteen hours, the names of the members of this crew were omitted, although the names of many other employees who had been kept on duty longer than the statutory limit were stated in that report.

It was conceded at the hearing in the circuit court of appeals that the United States had sued the company for the "forfeitures" prescribed for these excessive services under discussion in this case, and had secured a judgment which had been paid, and that thereby it was determined, for the purposes of this suit, that these employees were on duty from 8:10 o'clock P. M., and therefore for more than sixteen hours.

The government's claim in the case is for the omission for five days to file the report, and it prays judgment for "forfeitures" aggregating \$500, although when the complaint was filed the report claimed to be defective had been on file from November

30th, 1911, to September 14th, 1912, and if the "forfeitures" of \$100 per day prescribed by the law for each day of failure to file a proper report were allowed, the amount of recovery by the government would be \$28,900, and it is only by grace of the public officials that the claim in the suit was not for this amount instead of for \$500.

Assistant Attorney General Underwood for petitioner.

Messrs. Emerson Hadley and Charles W. Bunn for respondent.

Mr. Justice Clarke, after making the foregoing statement, delivered the opinion of the court:

It will be seen from the foregoing statement of facts that the question presented by the record in this case for decision is: Assuming that the law required that, in the report of the company filed on November 30th, 1911, the names of these five employees of the defendant should have been included as having been on duty for more than sixteen hours, and that their names were omitted from that report because it was in good faith believed that their hours of service should be computed from 10:35 o'clock P. M., and that, therefore, they had not been on duty in excess of sixteen hours, is the company liable for the "forfeitures" prescribed by the statute, judgment for which was prayed for in the complaint?

Section 20 of the Act to Regulate Interstate Commerce of February 4, 1887, as amended June 18, 1910 (36 Stat. at L. 556, chap. 309, Comp. Stat. 1913, § 8592), requires the filing of elaborate annual reports by carriers and also the filing of such special reports as the Commission may, by general or special order, require. On the 28th day of June, 1911, the Commission ordered that all carriers subject to the provisions of the act should report "under oath" within thirty days after the end of each month all instances of employees who had been on duty for a longer time than that required by the act. It is for violation of this order, which has the effect of statute law, that this suit was instituted, it being admitted by the government that the failure to mention these five men in the report by the defendant, filed at the proper time, and which contained a report of many men kept on duty for a period longer than the time allowed by law, was due to the fact that it in good faith believed that these men commenced their time of service at 10:35 instead of at 8:10 o'clock, and that therefore they were not on duty more than the sixteen hours prescribed by the statute.

The defendant in error contends that judgment is asked for an omission caused by an honest mistake with respect to a genuinely doubtful case in a report which was properly filed, and this, it is claimed, is not a violation of the law. The statute is a penal one and should be applied only to cases coming plainly within its terms. *Providence Steam Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. ed. 786. While the reports filed must be truthful reports (*Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638), yet, since they must be made under oath, the penalties for perjury would seem to be the direct and sufficient sanction relied upon by the lawmaking power to secure their correctness.

We are confirmed in this conclusion by the fact that the annual report required of carriers by this same § 20 of the act calls for so great an amount of detailed information that it would be difficult, if not impossible, for anyone to prepare such a report without making some unintentional omission or mistake, and we cannot bring ourselves to think that Congress intended to punish such an innocent mistake or omission with a penalty of \$100 a day.

There are, to be sure, many statutes which punish violations of their requirements regardless of the intent of the persons violating them; but innocent mistakes, made in reporting facts, where the circumstances are such that candid-minded men may well differ in their conclusions with respect to them, should not be punished by exacting penalties, except where the express letter of the statute so requires; and we conclude that the section under discussion contains no such requirement. In reports in which a mistake is much more likely to prove harmful than in such a report as we have here, the national banking laws punish mistakes only where "knowingly" made.

It is argued that if good faith will excuse an omission or a mistaken statement in this report, it will be widely taken advantage of as a cover for making false and fraudulent statements in such reports in the future. Such a prospect seems quite groundless, since many, if not most, criminal laws imposing penalties are made applicable only in cases where corrupt intent or purpose is established to the satisfaction of a court or jury; yet such requirement has not been found in practice to be an encouragement to wrongdoing.

*The fact that the government sues for only one-fifty-seventh part of the forfeitures which had accrued under the construction of the rule and statute contended for by it should make us slow to attribute to Con-

gress a purpose to exact what is thus admitted to be a punishment greatly disproportionate to the offense. Statutes should be construed, as far as possible, so that those subject to their control may, by reference to their terms, ascertain the measure of their duty and obligation, rather than that such measure should be dependent upon the discretion of executive officers, to the end that ours may continue to be a government of written laws rather than one of official grace.

It being very clear that it is not the purpose of the law under discussion to punish honest mistakes, made in a genuinely doubtful case, the decision of the Circuit Court of Appeals is affirmed.

(242 U. S. 178)

UNITED STATES OF AMERICA, Interstate Commerce Commission, Atchison, Topeka, & Santa Fe Railway Company, et al., Appts.,

v.

MERCHANTS' & MANUFACTURERS' TRAFFIC ASSOCIATION OF SACRAMENTO et al.

COMMERCE §88 — INTERSTATE COMMERCE COMMISSION — POWERS — RATE REGULATION — LONG AND SHORT HAULS.

1. An order of the Interstate Commerce Commission relieving carriers in certain respects from the operation of the long-and-short-haul clause of the Act of February 4, 1887 (24 Stat. at L. 380, chap. 104), § 4, as amended by the Act of June 18, 1910 (36 Stat. at L. 547, chap. 309, Comp. Stat. 1913, § 8566), need not be based upon an application asking only the precise relief granted; and such an order is, therefore, not invalid because the carriers asked leave to charge on west-bound transcontinental freight to a number of coast and interior points much less than to intermountain territory, and the Commission, while permitting them to charge to ports of call as much less as the application requested, as to the other points, which were interior cities, permitted the carriers to charge only somewhat less, since such amended section not only empowers the Commission "upon application" to authorize a carrier "to charge" less for longer than for shorter distances, but empowers the Commission to prescribe from time to time the extent to which the designated carriers may be relieved from the operation of such section.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141; Dec. Dig. §88.]

COMMERCE §96 — INTERSTATE COMMERCE COMMISSION — SUSPENDING LONG-AND-SHORT-HAUL CLAUSE — REMEDY OF AGGRIEVED COMMUNITY OR SHIPPER.

2. Communities or shippers aggrieved by tariff schedules filed conformably to an order of the Interstate Commerce Commis-

sion relieving the carrier in certain respects from the operation of the long-and-short-haul clause of the act of February 4, 1887 (24 Stat. at L. 380, chap. 104), § 4, as amended by the act of June 18, 1910 (36 Stat. at L. 547, chap. 309, Comp. Stat. 1913, § 8566), are afforded ample remedy by the provisions of §§ 13, 15, for complaints to the Commission and action by such Commission on complaints or on its own initiative, and they may not seek redress in the courts by way of injunction after having been refused a rehearing by the Commission in the proceedings upon the carriers' applications, to which the communities and shippers were not parties.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 146; Dec. Dig. §96.]

COMMERCE §85 — INTERSTATE COMMERCE COMMISSION — RATE REGULATION — LONG AND SHORT HAULS.

3. The Interstate Commerce Commission, in permitting carriers to charge on west-bound transcontinental freight to certain ports of call a lesser rate than to certain interior coast cities, did not violate the clause added to the act of February 4, 1887 (24 Stat. at L. 380, chap. 104), § 4, by the act of June 18, 1910 (36 Stat. at L. 547, chap. 309, Comp. Stat. 1913, § 8566), which provides that "whenever a carrier by railroad shall, in competition with a water route or routes, reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition," where it was the increased effectiveness of water competition, due to the opening of the Panama canal, which compelled the rate readjustment of which the interior coast cities complain, and the higher rates to such cities, made under authority of the Commission, were granted after prolonged hearings, as part of the general readjustment of transcontinental rates.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. §85.]

[No. 452.]

Argued October 19, 1916. Decided December 4, 1916.

APPEAL from the District Court of the United States for the Northern District of California to review a decree enjoining the enforcement of an order of the Interstate Commerce Commission, relieving certain carriers in certain respects from the operation of the long-and-short-haul clause of the Interstate Commerce Act. Reversed and remanded, with directions to dismiss the bill.

See same case below, 231 Fed. 292.

The facts are stated in the opinion.

Assistant Attorney General Underwood for the United States.

Mr. Joseph W. Folk for the Interstate Commerce Commission.

Mr. John E. Alexander for appellees.

*Mr. Justice Brandeis delivered the opinion of the court:

By the Act of June 18, 1910, chap. 309, 36 Stat. at L. 539, 547, Comp. Stat. 1913, § 8566, amending § 4 of the Act to Regulate Commerce [24 Stat. at L. 380, chap. 104], carriers were prohibited from charging more "for a shorter than for a longer distance over the same line or route in the same direction" without obtaining authority from the Interstate Commerce Commission so to do. A period of six months from the passage of the amendment was provided within which carriers might file application for authority to continue charges of that nature then lawfully existing.

For many years prior to 1910 it had been a common practice to make freight rates from the East to Pacific coast points lower than to intermountain territory, because of competition by the Atlantic-Pacific ocean carriers. About 185 interior cities near the coast had been granted the same transcontinental rates as the ports of San Francisco and Oakland, because the competing water carriers customarily "absorbed" the local rates or charges from the ports to those cities. Among the interior cities thus treated as "Pacific Coast Terminals" were Sacramento, Stockton, San José, and Santa Clara. The extent to which the higher rates to intermountain territory were justified and the proper basis for "back haul" rates had been the subject of many hearings before the Interstate Commerce Commission.

Proceeding under § 4, as amended, six railroads applied to the Commission under date of December 7, 1910, for relief in respect to west-bound transcontinental commodity rates. The applications, after enumerating the then-existing tariffs, sought authority specifically "to continue all rates shown in the above-named tariffs from eastern shipping points designated to Pacific coast terminal points," and generally "to continue the present method of making rates lower at the more distant points than at the intermediate points, such lower rates being necessary by reason of competition of various water carriers" from Atlantic to Pacific ports. After prolonged hearings the Commission entered its so-called 4th section order No. 124, by which, while declining to grant the applications as made, it authorized charging, in some respects, lower rates for the longer hauls. The limitation of such charges was set by a zone system

and rate percentage basis prescribed by the Commission, which involved an extensive readjustment of rates; but the existing practice of treating these interior cities as terminals was not disturbed. The validity of the order was attacked by the carriers in the courts, and, after three years of litigation, finally sustained in *Intermountain Rate Cases* (United States v. Atchison, T. & S. F. R. Co.) 234 U. S. 476, 58 L. ed. 1408, 34 Sup. Ct. Rep. 986.

Meanwhile the "effective date" of the order had been extended by the Commission. After the decision of this court, further extensions of the "effective date" were sought by the carriers and granted. Some modifications of the order were proposed by the carriers. Additional hearings were had in which many shippers participated. Changes in conditions occurring since the entry of the original order on July 31, 1911, were considered,—among others, that Congress had passed the Act of August 24, 1912 [37 Stat. at L. 568, chap. 390, Comp. Stat. 1913, § 8569], giving the Commission jurisdiction over transportation "by rail and water through the Panama canal;" that the canal itself had been opened on August 15, 1914; that competing ocean rates had been lowered and service improved; and that the ocean carriers had discontinued the practice of "absorbing" rates from the ports to interior cities. An elaborate supplemental report was made by the Commission on January 29, 1915, and another on April 30, 1915. The propriety of modifications in addition to those proposed by the carriers was shown and a new plan for constructing "back haul" rates, developed by the Commission, was eventually embodied in the amended 4th section order No. 124 of April 30th, 1915, and adopted by the carriers in the tariffs filed thereunder. Following the limitation imposed by the amended order, the tariffs filed confined the low "terminal" rates to ports of call like San Francisco and Oakland; and the interior coast cities, including Sacramento, Stockton, San José, and Santa Clara, were subjected to rates materially higher than San Francisco and Oakland, though much lower than those to intermountain territory.

Representatives of these four cities, conceiving them aggrieved by the refusal to grant them the same rates as the ports, and alleging that they had participated in whole or in part at hearings which preceded the entry of the last amendment order, applied to the Commission for a rehearing, and when their application was denied, brought this suit in the district court to restrain the enforcement as to them

of the amended order, and of the tariffs filed thereunder. The city of Santa Clara and associations representing the traffic interests of Sacramento, Stockton, and San José joined as plaintiffs. The United States, the Interstate Commerce Commission, and the six railroads were made defendants. The bill alleged, among other things, that these cities had for a number of years enjoyed the same rates as San Francisco and Oakland; that large industries and other businesses had been established there because they enjoyed terminal rates; that their commercial importance and prosperity would be ruined if the rates were withdrawn; that no changed conditions existed justifying a withdrawal of terminal rates; that they had not been parties to the proceedings in which the orders were made; and that the "orders authorizing withdrawal of terminal rates" from them were, among other things, "discriminatory and unjust, were made without said cities having their day in court, or without giving them an opportunity to show the unreasonableness thereof, that no justification for such increase was shown, and the order of April 30, 1915, was without evidence, that petitioners have been denied the equal protection of the law and deprived of property without due process of law, to their irreparable damage."

The case was heard before three judges; and a final decree was entered which declared that the "orders of the Interstate Commerce Commission of January 29, 1915, and April 30, 1915, in 4th section applications Nos. 205, 342, 343, 344, 350, and 352," in so far as they authorize the carriers to charge for the transportation of west-bound transcontinental freight destined to Sacramento, Stockton, San José, and Santa Clara, California, "any greater amount than is concurrently charged for the like carriage of like freight to San Francisco and Oakland, California, were beyond the statutory powers of the Interstate Commerce Commission, and the enforcement thereof should be enjoined; and said orders in the particulars above mentioned are hereby canceled and set aside." The decree also enjoined and canceled to like extent the tariffs filed in pursuance of such orders. The district court rested its decision that the Commission had no statutory power to enter the amended order upon the ground that an order authorizing higher rates to these interior cities could not legally be entered unless there was an "application" to it by the carriers for that specific purpose and "a hearing upon the particular application as in a special case;" that there had been no such application and hearing, and that

consequently the orders were void and the tariffs filed in pursuance thereof illegal. *Merchants' & Mfrs. Traffic Asso. v. United States*, 231 Fed. 292.

The appeal, in which all the defendants joined, raises important questions involved in the administration of the 4th section as amended June 18, 1910, namely:

First: Is it essential to the validity of ¹⁰an order*authorizing a lower rate for a ¹¹longer haul, that it be based upon an application asking only the precise relief granted?

Second: What is the remedy of a community or shipper which deems itself aggrieved by the order made?

The orders here in controversy were confessedly based upon applications made by the carriers. Both the amended orders and the decree recite by numbers the applications dated December 7, 1910. The objection made by the appellees is that the limited authority granted by the Commission had not been applied for; since the carriers asked specifically for leave to continue lower rates, which were the same for ports and for interior California cities, but the Commission permitted these rates to ports while it denied like rates to the interior cities. Respondents deny that the district court holds in effect that applications for relief must be granted in toto or denied in toto; but such is the necessary effect of its decision. Amended § 4 empowers the Commission "upon application" to authorize a carrier "to charge less for longer than for shorter distances." These carriers asked leave, among other things, to charge on west-bound transcontinental freight to about 193 coast and interior cities much less than to intermountain territory. The Commission permitted them to charge, to eight of these cities which were ports, *as much less* as the application requested; but as to the other 185, which were interior cities, including the four complaining here, permitted the carriers to charge only *somewhat less*. In other words, the Commission granted a part of the relief asked. The district court says it had no power so to do. But there is nothing in the act to justify limiting the power of the Commission to either a grant or a denial in toto of the precise relief applied for. Such a construction would make § 4 unworkable and defeat the purpose of the amendment. It is at variance with the broad discretion vested in the ¹²Commission and the prevailing practice of administrative bodies. It fails to give effect to the provision that "the Commission may from time to time prescribe the extent to which such designated common carriers may be relieved from the operation of this section." It is inconsis-

ent with Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.) 234 U. S. 476, 58 L. ed. 1408, 34 Sup. Ct. Rep. 986, where the order sustained granted relief very different from that applied for; and it finds no support in United States v. Louisville & N. R. Co. 235 U. S. 314, 322, 59 L. ed. 245, 251, 35 Sup. Ct. Rep. 113, cited by the district court, in which case relief from the operation of the 4th section had not been granted. The clause in amended 4th section, which declares "that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized to charge less for longer than for shorter distances" was designed to guard against the issue, by the Commission, of general orders suspending the long and short haul clause, and to insure action by it separately in respect to particular carriers, and only after consideration of the special circumstances existing. Whenever such consideration has been given, "the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of the section."

It may be doubted whether application by the carrier is a prerequisite to the granting of relief. As was said in Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.) 234 U. S. 476, 485, 58 L. ed. 1408, 1421, 34 Sup. Ct. Rep. 986, § 4 vests in the Commission the "primary instead of a reviewing function" to determine the propriety of a lesser rate for a longer distance; and § 13 declares that the Commission "shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which inquiry is had,*excepting orders for the payment of money." Unless formal application be an indispensable prerequisite to the exercise by the Commission of the power granted by the 4th section, its absence or a defect in it could be waived; and it would be waived by the filing of tariffs under the order entered. For the order is permissive merely. The carrier is the only necessary party to the proceeding under § 4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least, in the absence of such participation. And if the rates made by

tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, §§ 13 and 15 afford ample remedy. Respondents contend that, after the amended order was entered and the tariffs filed, they did apply to the Commission for relief, "but were denied the right of a hearing," and that "their protest and demand were ignored and denied." What they did was to petition for a "rehearing" in the proceedings under the 4th section, to which they now say they were not parties, instead of applying for redress under § 13, as they had a legal right to do. They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged unjust discriminations might result in creating infinitely more. The decree of the district court cancels the amended order and the tariff only so far as it concerns the four complaining cities, and thereby discriminates perhaps most unjustly in their favor as against the other 181 interior cities.

It was also contended on behalf of the four cities that the amended orders violated the clause added to § 4 by*the Act of June* 18, 1910, which provides that "whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition." The answers to this contention are many. What these four cities complain of is not increase of rates, but the fact that San Francisco and Oakland may be given rates lower than theirs; and they strongly deny that water competition has been eliminated. Indeed, it was the increased effectiveness of water competition due to the opening of the Panama canal—a notable change in conditions—which compelled the rate readjustment of which they complain; and the higher rates to the interior cities, made under authority of the Commission, were granted after prolonged hearings, as part of the general readjustment of transcontinental rates. The provision relied upon has no application to such a case.

The decree of the District Court must be reversed, with directions to dismiss the bill.
Reversed.

(242 U. S. 153)

HUTCHINSON ICE CREAM COMPANY
et al., Plffs. in Err.,
v.

STATE OF IOWA. (No. 40.)

A. B. CROWL, Plff. in Err.,
v.

COMMONWEALTH OF PENNSYLVANIA.
(No. 50.)

CONSTITUTIONAL LAW § 240(1), 296(1) —
FOOD § 1—"DUE PROCESS OF LAW" —
"EQUAL PROTECTION OF THE LAWS" —
REGULATING PERCENTAGE OF BUTTER
FAT IN ICE CREAM.

State statutes which prohibit the sale as "ice cream" of a product containing less than a fixed percentage of butter fat do not take property without due process of law nor deny the equal protection of the laws,—the particular percentages fixed not being so exacting as to be in themselves unreasonable,—although the ice cream of commerce is not iced or frozen cream, but is a frozen confection, varying in composition, and under some formulas may be made without either cream or milk.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 693, 825, 827; Dec. Dig. § 240(1), 296(1); Food, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.

For other definitions, see Words and Phrases, First and Second Series, Due Process of Law; Equal Protection of the Law.]

[Nos. 40 and 50.]

Argued November 13, 1916. Decided December 4, 1916.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which reversed a judgment of the District Court of Polk County, in that state, sustaining a demurrer to an information charging a violation of a state statute forbidding the sale of a product as ice cream which did not contain a specified percentage of butter fat. Affirmed. Also

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Superior Court, affirming a conviction in the Court of Quarter Sessions of Erie County, in that state, for selling as ice cream a compound containing less than the minimum percentage of butter fat specified by a state statute. Affirmed.

See same case in No. 40, 168 Iowa, 1, L.R.A. 1917B, 198, 147 N. W. 195; in No. 50, 245 Pa. 554, 91 Atl. 922.

The facts are stated in the opinion.

Mr. Walter Jeffreys Carlin for plaintiff in error in No. 50.

Messrs. R. L. Parrish and Walter Jeffreys Carlin for plaintiffs in error in No. 40.

Mr. George Cosson, Attorney General of Iowa, for defendant in error in No. 40.

Mr. William M. Hargest and Mr. Francis Shunk Brown, Attorney General of Pennsylvania, for defendant in error in No. 50.

* Mr. Justice Brandeis delivered the opinion of the court:

These cases were argued together. In each a state statute which prohibits the sale of ice cream containing less than a fixed percentage of butter fat is assailed as invalid under the 14th Amendment; the supreme court of each state having held its statute constitutional. State v. Hutchinson Ice Cream Co. 168 Iowa, 1, L.R.A. 1917B, 198, 147 N. W. 195; Com. v. Crowl, 245 Pa. 554, 91 Atl. 922. Iowa makes 12 per cent the required minimum; Pennsylvania 8 per cent. The material provisions of the several statutes are copied in the margin.¹

* The right of the state under the police power to regulate the sale of products with a view to preventing frauds or protecting the public health is conceded by plaintiffs in error. And they do not contend that the particular percentages of butter fat set by

¹ Iowa: Code Supp. 1913, § 4999-a20:

"No person, firm or corporation, . . . shall manufacture or introduce into the state, or solicit or take orders for delivery, or sell, exchange, deliver or have in his possession with the intent to sell, exchange or expose or offer for sale or exchange, any article of food which is adulterated or misbranded, within the meaning of this act."

Code Supp. 1913, § 4999-a31e:

"For the purpose of this act an article of food shall be deemed to be adulterated:

"First. If any substance or substances has or have been mixed and packed with it so as to reduce or lower or injuriously affect its quality, strength or purity.

"Second. If any substance or substances has or have been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it be an imitation of, or offered for sale, under the specific name of another article, or if it does not conform to the standards established by law."

Chap. 175, Acts 34th G. A.:

"Ice Cream."

"1. Ice cream is the frozen product made from pure wholesome sweet cream, and sugar, with or without flavoring, and if desired, the addition of not to exceed 1 per cent (1%) by weight of a harmless thickener, and contains not less than 12 per cent (12%) by weight of milk fat, and the acidity shall not exceed three tenths (3-10) of 1 per cent (1%)."

Pennsylvania: P. L. 63, Purdon's Dig. vol. 5, p. 529:

"An act for the protection of the public health and to prevent fraud and deception in the manufacture, sale, offering for sale, exposing for sale, and having in possession with intent to sell, of adulterated or deleterious ice cream; fixing a standard of butter fat for ice cream; providing penalties for the violation thereof, and providing for the enforcement thereof."

158 Iowa and Pennsylvania are so exacting as to be in themselves unreasonable. Thirteen other states have by similar legislation set 14 per cent as the minimum; five other states 12 per cent; only eight states have fixed a percentage as low as Pennsylvania; and the United States Department of Agriculture has declared 14 per cent to be standard.² The main objection urged is this: To require that ice cream, in order to be legally salable, must contain some butter fat, is a regulation so unreasonable and arbitrary as to be a deprivation of property without due process of law and a denial of the equal protection of the laws. To support this contention the following trade facts are shown:

The ice cream of commerce is not iced or frozen cream. It is a frozen confection—a compound. The ingredients of this compound may vary widely in character, in the number used, and in the proportions in which they are used. These variations are dependent upon the ingenuity, skill, and judgment of the maker, the relative cost at a particular time or at a particular place of the possible ingredients, and the requirements of the market in respect to taste or selling price. Thus, some Philadelphia ice cream is made of only cream, sugar, and a vanilla flavor. In making other Philadelphia ice cream the whites of eggs are added; and according to some formulas vanilla ice cream may be made without any cream or milk whatsoever; for instance, by proper manipulation of the yolks of eggs, the whites of eggs, sugar, syrup, and the vanilla bean. All of these different compounds are commonly sold as

ice cream; and none of them is necessarily unwholesome.

159 Plaintiffs in error contend that as ice cream is shown to be a generic term embracing a large number and variety of products, and the term as used does not necessarily imply the use of dairy cream in its composition, it is arbitrary and unreasonable to limit the ice cream of commerce to that containing a fixed minimum of butter fat. But the legislature may well have found in these facts persuasive* evidence* that the public welfare required the prohibition enacted. The facts show that, in the absence of legislative regulation, the ordinary purchaser at retail does not and cannot know exactly what he is getting when he purchases ice cream. He presumably believes that cream or at least rich milk is among the important ingredients; and he may make his purchase with a knowledge that butter fat is the principal food value in cream or milk. Laws designed to prevent persons from being misled in respect to the weight, measurement, quality, or ingredients of an article of general consumption are a common exercise of the police power. The legislature defines the standard article or fixes some of its characteristics; and it may conclude that fraud or mistake can be effectively prevented only by prohibiting the sale of the article under the usual tradename, if it fails to meet the requirements of the standard set. Laws prohibiting the sale of milk or cream containing less than fixed percentages of butter fat present a familiar instance of such legislation. Cases in the state courts upholding laws of this character are referred to in the margin.³ This court has repeatedly

² The requirements of the several states are set forth in U. S. Department of Agriculture (Bureau of Animal Industry), Circular 218, on Legal Standards for Dairy Products.

"Section 1. Be it enacted, etc., That no person, firm or corporate body, by himself, itself or themselves, or by his, her or their agents, servants, or employees, shall sell, offer for sale, expose for sale, or have in possession with intent to sell, ice cream adulterated within the meaning of this act.

"Section 2. Ice cream shall be deemed to be adulterated within the meaning of this act—

"First. If it shall contain boric acid, formaldehyde, saccharin, or any other added substance or compound that is deleterious to health.

"Second. If it shall contain salts of copper, iron oxid, ochers, or any coloring substance deleterious to health; Provided, That this paragraph shall not be construed to prohibit the use of harmless coloring matter in ice cream, when not used for fraudulent purposes.

"Third. If it shall contain any deleterious

flavoring matter, or flavoring matter not true to name.

"Fourth. If it be an imitation of, or offered for sale under, the name of another article. . . .

"Section 4. No ice cream shall be sold within the state containing less than eight (8) per centum butter fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter fat."

³ State v. Schlenker, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698; State v. Campbell, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; People v. Bowen, 182 N. Y. 1, 74 N. E. 489; State v. Crescent Creamery Co. 83 Minn. 284, 54 L.R.A. 466, 85 Am. St. Rep. 464, 86 N. W. 107; State v. Stone, 46 La. Ann. 147, 15 So. 11; Deems v. Baltimore, 80 Md. 164, 28 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; Com. v. Wheeler, 205 Mass. 384, 137 Am. St. Rep. 456, 91 N. E. 415, 18 Ann. Cas. 319; St. Louis v. Grafeman Dairy Co. 190 Mo. 507, 1 L.R.A. (N.S.) 926, 89 S. W. 627; State v. Smyth, 14 R. I. 100, 51 Am. Rep. 344.

sustained the validity of similar prohibitions. *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; *Armour & Co. v. North Dakota*, 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548.

It is specially urged that the statutes are unconstitutional because they do not merely define the term "ice cream;" but arbitrarily prohibit the sale of a large variety of wholesome compounds theretofore included under the name "ice cream." The acts appear to us merely to prohibit the sale of such compounds as ice cream. Such is the construction given to the act by the supreme court of Iowa. **State v. Hutchinson Ice Cream Co.* 108 Iowa. 1. 15, L.R.A. 1917B, 198, 147 N. W. 195, which is, of course, binding on us. We cannot assume, in the absence of a definite and authoritative ruling, that the supreme court of Pennsylvania would construe the law of that state otherwise. The conviction here under review was for selling the "compound" as ice cream, so that we are not called upon to determine whether the state may, in the exercise of its police power, prohibit the sale even of a wholesome product, if the public welfare appear to require such action—and if, as here, interstate commerce is not involved. See *Powell v. Pennsylvania*, 127 U. S. 678, 685, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 15, 43 L. ed. 49, 54, 18 Sup. Ct. Rep. 757.

In view of the conclusion stated above, it is unnecessary to consider whether the statutes are or are not sustainable as health measures; and upon this we express no opinion.

The judgment in each case is affirmed.

(42 U. S. 153)

SANDERS ICE CREAM COMPANY, Plff.
in Err.,
v.

STATE OF IOWA.

[No. 39.]

IN ERROR to the Supreme Court of the State of Iowa. By stipulation of counsel this case was heard and submitted upon the record in *Hutchinson Ice Cream Co. v. Iowa*, ante, p. 28.

(242 U. S. 160)

FRANK J. KANE, Plff. in Err.,
v.

STATE OF NEW JERSEY.

CONSTITUTIONAL LAW §235 — "EQUAL PROTECTION OF THE LAWS"—PRIVILEGES AND IMMUNITIES—STATE REGULATION OF MOTOR VEHICLES — DISCRIMINATION AGAINST NONRESIDENTS.

1. Nonresident automobile owners are not denied rights under U. S. Const. 14th Amend., because the New Jersey Auto-

motive Law (N. J. Laws 1908, p. 613), in addition to providing for the registration of automobiles and the licensing of drivers, requires a nonresident owner to appoint the secretary of state as his agent upon whom process may be served "in any action or legal proceeding caused by the operation of his registered motor vehicle within this state against such owner."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 683; Dec. Dig. §235.]

For other definitions, see Words and Phrases, First and Second Series, Equal Protection of the Law.]

CONSTITUTIONAL LAW §230(1)—"EQUAL PROTECTION OF THE LAWS"—STATE AUTOMOBILE LAW — DISCRIMINATION AGAINST NONRESIDENT.

2. The absence from the New Jersey Automobile Law (N. J. Laws 1908, p. 613), which provides for the registration of automobiles and the licensing of drivers, of any reciprocal provision by which nonresidents whose cars are duly registered in their home state are given for a limited period free use of the highways in return for similar privileges granted to residents of New Jersey, does not involve an unconstitutional discrimination against nonresidents, where the annual fees prescribed are not so large as to be unreasonable, and where any resident owner would be subjected to the full annual charge for the use of the highways for any period, however brief.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. §230(1).]

COMMERCE §10—STATE AUTOMOBILE LAW —NONRESIDENTS—CONGRESSIONAL INACTION.

3. The requirements of the New Jersey Automobile Law (N. J. Laws 1908, p. 613), for the registration of automobiles and the licensing of drivers, are not invalid regulations of interstate commerce,—until Congress acts in the matter,—as applied to a nonresident owner who is driving his car through the state on his way from New York to Pennsylvania.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. §10.]

CONSTITUTIONAL LAW §230(1)—"EQUAL PROTECTION OF THE LAWS" — STATE AUTOMOBILE LAW—LICENSE FEES.

4. The fact that the fees collected under the New Jersey Automobile Law (N. J. Laws 1908, p. 613) exceed the amount required to defray the expense of maintaining the regulation and inspection department, which excess, under the law, is to be applied to the maintenance of improved highways, does not render invalid as to nonresidents, under U. S. Const. 14th Amend., the requirements of that law for the registration of automobiles and the licensing of drivers.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. §230(1).]

[No. 51.]

Argued October 31, 1916. Decided December 4, 1916.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a judgment which affirmed a judgment of the Supreme Court of that state, affirming a conviction in the Recorder's

Court of the City of Paterson of violating the state automobile laws. Affirmed.

See same case below, 81 N. J. L. 594, 80 Atl. 453, Ann. Cas. 1912D, 237.

The facts are stated in the opinion.

Messrs. John W. Griggs and Charles Thaddeus Terry for plaintiff in error.

Messrs. Herbert Boggs and John W. Wescott, Attorney General of New Jersey, for defendant in error.

*164 *Mr. Justice Brandeis delivered the opinion of the court:

The New Jersey Automobile Law of 1908 (P. L. 1908, p. 613) provides in substance that no person, whether a resident or non-resident of the state, shall drive an automobile upon a public highway unless he shall have been licensed so to do and the automobile shall have been registered under the statute; and also that a nonresident owner shall appoint the secretary of state his attorney upon whom process may be served "in any action or legal proceeding caused by the operation of his registered motor vehicle within this state against such owner." The statute fixes the driver's license fee for cars of less than thirty horse power at \$2, and more than thirty horse power at \$4. It fixes the registration fee at \$3 for cars of not more than ten horse power; \$5 for those from eleven to twenty-nine horse power; and \$10 for those of thirty or greater horse power. Both license fees and registration fees, whensoever issued, expire at the close of the calendar year. The moneys received from license and registration fees in excess of the amount required for the maintenance of the motor vehicle department are to be applied to the maintenance of the improved highways. Penalties are prescribed for using the public highways without complying with the requirements of the act. The material portions of the statute are copied in the margin.¹

Kane, a resident of New York, was arrested while driving his automobile on the public highways of New Jersey,* and tried¹⁹¹⁶ in the recorder's court. The following facts were stipulated: Kane had been duly licensed as a driver under the laws of both New York and New Jersey. He had registered his car in New York, but not in New Jersey. He had not filed with the secretary of state of New Jersey the prescribed instrument appointing that official his attorney upon whom process might be served. When arrested he was on his way from New York to Pennsylvania. The aggregate receipts from license and registration fees for the year exceeded the amount required to defray the expenses of the motor vehicle department, so that a large sum became available for maintenance of the improved roads of the state. Kane contended that the statute was invalid as to him, a nonresident, because it violated the Constitution and laws of the United States regulating interstate commerce, and also because it violated¹⁹¹⁶ the 14th Amendment.* These contentions were overruled, and he was fined \$5. The conviction was duly reviewed both in the supreme court and by the court of errors and appeals. The contentions were repeated in both of those courts; and both courts affirmed the conviction. Kane v. State, 81 N. J. L. 594, L.R.A. 1917B, 553, 80 Atl. 453, Ann. Cas. 1912D, 237. The case was brought here by writ of error.

The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. It extends to nonresidents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to insure safety. And it is properly exercised in imposing a license fee graduated according to the horse power of the en-

1 "Part IV.—The Operation of Motor Vehicles.

*165 "16. (1) Every resident of this state and every nonresident, whose automobile shall be driven in this state, shall, before using such vehicle on the public highways, register the same, and no motor vehicle shall be driven unless so registered. Every registration shall expire and the certificate thereof become void on the 31st of December of each year; provided, it may be lawful for any automobile duly registered, to operate under said registration certificate for a period not exceeding thirty-one days after the expiration of said registration certificate. . . . The applicant shall pay to the commissioner of motor vehicles for each registration, a fee of \$3 for automobiles of the first class; \$5 for the second class, and \$10 for the

third class. Automobiles of ten horse power or less, shall be of the first class; from eleven to twenty-nine horse power, inclusive, of the second class; and of thirty horse power or more, of the third class. . . . Each owner having a residence outside of the state shall file with the secretary of state a duly executed instrument, constituting the secretary of state and his successors in office, the true and lawful attorney upon whom all original process in any action or legal proceeding caused by the operation of his registered motor vehicle, within the state, against such owner may be served, and therein shall agree that any original process against such owner shall be of the same force and effect as if served on such owner within this state; the service of such process shall be made by leaving a copy of the same in the office of the secretary of

gine. *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140. Several reasons are urged why that case should not be deemed controlling:

1. The Maryland law did not require the nonresident to appoint an agent within the state upon whom process may be served. But it was recognized in discussing it, that "the movement of motor vehicles over the highways is attended by constant and serious dangers to the public." (p. 622.) We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the state, any financial liability of nonresident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against nonresidents, denying them equal protection of the law. On the contrary, it puts nonresident owners upon an equality with resident owners.

2. The Maryland law contained a reciprocal provision by which nonresidents whose cars are duly registered in their home state are given, for a limited period, free use of the highways in return for similar privileges granted to residents of Maryland. Such a provision promotes the convenience of owners and prevents the relative hardship of having to pay the full registration fee for a brief use of the highways. It has become common in state legislation; and New Jersey has embodied it in her law

since the trial of this case in the lower court. But it is not an essential of valid regulation. Absence of it does not involve discrimination against nonresidents; for any resident similarly situated would be subjected to the same imposition. A resident desiring to use the highways only a single day would also have to pay the full annual fee. The amount of the fee is not so large as to be unreasonable; and it is clearly within the discretion of the state to determine whether the compensation for the use of its highways by automobiles shall be determined by way of a fee, payable annually or semiannually, or by a toll based on mileage or otherwise. Our decision sustaining the Maryland law was not dependent upon the existence of the reciprocal provision. Indeed, the plaintiff in error there was not in a position to avail himself of the reciprocal clause; and it was referred to only because of the contention that the law discriminated between nonresidents; that is, that Maryland extended to residents of other states privileges it denied to residents of the District.

3. In *Hendrick v. Maryland*, it appeared only that the nonresident drove his automobile into the state. In this case it is admitted that he was driving through the state. The distinction is of no significance. As we there said (622): "In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others."

state with a service fee of \$2 to be taxed on the plaintiff's costs of suit. Said commissioner of motor vehicles shall forthwith notify such owner of such service by letter directed to him at the post-office address stated in his application. . . .

"17. No person shall hereafter drive an automobile upon any public highway in this state, unless licensed to do so in accordance with the provisions of this act. No person under the age of sixteen years shall be licensed to drive automobiles, nor shall any person be licensed to drive automobiles until said person shall have passed a satisfactory examination as to his ability as an operator. . . .

There shall be two classes of drivers' licenses. Those authorizing the licensee to drive cars of less than thirty horse power shall be of the first class, and those authorizing the licensee to drive cars of thirty and greater horse power shall be of the second class. The annual license fee to be charged shall be \$2 for drivers of the first class, and \$4 for drivers of the second class. . . .

"Part X.—Miscellaneous.

"37. Moneys received in accordance with

the provisions of this act, whether from fines, penalties, registration fees, license fees, or otherwise, shall be accounted for and forwarded to the commissioner of motor vehicles and by him paid over to the treasurer of the state of New Jersey, to be appropriated annually to the commissioner of public roads, to be used as a fund for the repair of the improved roads throughout the state, whether they had been originally built by state aid or not, and to be by the said commissioner, apportioned once each year among the several counties of this state according to the mileage of improved roads in each county, the share apportioned each county to be used for the repair of improved roads in that county under the direction of the commissioner of public roads or his authorized representatives, and to be paid in the same manner as state funds are now paid for the improvement of public roads. The term 'improved roads' as used in this section shall not include streets paved with cobblestones, Belgium block or asphalt."

4. In the Hendrick Case it did not appear, as here, that the fees collected under the Motor Vehicle Law exceeded the amount required to defray the expense of maintaining the regulation and inspection department. But the Maryland statute, like that of New Jersey, contemplated that there would be such excess, and provided that it should be applied to the maintenance of improved roads. And it was expressly recognized that the purpose of the Maryland law "was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious."

The judgment should be affirmed.

Mr. Justice Pitney took no part in the consideration or decision of this case.

(212 U. S. 169)

BALTIMORE & OHIO RAILROAD COMPANY, Plff in Err.,

v.

HARVEY W. C. WHITACRE.

COURTS $\hookrightarrow$ 399(2)—ERROR TO STATE COURT—FOLLOWING DECISION BELOW.

1. Only in case of clear and palpable error will a unanimous ruling of the highest state court that the trial court had properly left to the jury a suit under the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), be disturbed by the Federal Supreme Court on writ of error.

[Ed. Note.—For other cases, see Courts, Dec. Dig. $\hookrightarrow$ 399(2); Appeal and Error, Cent. Dig. § 3396.]

TRIAL $\hookrightarrow$ 253(9)—REQUESTED INSTRUCTIONS—IGNORING EVIDENCE.

2. Instructions on the issues of negligence and assumption of risk are properly refused where, in each instance, the recital therein did not include all the facts which the jury was entitled to consider on the issues presented, and concerning which there was some evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 620; Dec. Dig. $\hookrightarrow$ 253(9).]

[No. 71.]

Argued November 7, 1916. Decided December 4, 1916.

IN ERROR to the Court of Appeals of the State of Maryland to review a judgment which affirmed a judgment of the Circuit Court for Washington County, in that state, in favor of plaintiff in an action under the Federal Employers' Liability Act. Affirmed.

See same case below, 124 Md. 411, 92 Atl. 1060.

The facts are stated in the opinion.

Messrs. Duncan K. Brent, George A. Pearre, A. Hunter Boyd, Jr., and George E. Hamilton for plaintiff in error.

Messrs. Frank A. Perdew and Albert A. Doub for defendant in error.

* Mr. Justice Brandeis delivered the opinion of the court:

Whitacre, a freight train brakeman, while walking through a railroad yard on a dark and foggy night, fell into a water cinder pit and was seriously injured. He brought suit under the Federal Employers' Liability Act of April 22, 1908 (chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657), in a state court and recovered a verdict. Exceptions were taken to certain refusals to rule. The court of appeals of Maryland affirmed the judgment of the court below. 124 Md. 411, 92 Atl. 1060.

It appeared at the trial that, although the pit was of modern construction and well adapted to the purpose for which it was constructed, it was not protected by a guard rail. There was testimony that at the time of the accident certain lights alleged to have been provided about the pit were not lighted; that it had been raining; and that the top of the water was covered to some extent with ashes, which made it difficult to distinguish the surface of the pit from solid ground. It was admitted that Whitacre was engaged in interstate commerce. The defenses relied upon were assumption of risk and denial of negligence.

The defendant (plaintiff in error) requested a peremptory instruction in its favor, on the ground that there was not sufficient evidence to entitle the plaintiff to recover. The appellate court was unanimous in holding that the trial court had properly left the case to the jury. No clear and palpable error is shown which would justify us in disturbing that ruling. Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 673, 59 L. ed. 777, 781, 35 Sup. Ct. Rep. 481; Great Northern R. Co. v. Knapp, 240 U. S. 464, 466, 60 L. ed. 745, 751, 36 Sup. Ct. Rep. 399. The defendant further complains that the trial court refused to give certain instructions on the issues of negligence and assumption of risk. These instructions were properly refused; because in each instance the recital therein did not include all the facts which the jury was entitled to consider on the issues presented and concerning which there was some evidence.

The judgment is affirmed.

HENRY H. KRYGER, Plff. in Err.,
v.
EDWARD H. WILSON.

COURTS 394(2)—ERROR TO STATE COURT
—SCOPE OF REVIEW—QUESTIONS OF LOCAL LAW.

1. Whether the cancellation of a land contract is governed by the law of the situs or of the place of making and performance is purely a question of local common law with which the Federal Supreme Court is not concerned on writ of error to a state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1049; Dec. Dig. 394(2).]

CONSTITUTIONAL LAW 309(1)—DUE PROCESS OF LAW—NOTICE—CANCELLATION OF LAND CONTRACT.

2. The nonresident vendee in an executory contract of sale may not say that his rights thereunder were foreclosed without due process of law because of lack of actual notice of cancellation proceedings taken by the vendor under the law of the situs of the property, where, in fact, his rights were foreclosed not by the cancellation proceedings, but by a decree of a court of the state of the situs, quieting title in the vendor, rendered in a suit in which the vendee appeared and asked for the land under the contract of sale, the court basing its decree upon the finding that a default occurred of which the vendor is entitled to take advantage, having complied with the cancellation law, which the court held to be controlling, i. e., the law of the situs rather than the place of making and performance.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. 309(1).]

COURTS 394(9)—ERROR TO STATE COURT
—FEDERAL QUESTION—IMPAIRING CONTRACT BY JUDICIAL DECREE.

3. Impairment of a contract by judicial decision does not raise a Federal question which can be reviewed by the Federal Supreme Court on writ of error to a state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1055; Dec. Dig. 394(9).]

[No. 99.]

Submitted November 13, 1916. Decided December 4, 1916.

IN ERROR to the Supreme Court of the State of North Dakota to review a judgment which affirmed a judgment of the District Court of Kidder County, in that state, in favor of plaintiff in a suit to quiet title. Affirmed.

See same case below, 29 N. D. 28, 149 N. W. 721.

The facts are stated in the opinion.

Messrs. O. E. Holman and William W. Fry for plaintiff in error.

Messrs. George S. Grimes and Jesse Van Valkenburg for defendant in error.

* Mr. Justice Brandeis delivered the opinion of the court:

This case comes here on writ of error to the supreme court of North Dakota to review a decree quieting title in the defendant in error—the plaintiff below—to land situated in that state. The plaintiff in error, a resident of Minnesota, claimed under an executory contract for the purchase of the land in controversy, and the rights of the parties turned upon whether this contract was outstanding or had been duly canceled. Both Minnesota, where the contract was made and to be performed, and North Dakota, had statutes providing that a vendor in a contract for the sale of land may not cancel and terminate the same upon default, except after written notice to the vendee, giving him at least thirty days within which to make good his nonperformance. Minn. Rev. Stat. 1905, § 4442; N. D. Rev. Codes 1905, chap. 30, art. 3, N. D. Comp. Laws 1913, chap. 30, art. 4. The material provisions of the latter statute are copied in the margin.¹ The vendor in this case (grantor of defendant in error) had given to the sheriff of the county where the land lay a written notice of cancellation to be served upon the plaintiff in error if found within the said county, and upon return of *not found*, caused the same to be published in a county newspaper, and later filed for record affidavits of publication and of non-redemption,—all in conformity with the North Dakota statute, if it applied.

When the present action was brought to quiet title, plaintiff in error defended, and asked for counter relief, contending that his contract was still valid and subsisting, as

¹ N. D. Rev. Codes 1905, chap. 30, art. 3; "Par. 7494. Owner must give written notice to vendee or purchaser.—No owner of real estate, or owner of any equity therein, [who] shall hereafter make or execute a contract for deed, bond for deed, or other instrument for the future conveyance of any such real estate or equity therein, shall have the right to declare a cancellation, termination or forfeiture thereof or thereunder, except upon written notice to the vendee or purchaser, or his assigns, as hereinafter provided; and such notice shall be given to such vendee or purchaser or his assigns, notwithstanding any provision or condition in any such instrument to the contrary.

"Par. 7495. In case of default. Contents of notice.—Whenever any default shall have been made in the terms or conditions of any such instrument hereinafter made, and the owner or vendor shall desire to cancel or terminate the same, [he] shall, within a reasonable time after such default, cause a written notice to be served upon the vendee or purchaser, or his assigns, stating that

the action prescribed by the Minnesota statute to entitle a vendor to cancel had not been taken. The trial court held that the North Dakota law governed; that under it the contract had been "duly and legally canceled;" that the plaintiff in error having shown no right in the land, title should be forever quieted in the defendant in error. This decree was affirmed by the supreme court on appeal. *Wilson v. Kryger*, 29 N. D. 28, 149 N. W. 721. We are asked to review the case on the ground that the state court deprived the plaintiff in error of property without due process of law and impaired the obligation of his contract, in holding that the cancellation proceeding, of which the plaintiff in error had no actual notice, effectively terminated his rights under the contract.

It is apparent from the above statement that there has been no lack of due process. The court below, having jurisdiction of the suit to quiet title, was called upon to determine the conflicting claims to the land. The plaintiff in error voluntarily appeared, and he availed himself of the opportunity to urge his claims to equitable ownership under the contract of sale. The court decided against him, holding the contract no longer outstanding. The most that the plaintiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the cancellation of a land contract is governed by the law of the situs instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned. *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Finney v. Guy*, 189 U. S. 335, 346, 47 L. ed. 839, 845, 23 Sup. Ct.

Rep. 558; *Allen v. Alleghany Co.* 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311; *Marrow v. Brinkley*, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267.

The argument of the plaintiff in error is seemingly based upon the erroneous theory that his rights were foreclosed by the cancellation proceeding, which, lacking the requisite notice, deprived him of property without due process. But the action under the cancellation statute was in no sense a judicial proceeding. It was simply a statutory condition with which vendors were required to comply before they could take advantage of a default by the vendee. If the contract, properly interpreted, or the law, properly applied, required that this condition be performed in Minnesota, steps taken by him under the North Dakota statute would be ineffective. Whether or not proper proceedings had been taken to secure cancellation could be determined only by a court having jurisdiction; and the North Dakota court had jurisdiction not only over the land, but, through the voluntary appearance of plaintiff in error, also over him. His rights have been foreclosed, not by the cancellation proceeding under the statute, but by a due and regular judicial decree which was based upon the finding that a default had occurred, of which the vendor was entitled to take advantage, having complied with the proper law. If the plaintiff in error had not submitted himself to the jurisdiction of the court, the decree could have determined only the title to the land, and would have left him free to assert any personal rights he may have had under the contract. But, having come into court and specifically asked in his cross bill that he be declared entitled to the "possession and control of the real estate described

such default occurred, and that said contract will be canceled or terminated, and shall recite in said notice the time when said cancellation or termination shall take effect, which shall not be less than thirty days after the service of such notice.

"Par. 7496. Notice, how served.—Such notice shall be served upon the vendee or purchaser, or his assigns, in the manner now provided for the service of summons in the district court of this state, if such person to be served resides within the state. If such vendee or purchaser, or his assigns, as the case may be, resides without the state or cannot be found therein, of which fact, the return of the sheriff of the county in which said real estate is situated, that such person to be served cannot be found in his county, shall be prima facie evidence, then such notice shall be served by the publication thereof in a weekly newspaper within said county; or, if there is no weekly newspaper within said county, then in a

newspaper published at the capital of this state for a period of three successive weeks.

"Par. 7497. Time allowed.—Such vendee or purchaser, or his assigns, shall have thirty days after the service of such notice upon him in which to perform the conditions or comply with the provisions upon which the default shall have occurred; and upon such performance, and upon making such payment, together with the costs of service of such notice, such contract or other instrument shall be reinstated and shall remain in force and effect the same as if no default had occurred therein. No provision in any contract for the purchase of land, or an interest in land, shall be construed to obviate the necessity of giving the aforesaid notice, and no contract shall terminate until such notice is given, any provision in such contract to the contrary notwithstanding."

The provisions of the Minnesota statute are substantially to the same effect.

in the complaint herein under a contract of sale," he cannot now complain if he has been concluded altogether in the premises. The plaintiff in error relies upon *Selover, B. & Co. v. Walsh*, 226 U. S. 112, 57 L. ed. 146, 33 Sup. Ct. Rep. 69. That was a personal action for breach of contract, and not, like the present case, an action merely to determine the title to land; and, as the court found on the facts there involved, that the proper law as to cancellation had been applied, the case cannot be construed as holding that an erroneous application thereof would raise a question of due process.

The contention based on the contract clause is equally devoid of merit, for there has been no subsequent legislation impairing the obligation of the contract. Impairment by judicial decision does not raise a Federal question. *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 56 L. ed. 924, 32 Sup. Ct. Rep. 577.

Judgment affirmed.

(242 U. S. 131)

JAMES SIM, Petitioner,
v.
WILLIAM EDENBORN.

COURTS 366(14) — FEDERAL COURTS — FOLLOWING DECISION OF STATE COURT—RESCISSION — RESTORATION OF STATUS QUO.

The Federal Supreme Court, when undertaking to determine rights dependent upon the laws of a state, should follow a ruling of the highest court of that state that persons induced to subscribe to a syndicate agreement for the purchase of the capital stock of an existing corporation, together with certain coal properties, through the misleading representations and suppressions of fact of the promoter, whom they created their agent in the matter, may rescind, upon discovering that he was a majority owner of the stock to be purchased, and recover the amount of their subscriptions, without doing anything more to restore the status quo than to tender the stock which they had received under the agreement.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 955; Dec. Dig. 366(14).]

[No. 8.]

Argued May 5, 1915. Reargued October 23, 1916. Decided December 4, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed a judgment of the District Court for the Eastern District of New York, in favor of plaintiff, in a suit to rescind a contract for fraud and to recover payments

made thereunder. Reversed; judgment of trial court affirmed.

See same case below, 124 C. C. A. 339, 206 Fed. 275.

The facts are stated in the opinion.

Mr. Theron G. Strong for petitioner.

Messrs. Joseph W. Bailey, Martin W. Littleton, and Owen N. Brown for respondent.

* Mr. Justice McReynolds delivered the opinion of the court:

By an action at law commenced in the supreme court, Kings county, New York, and subsequently removed to the United States circuit court because of diverse citizenship, petitioner, Sim, sought to recover from respondent the amounts paid upon subscriptions to a syndicate agreement which the latter fraudulently induced him and his assignors to make. By stipulation, a jury being waived, the issues were referred to a referee. The reported facts, essential to an understanding of points now involved, are summarized below.

* While owning the majority stock of United States Iron Company, respondent and others conceived a scheme to consolidate it with certain coal properties, erect blast furnaces, engage in smelting and manufacturing iron, etc. He accordingly prepared an agreement, dated April 15, 1902, stating generally the ends in view, and invited subscriptions. This instrument designated him and two others as "syndicate managers," and recited there was an opportunity to acquire for cash the \$1,000,000 capital stock of that company, together with valuable coal properties, and that the purpose was to raise the essential two and a half million dollars. It further specified that "the syndicate managers hereunder shall have the direction and management of the subject-matter of the said syndicate, and each subscriber nominates and appoints the syndicate managers his agents and attorneys irrevocable, until the termination of this agreement, to exercise all the rights of the subscribers in and to the properties proposed to be acquired." Still other provisions conferred upon the managers wide discretion and powers of control. Petitioner and his assignors became subscribers while in entire ignorance of respondent's true position. He represented that it was proposed to purchase only valuable and paying properties; that subscriptions were payable in dollars, and not in property; that he had made a subscription for \$500,000, payable in dollars; that the enterprise was being organized in good faith; that all, according to their interest, had equal rights and stood on same basis; that every

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man's dollar was put up against every other man's dollar; and that there were to be no special advantages to anyone. In fact, however, he always intended to utilize stock owned by him in payment of his subscription. The managers changed the company's name to Sheffield Coal & Iron Company, increased the capital to \$2,500,000, and caused it to acquire additional coal properties. For cash paid to them by syndicate members, they delivered an equal amount of stock issued by the corporation. In settlement of his subscription (reduced from \$500,000 to \$475,000) respondent surrendered the majority stock in United States Iron Company, at a valuation of \$70 per share, paid balance in cash, and took new certificates. When he solicited and obtained subscriptions and received payments, he knew subscribers were relying upon him faithfully to act as their agent. Subsequent to the specified transactions petitioner and his assignors discovered respondent's interest, and thereupon promptly elected to rescind their subscriptions, gave due notice to the managers, offered to return and restore all stock received, and demanded their money.

Relying on *Heckscher v. Edenborn*, 203 N. Y. 210, 96 N. E. 441, the referee reported that Edenborn was liable for amounts paid, with interest, and final judgment therefor was duly entered. The circuit court of appeals declined to follow the state court, and, being of opinion that "it is a condition of rescission that the status quo shall be restored," and that no such restoration had been offered, reversed the trial court (124 C. C. A. 339, 206 Fed. 275, 277). The cause is here upon writ of certiorari.

Heckscher v. Edenborn arose out of another subscription to the agreement now involved, and the essential facts there and here are substantially alike. After much consideration the court of appeals decided in favor of plaintiff, *Heckscher*, holding the agreement was vitiated by fraud because Edenborn failed to reveal his interest in the stock intended to be purchased, and, further, that tender of stock actually received was all the subscriber could do towards restoring the original position, and constituted an adequate preliminary to an action for recovery. The opinion expresses that court's deliberate conclusion upon the issues, and is supported by reference to earlier decisions of its own and other authorities.

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* Petitioner now contends that the court of appeals was correct upon principle, and, moreover, that if doubts exist they should be resolved in favor of its opinion. On the other hand, respondent maintains the ques-

tions involved are of general law, and that the state court reached an unwarranted result, not to be accepted here.

This court has many times considered how far Federal tribunals, when undertaking to enforce laws of the states, should follow opinions of their courts. The authorities were reviewed and rule announced in *Burgess v. Seligman*, 107 U. S. 20, 33-35, 27 L. ed. 359, 365, 366, 2 Sup. Ct. Rep. 10, which declared that, as to doctrines of commercial law and general jurisprudence, the former exercise their own judgment, "but even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt." This has been often reaffirmed. *Wilson v. Standefer*, 184 U. S. 399, 412, 46 L. ed. 612, 618, 22 Sup. Ct. Rep. 384; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 220, 46 L. ed. 1132, 1135, 22 Sup. Ct. Rep. 820; *Stanly County v. Coler*, 190 U. S. 437, 444, 445, 47 L. ed. 1126, 1131, 1132, 23 Sup. Ct. Rep. 811; *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 547, 48 L. ed. 778, 786, 24 Sup. Ct. Rep. 576; *Tampa Waterworks Co. v. Tampa*, 199 U. S. 241, 243, 244, 50 L. ed. 172-174, 26 Sup. Ct. Rep. 23; *Kuhn v. Fairmont Coal Co.* 215 U. S. 349, 357-361, 54 L. ed. 228, 233-235, 30 Sup. Ct. Rep. 140; *Ennis Waterworks v. Ennis*, 233 U. S. 652, 657, 658, 59 L. ed. 1139-1141, 34 Sup. Ct. Rep. 767; *Moore-Mansfield Constr. Co. v. Electrical Installation Co.* 234 U. S. 619, 625, 58 L. ed. 1503, 1505, 34 Sup. Ct. Rep. 941; *Lankford v. Platte Iron Works Co.* 235 U. S. 461, 474, 59 L. ed. 316, 320, 35 Sup. Ct. Rep. 173.

The conclusions of the court of appeals in *Heckscher's Case* are not in direct conflict with any declared views of this court and some expressions in our former opinions tend to support them. *Veazie v. Williams*, 8 How. 134, 158, 12 L. ed. 1018, 1028; *Andrews v. Hensler*, 6 Wall. 254, 258, 18 L. ed. 737, 739; *Neblett v. Macfarland*, 92 U. S. 101, 103-105, 23 L. ed. 471-473.

Through misleading representations and suppression of facts, respondent induced syndicate subscribers to become parties to an agreement creating him their agent to acquire and deal with certain properties,—a position of especial trust and confidence. His original undisclosed purpose was to obtain their money and appropriate it toward purchase of something partly owned by himself. Having led them to intrust their funds to his discretion, he carried out his preconceived plan, and, as a part of it,

caused them to receive an equivalent amount of corporate stock. He now seeks to avoid a judgment, because his own actions have rendered it impossible for him to get back to the beginning point.

This was not a proceeding in equity addressed to the court's discretion, but a demand at law upon an agent for return of something improperly received and disposed of. The defrauded principals tendered back everything received by them,—did all they could towards restoring original conditions. In such circumstances it is but just and right that any loss should fall on the unfaithful agent, not on his too-confiding principals. See *Snow v. Alley*, 144 Mass. 546, 551, 59 Am. Rep. 119, 11 N. E. 764; *O'Shea v. Vaughn*, 201 Mass. 412, 87 N. E. 616; *Bigelow, Fr.* 430, 431; *Whart. Contr.* § 285.

We think, in *Heckscher v. Edenborn*, the Court of Appeals reached a result well supported both by reason and upon authority, and that the courts below should have followed it when undertaking to determine rights depending upon the laws of New York. The action of the Circuit Court of Appeals is accordingly reversed; and the judgment of the trial court is affirmed.

Reversed.

Mr. Justice McKenna, Mr. Justice Day, and Mr. Justice Van Devanter dissent, being of opinion that the questions involved are of general, not local, law; that there has not been such restoration of the status quo as is essential to a recovery at law upon a rescission; and that, upon the facts specially found by the referee, the decision of the Circuit Court of Appeals was right.

(242 U. S. 137)

THOMAS P. ALDER, Petitioner,

v.

WILLIAM EDENBORN.

This case is governed by the decision in *Sim v. Edenborn*, ante, 36.

[No. 9.]

Argued May 5, 1915. Reargued October 23, 1916. Decided December 4, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed a judgment of the District Court for the Eastern District of New York in favor of plaintiff in a suit to rescind a contract for fraud, and to recover payments made thereunder. Reversed; judgment of trial court affirmed.

See same case below, 124 C. C. A. 339, 206 Fed. 275.

Mr. Theron G. Strong for petitioner.

Messrs. Joseph W. Bailey, Martin W. Littleton, and Owen N. Brown for respondent.

* Mr. Justice McReynolds delivered the opinion of the court:

This cause is similar in all essential respects to *Sim v. Edenborn*, just decided [242 U. S. 131, 61 L. ed. 199, 37 Sup. Ct. Rep. 36]. Accordingly, the Circuit Court of Appeals' action is reversed, and the judgment of the trial court is affirmed.

Reversed.

(242 U. S. 138)

JOHN G. MCINTYRE, Plff. in Err.,

v.

FREDERICK W. KAVANAUGH.

PARTNERSHIP $\Leftrightarrow$ 153(1)—INDIVIDUAL RESPONSIBILITY FOR FIRM'S TORT.

1. Partners are individually responsible for torts by the firm when acting within the general scope of its business, whether they personally participate therein or not. [Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 274, 276, 277; Dec. Dig. $\Leftrightarrow$ 153(1).]

BANKRUPTCY $\Leftrightarrow$ 424 — EFFECT OF DISCHARGE—LIABILITY FOR CONVERSION — "WILFUL AND MALICIOUS INJURY TO PROPERTY."

2. The unauthorized sale by a firm of brokers of certificates of stock held by them as collateral, and the appropriation of the avails to their own use, without the knowledge of the owner, is a wilful and malicious injury to property within the meaning of the provision of the Bankrupt Act of July 1, 1898 (30 Stat. at L. 550, chap. 541), § 17, as amended by the Act of February 5, 1903 (32 Stat. at L. 793, chap. 487, Comp. Stat. 1913, § 9601), that a discharge in bankruptcy shall not release the bankrupt from liability for wilful and malicious injuries to the person or property of another. [Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 787, 818; Dec. Dig. $\Leftrightarrow$ 424.

For other definitions, see *Words and Phrases*, First and Second Series, *Wilful and Malicious Injury*.]

[No. 88.]

Argued November 10, 1916. Decided December 4, 1916.

IN ERROR to the Supreme Court of the State of New York in and for the County of Saratoga, entered pursuant to the mandate of the Court of Appeals of that state, which affirmed a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of the Trial Term of the Supreme Court in favor of plaintiff in an action against a discharged bankrupt to recover damages for conversion. Affirmed.

See same case below, in appellate division,

151 App. Div. 910, 135 N. Y. Supp. 1120; in court of appeals, 210 N. Y. 175, 104 N. E. 135.

The facts are stated in the opinion.

Mr. Robert H. Patton for plaintiff in error.

Mr. Myer Nussbaum for defendant in error.

Mr. Justice McReynolds delivered the opinion of the court:

Plaintiff in error was a member of T. A. McIntyre & Company, engaged in business as brokers. During February, 1908, the partnership received certain stock certificates owned by defendant in error, and undertook to hold them as security for his indebtedness, amounting to less than one sixth of their market value. Within a few weeks, without authority and without his knowledge, they sold the stocks and appropriated the avails to their own use. Shortly thereafter both firm and its members were adjudged bankrupts. After his discharge in bankruptcy this suit was instituted against plaintiff in error, seeking damages for the wrongful conversion. He set up his discharge and also personal ignorance of and nonparticipation in any tortious act.

The trial court held the liability was for wilful and malicious injury to property and expressly excluded from release by § 17 (2), Bankruptcy Act, as amended in 1903 (32 Stat. at L. 798, chap. 487, Comp. Stat. 1913, § 9601), and that the several partners were liable. A judgment for damages was affirmed by appellate division (151 App. Div. 910, 135 N. Y. Supp. 1120) and court of appeals (210 N. Y. 175, 104 N. E. 135).

That partners are individually responsible for torts by a firm when acting within the general scope of its business, whether they personally participate therein or not, we regard as entirely clear. *Castle v. Ballard*, 23 How. 172, 16 L. ed. 424; *Re Peck*, 206 N. Y. 56, 41 L.R.A. (N.S.) 1223, 99 N. E. 258, Ann. Cas. 1914A, 798. If, under the circumstances here presented, the firm inflicted a wilful and malicious injury to property, of course, plaintiff in error incurred liability for that character of wrong.

As originally enacted, § 17 of the Bankruptcy Act provided:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; . . . (4) were created by his fraud, embezzlement,

misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." [30 Stat. at L. 550, chap. 541, Comp. Stat. 1913, § 9601.]

This was amended by Act February 5, 1903, so as to read:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries* to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." [32 Stat. at L. 798, chap. 487, Comp. Stat. 1913, § 9601.]

The trial court found—

That on February 5, 1908, McIntyre & Company by agreement obtained possession of Kavanaugh's stocks, worth approximately \$25,000, and held them as security for his indebtedness, amounting to \$3,853.32.

"That almost immediately after taking over said stocks by certificates as aforesaid by the said firm of T. A. McIntyre & Company, composed as aforesaid, and commencing on the very next day, said firm of T. A. McIntyre & Company (the above-named defendants being members thereof), without any notice to the plaintiff, and without his authority, knowledge, or consent, or demand of any kind upon him, sold and disposed of the identical certificates of such stock and scrip so turned over to them as aforesaid, and placed the avails thereof in the bank account of said firm of T. A. McIntyre & Company to the credit of said firm.

"That the various stocks aforesaid had all been disposed of prior to the 18th day of March, 1908, and that three quarters in value thereof had been disposed of on or prior to February 14th, 1908, or within nine days after the acquisition of the possession thereof by defendant's firm as aforesaid.

"That the above-named defendants, together with the other members of the said firm of T. A. McIntyre & Company, in disposing of said stocks aforesaid, without notice to or demand upon the plaintiff, and without his authority, knowledge, or consent, and in depositing the proceeds and avails thereof in the bank account to the credit of said firm of T. A. McIntyre & Company, committed wilful and malicious injury to the property of the plaintiff.

* "That on April 23, 1908, the said firm

of T. A. McIntyre & Company filed a petition in bankruptcy in the United States district court for the southern district of New York, and were afterwards adjudicated bankrupts.

"That thereafter the plaintiff in this action proved his claim against the bankrupt estate without waiving any legal rights in this action or otherwise."

To deprive another of his property forever by deliberately disposing of it without semblance of authority is certainly an injury thereto within common acceptance of the words. Bouvier's Law Dict., "Injury." And this we understand is not controverted; but the argument is that an examination of our several Bankruptcy Acts and consideration of purpose and history of the 1903 amendment will show Congress never intended the words in question to include conversion. We can find no sufficient reason for such a narrow construction. And instead of subserving the fundamental purposes of the statute, it would rather tend to bring about unfortunate if not irrational results. Why, for example, should a bankrupt who had stolen a watch escape payment of damages, but remain obligated for one maliciously broken? To exclude from discharge the liability arising from such transactions as those involved in *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9, and here presented, not improbably was a special purpose of the amendment.

In *Tinker v. Colwell*, 193 U. S. 473, 485, 487, 48 L. ed. 754, 759, 760, 24 Sup. Ct. Rep. 505, we said of original § 17 (2): "In order to come within that meaning as a judgment for a wilful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained." And further: "A wilful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception. It is urged that the malice referred to in the exception is malice towards the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where mere intentional injury without special malice towards the individual has been held by some courts not to be sufficient. *Com. v. Williams*, 110 Mass. 401. We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended

to limit the exception in any such way. It was an honest debtor, and not a malicious wrongdoer, that was to be discharged."

The circumstances disclosed suffice to show a wilful and malicious injury to property for which plaintiff in error became and remains liable to respond in damages. The judgment below is affirmed.

(242 U. S. 142)

CHESAPEAKE & OHIO RAILWAY COMPANY, Plff. in Err.,

v.

L. P. McLAUGHLIN.

CARRIERS $\S$ 218(10)—NOTICE OF CLAIM—
EXCUSE FOR NONCOMPLIANCE.

Failure to comply with the stipulation in a "uniform live-stock contract" under which an interstate shipment was made, that no claim for damages which may accrue to the shipper under such contract shall be allowed or paid by the carrier, or sued for in any court by the shipper, unless claim for such loss or damage shall be made in writing, verified by the affidavit of the shipper or his agent, and delivered to the carrier's general claim agent, defeats any recovery from the carrier because of injury to the shipment, where there are no circumstances rendering such stipulation invalid or excusing noncompliance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 947; Dec. Dig. $\S$ 218(10).]

[No. 100.]

Argued November 14, 1916. Decided December 4, 1916.

IN ERROR to the Circuit Court of Pocahontas County in the state of West Virginia to review a judgment against a carrier for injuries to an interstate live-stock shipment. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. F. B. Enslow and Herbert Fitzpatrick for plaintiff in error.

No appearance for defendant in error.

* Mr. Justice McReynolds delivered the opinion of the court:

McLaughlin recovered judgment against the railway company in the circuit court, Pocahontas county, West Virginia, for injuries to a horse which it transported from Lexington, Kentucky, and delivered to him at Seebert, West Virginia, February 17, 1914.

The shipment was under a "uniform live-stock contract" signed by both parties and introduced in evidence by defendant in error, which, among other things, provides:

"That no claim for damages which may accrue to the said shipper under this con-

tract shall be allowed or paid by the said carrier or sued for in any court by the said shipper, unless claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent and delivered to the general claim agent of the said carrier at his office in Richmond, Virginia, within five days from the time said stock is removed from said car or cars; and that if any loss or damages occur upon the line of a connecting carrier then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs."

It conclusively appears that McLaughlin did not present a verified claim to the carrier's agent as provided by the contract. Upon its face the agreement seems to be unobjectionable, and nothing in the record tends to establish circumstances rendering it invalid, or excuse failure to comply therewith. The court below erred in denying a seasonable request for a directed verdict; and its judgment must be reversed. Our recent opinions render unnecessary any further discussion of the reasons for this conclusion. Northern P. R. Co. v. Wall, 241 U. S. 87, 60 L. ed. 905, 36 Sup. Ct. Rep. 493; Georgia, F. & A. R. Co. v. Blish Mill Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 60 L. ed. 1022, L.R.A. 1917A, 265, 36 Sup. Ct. Rep. 555.

Reverse and remand for further proceedings not inconsistent with this opinion.

Reversed.

(242 U. S. 144)

GREAT NORTHERN RAILWAY COMPANY, Plff. in Err.,

v.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William M. Ward, Deceased.

DEATH $\hookrightarrow$ 10—DAMAGES—UNDER FEDERAL EMPLOYERS' LIABILITY ACT—CONSCIOUS SUFFERING OF DECEASED.

1. The fact that a railway employee, though wholly unconscious, continued to breathe for perhaps ten minutes after receiving a fatal injury, affords no basis for an estimation or award of damages in addition to the beneficiary's pecuniary loss, under the Act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), amending the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149), by providing that any right of action given by that act to the person suffering injury shall survive to the personal representative for the benefit of the same

beneficiaries in whose behalf the right of action created by the original act is given, but that there shall be only one recovery for the same injury.

[Ed. Note.—For other cases, see Death, Dec. Dig. $\hookrightarrow$ 10.]

DEATH $\hookrightarrow$ 82—DAMAGES—UNDER FEDERAL EMPLOYERS' LIABILITY ACT—PERSONAL LOSS AND CONSCIOUS SUFFERING.

2. Damages recoverable under the Act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), amending the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149), by providing that any right of action given by that act to the person suffering injury shall survive to the personal representative for the benefit of the same beneficiaries in whose behalf the right of action created by the original act is given, but that there shall be only one recovery for the same injury, should be confined to the personal loss and suffering of the injured employee during the time intervening between the injury and the resulting death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 106; Dec. Dig. $\hookrightarrow$ 82.]

[No. 107.]

Submitted November 15, 1916. Decided December 4, 1916.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of Ramsey County, in that state, in favor of plaintiff in an action under the Federal Employers' Liability Act. Reversed and remanded for further proceedings.

See same case below on appeal from order denying alternative for judgment or new trial, 127 Minn. 144, L.R.A.—, —, 149 N. W. 14, 7 N. C. C. A. 154; on appeal from judgment, 128 Minn. 537, 150 N. W. 1102.

The facts are stated in the opinion.

Messrs. A. L. Jones and M. L. Countryman for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

* Mr. Justice McReynolds delivered the opinion of the court:

While employed by the railway company as a switchman, William M. Ward was accidentally killed, December 13, 1912; and the administrator brought suit in a state court under the Federal Employers' Liability Act, as amended, for the benefit of his father and mother, seeking to recover their pecuniary loss and also damages for the injuries suffered by him prior to death. Some evidence tended to show that, after being run over by one or more cars, although wholly unconscious, the deceased continued to breathe for perhaps ten min-

utes. Testimony of other witnesses supported a claim that there was no appreciable continuation of life. Judgment upon an unapportioned verdict, in favor of the administrator, was affirmed by the state supreme court, October, 1914. The railway company duly excepted to the following portions of the charge:

"Did Ward's injuries kill him instantly? If he was killed instantly, one rule of damages applies, while if he lived some time after he was injured, another rule of damages would apply. There is some evidence that he lived a few minutes after receiving his injuries; there is other evidence that he was dead when taken out from*under the car. If you should find that Ward died from his injuries without living an appreciable length of time, then the plaintiff could only recover, if at all, what would have been the pecuniary value of Ward's life to his father and mother had he lived.

. . . And in that connection it would be proper for you to consider his health, his disposition to contribute to the support of his parents, the evidence of what he customarily earned, his earning capacity, the amount he was in the habit of giving to his parents, his age, his condition in life, the length of time he probably would have lived had not this accident happened, and the expectancy of the life of the father and mother, and the reasonable expectancy of the parents in respect to benefits, if any, from the services of their son; . . .

"In case you find that Ward did not die instantly from his injuries, but that he lived some appreciable length of time after the accident, then you would come to another question in the case.

"Under the law of the United States it is provided that any right of action given by the act of Congress in reference to injuries of this kind under such circumstances, that the right of action shall survive to the personal representatives of the deceased for the benefit of his parents, if there is no surviving widow and children. And if you should find from the evidence that Ward did not die instantly from his injuries, but that he lived some little time after he was injured, then, under the law, the plaintiff would be entitled to recover damages in the same amount that Ward, the deceased, would have been entitled to recover had he brought the action in his lifetime. That is, you can award such damages as, in your judgment, would be a full, fair, and reasonable compensation for the loss sustained by Ward, the deceased, by reason of the injuries he received. . . . And in that connection, it would be proper for you to consider his age, his habits of industry, his

health, his ability to work, his earning capacity, and the amount he usually earned at the time he was injured, and the length of time he would probably have lived had he not been injured, using your best judgment under all the circumstances in arriving at what would be a fair compensation for his loss."

In *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 655, 658, 59 L. ed. 1160, 1162, 1163, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754 (June 1, 1915) we held that, under the Employers' Liability Act, as amended in 1910, 36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662, the administrator of a fatally injured employee might recover the beneficiary's pecuniary loss and also for pain and suffering endured by deceased between the moment of injury and final dissolution. We were careful, however, to say—

(655) "But to avoid any misapprehension it is well to observe that the case is close to the border line, for such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here." And, referring to the two separate grounds of recovery—(658) "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."

The present record presents the very circumstances which we declared afforded no basis for an estimation or award of damages in addition to the beneficiary's pecuniary loss. And although apparently not challenged in the state supreme court, and therefore not now to be relied on as ground for reversal (*Harding v. Illinois*, 196 U. S. 78, 87, 88, 49 L. ed. 394, 397, 398, 25 Sup. Ct. Rep. 176), in view of a possible new trial, it seems proper to point out that the method approved by the trial court for estimating damages where the deceased's cause of action does survive conflicts with the rule sanctioned by us in the *Craft* Case.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

(242 U. S. 148)

NEW YORK CENTRAL & HUDSON
RIVER RAILROAD COMPANY, Plff. in
Err.,

v.

MARY EDNA BEAHAM.

CARRIERS $\hookrightarrow$ 397½—MEASURE OF RIGHTS
AND LIABILITIES—INTERSTATE BAGGAGE.

1. The rights and liabilities of an interstate passenger and the carrier in case of a loss of baggage depend upon Federal legislation, the agreement between the parties, and common-law principles, as accepted and enforced in Federal tribunals.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1519-1528; Dec. Dig. $\hookrightarrow$ 397½.]

EVIDENCE $\hookrightarrow$ 69—PRESUMPTION — CARRIER'S COMPLIANCE WITH LAW.

2. An interstate railway carrier is entitled to the presumption that it is conducting its business lawfully.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 90; Dec. Dig. $\hookrightarrow$ 69.]

CARRIERS $\hookrightarrow$ 405(3), 408(4) — EVIDENCE—SUFFICIENCY—LIMITATION OF CARRIER'S LIABILITY—LOSS OF BAGGAGE.

3. Acceptance and use by an interstate passenger of a railway ticket which purported to limit baggage liability to a specified sum unless a greater value should be declared and excess charges paid suffice to establish an agreement prima facie valid, limiting the carrier's liability in this respect, and the mere failure of the passenger to read the ticket could not overcome the presumption of assent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1548, 1549, 1562-1567; Dec. Dig. $\hookrightarrow$ 405(3), 408(4).]

APPEAL AND ERROR $\hookrightarrow$ 837(11)—ERROR TO STATE COURT — DENIAL OF FEDERAL RIGHT — INTERSTATE CARRIER'S LIMITATION OF BAGGAGE LIABILITY.

4. Insufficiency or defective certification of a carrier's applicable tariff schedules on file with the Interstate Commerce Commission, which were admitted in evidence by the trial court, could not justify a state appellate court in arbitrarily disregarding such schedules when passing upon the question whether or not the carrier had limited its liability for the baggage of an interstate passenger to a specified sum unless a greater value is declared and excess charges paid.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3275, 3277; Dec. Dig. $\hookrightarrow$ 837(11).]

[No. 118.]

Argued November 16, 1916. Decided December 4, 1916.

IN ERROR to the Kansas City Court of Appeals of the State of Missouri to review a judgment affirming a judgment of the Circuit Court of Jackson County, in that state, for the recovery from a carrier of the full value of lost interstate baggage, notwithstanding a limitation of such liability in the ticket and in the carrier's published tariffs to the declared value. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. Albert S. Marley, John S. Marley, and Robert J. Cary for plaintiff in error.

Messrs. Justin D. Bowersock and Robert B. Fizzell for defendant in error.

* Mr. Justice McReynolds delivered the opinion of the court:

At its New York city station, in September, 1910, Miss Beaham purchased of plaintiff in error a first-class ticket over its own and connecting lines, on the face of which was printed: "Issued by the New York Central & Hudson River Railroad. Good for one passage of the class indicated on coupons attached to Kansas City, Missouri, when stamped and sold by an agent holding written authority as prescribed by law, and presented with coupons attached. Subject to the following contract: . . . 5. Baggage liability is limited to wearing apparel not to exceed one hundred (100) dollars in value for a whole ticket and fifty (50) dollars for a half ticket unless a greater value is declared by the owner, and excess charge thereon paid at the time of taking passage."

* Immediately after purchasing the ticket she presented it at the baggage department; her trunk was received for transportation; and she accepted a check or receipt therefor upon which were the words: "See conditions on back. Value not stated." On the back this was printed: "Notice to passengers. Baggage consists of a passenger's personal wearing apparel and liability is limited to \$100 (except a greater or less amount is provided in tariffs) on full fare ticket, unless a greater value is declared by owner at time of checking and payment is made therefor."

The trunk and contents having been lost, she sued plaintiff in error for their full value in the circuit court, Jackson county, Missouri. Admitting responsibility for \$100, the company claimed exemption from any larger recovery because of limitations specified in the ticket and impliedly assented to when it was accepted and used; and also because of the same limitations embodied in its tariff schedules filed with the Interstate Commerce Commission.

A jury being waived, the cause was tried by the court. Acceptance and use of both ticket and check were shown, and nothing in the evidence indicated any purpose to deceive or mislead the purchaser, or inability on her part to appreciate the provisions in question; she disclaimed having read them, and denied their validity under general principles of law. Counsel for the railroad offered in evidence copies of its tariff schedules on file with the Interstate

Commerce Commission, certified by the chairman of that body. These contained clauses limiting liability for baggage to \$100 unless greater value was declared and paid for; and they were admitted notwithstanding an objection to mode of their authentication.

^{* 151} The circuit court held no agreement limiting liability resulted from acceptance and use of ticket and check,* and that, "even if the local and interstate tariffs of excess baggage rates introduced in evidence were filed with the Interstate Commerce Commission of the United States, and properly posted as required by the Interstate Commerce Act, still plaintiff would be entitled to recover the reasonable value of her trunk and the reasonable value of the articles of baggage contained therein, unless she expressly assented to the provisions of said tariffs limiting the liability of the defendant to \$100 for loss of baggage unless a greater value should be declared and paid for." A judgment for \$1,771.52 was affirmed by the Kansas City court of appeals. It held that *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593, would necessitate a reversal but for the fact that the record contained no competent evidence to show a schedule on file with the Commission specifying liability for baggage; "the Federal statute provides that copies of tariff rates on file with that Commission shall be received in evidence, if certified by the secretary, under the seal of the Commission," and certification by the chairman is insufficient. It therefore wholly disregarded the copies in the record and treated the cause as though they had not been introduced.

The transactions in question related to interstate commerce; consequent rights and liabilities depend upon acts of Congress, agreement between the parties, and common-law principles accepted and enforced in Federal courts. And the carrier is entitled to the presumption that its business is being conducted lawfully. *Southern Exp. Co. v. Byers*, 240 U. S. 612, 614, 60 L. ed. 825, 827, L.R.A.1917A, 197, 36 Sup. Ct. Rep. 410; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 326, 60 L. ed. 1022, 1025, L.R.A.1917A, 265, 36 Sup. Ct. Rep. 555.

^{* 152} In the circumstances disclosed, acceptance and use of the ticket sufficed to establish an agreement prima facie valid which limited the carrier's liability. Mere failure by the passenger to read matter plainly placed before her* could not overcome the presumption of assent. *New York C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 27, 25 L. ed. 531, 533; *The Kensington*, 183 U. S.

263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102; *Fonseca v. Cunard S. S. Co.* 153 Mass. 553, 12 L.R.A. 340, 25 Am. St. Rep. 660, 27 N. E. 665.

In order to determine the liability assumed for baggage it was proper to consider applicable tariff schedules on file with the Interstate Commerce Commission; and the carrier had a Federal right not only to a fair opportunity to put these in evidence, but also that, when before the court, they should be given due consideration. *Southern Exp. Co. v. Byers*, 240 U. S. 614, 60 L. ed. 827, L.R.A.1917A, 197, 36 Sup. Ct. Rep. 410; *Kansas City Southern R. Co. v. Jones*, 241 U. S. 181, 60 L. ed. 943, 36 Sup. Ct. Rep. 513. After their admission in evidence by the trial court the schedules could not be disregarded arbitrarily without denying the railroad's Federal right; and we think they were so treated by the court of appeals. We are cited to no decision of the supreme court of Missouri recognizing any settled rule of practice there which required such action, and the unjust consequences of it are apparent. Assuming, without deciding, the correctness of its opinion that the schedules as certified were inadmissible and improperly received, nevertheless the court should not have destroyed the carrier's opportunity to protect itself by introducing other evidence upon a new trial.

Reverse and remand for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Pitney dissents.

(242 U. S. 128)
GEORGE W. STEWART, Plff. in Err.,

v.

CHARLES H. RAMSAY.

COURTS 385(4)—APPEAL — FROM DISTRICT COURT—JURISDICTION BELOW.

1. The jurisdiction of a Federal district court as a Federal Court is so involved as to sustain a direct writ of error from the Federal Supreme Court under the Judicial Code, § 238, Act March 3, 1911, c. 231, 36 Stat. 1157 (Comp. St. 1913, § 1215) in an order quashing a summons issued out of that court, directed to a nonresident, because it was served while he was returning from the court room after testifying in a case in which he was a party plaintiff.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1022, 1031; *Dec. Dig.* 385(4); *Appeal and Error*, Cent. Dig. § 3302.]

PROCESS 119 — WRIT AND PROCESS — SERVICE ON NONRESIDENT—PRIVILEGE.

2. Suitors, as well as witnesses, coming from another state or jurisdiction, are exempt from the service of civil process while

in attendance upon court and during a reasonable time in coming and going.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 143, 149; Dec. Dig. § 119.]

[No. 105.]

Argued and submitted November 15, 1916.
Decided December 4, 1916.

IN ERROR to the District Court of the United States for the Northern District of Illinois to review an order quashing a summons because served on a nonresident while he was returning from the court room after testifying in a case in which he was a party. Affirmed.

The facts are stated in the opinion.

Mr. Robert C. Fergus for plaintiff in error.

Mr. Clarence S. Darrow for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

Stewart brought an action at law against Ramsay in the United States district court for the northern district of Illinois, and the summons was served personally upon defendant in that district. The jurisdiction was invoked on the ground that plaintiff was a citizen of Illinois and a resident of the northern district, and defendant was a citizen and resident of Colorado. Ramsay pleaded in abatement that he was a resident of the state of Colorado and was served with process while in attendance upon the district court as a witness in a case wherein he was plaintiff and one Anderson defendant, and that the process was served while he was returning from the courtroom after testifying. Upon plaintiff's demurrer this plea was sustained, and plaintiff electing to stand upon his demurrer, it was ordered that the writ be quashed and the defendant go without day. The present writ of error was sued out under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215], the jurisdictional question being certified.

That a direct writ of error lies in such a case is well settled. *G. & C. Merriam Co. v. Saalfeld*, 241 U. S. 22, 26, 60 L. ed. 868, 36 Sup. Ct. Rep. 477.

In our opinion, the decision of the district court was correct. The true rule, well founded in reason and sustained by the greater weight of authority, is that suitors, as well as witnesses, coming from another state or jurisdiction, are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going. A leading authority in the state courts is *Halsey v. Stewart*, 4

N. J. L. 366, decided in the New Jersey supreme court nearly one hundred years ago, upon the following reasoning: "Courts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them. The citizen in every claim of right which he exhibits, and every defense which he is obliged to make, should be permitted to approach them, not only without subjecting himself to evil, but even free from the fear of molestation or hindrance. He should also be enabled to procure, without difficulty, the attendance of all such persons as are necessary to manifest his rights. Now, this great object in the administration of justice would in a variety of ways be obstructed if parties and witnesses were liable to be served with process while actually attending the court. It is often matter of great importance to the citizen, to prevent the institution and prosecution of a suit in any court, at a distance from his home and his means of defense; and the fear that a suit may be commenced there by summons will as effectually prevent his approach as if a capias might be served upon him. This is especially the case with citizens of neighboring states, to whom the power which the court possesses of compelling attendance cannot reach."

* The state courts, with few exceptions,*¹³⁰ have followed this rule, applying it to plaintiffs as well as defendants, and to witnesses attending voluntarily as well as those under subpoena. Illustrative cases may be cited: *Richardson v. Smith*, 74 N. J. L. 111, 114, 65 Atl. 162; *Matthews v. Tufts*, 87 N. Y. 568; *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, 19 N. W. 176; *Andrews v. Lembeck*, 46 Ohio St. 38, 15 Am. St. Rep. 547, 18 N. E. 483; *Wilson v. Donaldson*, 117 Ind. 356, 3 L.R.A. 266, 10 Am. St. Rep. 48, 20 N. E. 250; *First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308; *Linton v. Cooper*, 54 Neb. 438, 69 Am. St. Rep. 727, 74 N. W. 842; *Bolz v. Crone*, 64 Kan. 570, 67 Pac. 1108; *Murray v. Wilcox*, 122 Iowa, 188, 64 L.R.A. 534, 101 Am. St. Rep. 263, 97 N. W. 1087; *Martin v. Bacon*, 76 Ark. 158, 113 Am. St. Rep. 81, 88 S. W. 863, 6 Ann. Cas. 336.

There are a few cases to the contrary, of which *Bishop v. Vose*, 27 Conn. 1, 11; *Baldwin v. Emerson*, 18 R. I. 304, 27 Am. St. Rep. 741, 15 Atl. 83; *Lewis v. Miller*, 115 Ky. 623, 74 S. W. 691, are instances.

In *Blight v. Fisher* (1809) Pet. C. C. 41, Fed. Cas. No. 1,542, Mr. Justice Washington, sitting at circuit, held that the privilege of a suitor or witness extended only to an exemption from arrest, and that the

service of a summons was not a violation of the privilege or a contempt of court unless done in the actual or constructive presence of the court. But in *Parker v. Hotchkiss* (1849) 1 Wall. Jr. 269, Fed. Cas. No. 10,739, District Judge Kane, with the concurrence, as he states, of Chief Justice Taney and Mr. Justice Grier, overruled *Blight v. Fisher*, and sustained the privilege in favor of a nonresident admitted to make defense in a pending suit, and served with summons while attending court for that purpose, the court declaring: "The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify. Witnesses would be chary of coming within our jurisdiction, and would be exposed to dangerous influences, if they might be punished with a lawsuit for displeasing parties by their testimony; and even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defense, if they were liable to be visited on the instant with writs from the defeated party." Since this decision, the Federal circuit and district courts have consistently sustained the privilege. *Juneau Bank v. McSpedan*, 5 Biss. 64, Fed. Cas. No. 7,582; *Brooks v. Farwell*, 2 McCrary, 220, 4 Fed. 166; *Atchison v. Morris*, 11 Biss. 191, 11 Fed. 582; *Nichols v. Horton*, 4 McCrary, 567, 14 Fed. 327; *Wilson Sewing Mach. Co. v. Wilson*, 23 Blatchf. 51, 22 Fed. 803; *Small v. Montgomery*, 23 Fed. 707; *Kinne v. Lant*, 68 Fed. 436; *Hale v. Wharton*, 73 Fed. 739; *Morrow v. U. H. Dudley & Co.* 144 Fed. 441; *Skinner & M. Co. v. Waite*, 155 Fed. 828; *Peet v. Fowler*, 170 Fed. 618; *Roschynialski v. Hale*, 201 Fed. 1017.

Judgment affirmed.

(242 U. S. 120)

PENNSYLVANIA RAILROAD COMPANY,
Plff. in Err.,
v.

SONMAN SHAFT COAL COMPANY.

COMMERCE §40(1) — "INTERSTATE COMMERCE"—WHAT IS—SALE OF COAL F. O. B. MINES.

1. The sale and delivery of coal f. o. b. cars at the mine for transportation to purchasers in other states is interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. §40(1).]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

COMMERCE §89—COURTS — CONCURRENT JURISDICTION — SUIT AGAINST INTERSTATE CARRIER — FAILURE TO FURNISH CARS—ADMINISTRATIVE QUESTION.

2. Jurisdiction of an action to recover damages arising out of a carrier's failure upon reasonable demand and under normal conditions to supply to a shipper in interstate commerce a sufficient number of cars to transport the output of the latter's coal mine may be entertained by a state court consistently with the provisions of the Act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), §§ 8, 9, prescribing modes of redress to shippers aggrieved by violations of that act, and § 22, preserving existing rights and remedies, although the carrier may have been applying or following a rule for allotting cars which did not entitle the shipper to receive as many cars as it needed and requested, since, the conditions in the coal trade being normal, and the demand for the cars being reasonable, the rule was inapplicable, and there was, therefore, no administrative question for the Interstate Commerce Commission to solve.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. §89.]

CARRIERS §45—EVIDENCE—RELEVANCY — CARRIER'S FAILURE TO FURNISH CARS — EQUIPMENT ON OTHER LINES.

3. Evidence of the number of the carrier's coal cars on other railway lines is immaterial in an action to recover damages arising out of the carrier's failure, upon reasonable demand, to supply to a shipper in interstate commerce a sufficient number of cars to transport the output of the latter's coal mine, where there is no claim of a car shortage, or that conditions in the coal trade were other than normal.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120, 123-128; Dec. Dig. §45.]

[No. 10.]

Argued May 14, 1915. Reargued October 25, 1915. Decided December 4, 1916.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Clearfield County, in that state, in favor of a shipper in an action against a railway company for damages caused by the failure of the latter to furnish cars. Affirmed.

See same case below, 241 Pa. 487, 88 Atl. 746.

The facts are stated in the opinion.

Messrs. Francis I. Gowen, John G. Johnson, and Frederic D. McKenney for plaintiff in error.

Messrs. A. M. Liveright and A. L. Cole for defendant in error.

* Mr. Justice Van Devanter delivered the opinion of the court:

The coal company brought this action to recover damages from the railroad company upon two grounds: first, that for a period of four years, beginning April 1, 1903, the railroad company had failed to supply the coal company with a sufficient number of cars to meet the needs of the latter's coal mine; and, second, that during the same period the railroad company, in furnishing cars to the several mines in that district, had discriminated unjustly against the coal company and in favor of some of its competitors. The second ground was eliminated by the coal company at the trial, and does not require further notice. The action was begun in a state court and resulted in a judgment for the coal company for \$145,830.25, which the supreme court of the state affirmed. 241 Pa. 487, 88 Atl. 746.

The questions presented by the several assignments of error are: (1) What was the nature of the commerce involved? (2) If the commerce was interstate, was the action cognizable in a state court? (3) Was prejudicial error committed in excluding evidence presently to be mentioned?

The coal company sold its coal f. o. b. cars at the mine, and when the cars were loaded, the coal was promptly forwarded to the purchasers at points within and without the state,—largely to points in other states. This was well understood by both companies,—by the coal company when it asked for cars and by the railroad company when it supplied them. Cars were not requested or furnished merely to be used in holding or storing coal, but always to be employed in its immediate transportation. While furnishing some cars for this service, the railroad company failed to furnish as many as the coal company needed and requested. It is plain that supplying the requisite cars was an essential step in the intended movement of the coal and a part of the commerce—whether interstate or intrastate—to which that movement belonged. It was expressly so held in *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.* 238 U. S. 456, 465–468, 59 L. ed. 1406, 1410–1412, 35 Sup. Ct. Rep. 896. We there said of the sale and delivery of coal f. o. b. at the mine for transportation to purchasers in other states: “The movement thus initiated is an interstate movement and the facilities required are facilities of interstate commerce.” Here the state court ruled that, as the coal was sold f. o. b. at the mine, the commerce involved was intrastate, even though the coal was going to purchasers outside the state. This was error, but it plainly was without prejudice unless it led

the state court to exercise a jurisdiction which it did not possess.

In the courts below the railroad company contended that, in so far as the commerce involved was interstate, the action could not be entertained by a state court consistently with the Interstate Commerce Act, chap. 104, 24 Stat. at L. 379, Comp. Stat. 1913, § 8563, and that contention is renewed here. It proceeds upon the theory, first, that the coal company was without any right to redress in respect of its interstate business unless the failure to supply it with the requisite cars was a violation of some provision of that act; second, that §§ 8 and 9 of the act prescribe the only modes of obtaining redress for violations of its provisions; and, third, that an action for damages in a state court is not among the modes prescribed.

It is true that §§ 8 and 9 deal with the redress of injuries resulting from violations of the act, and give the person injured a right either to make complaint to the Interstate Commerce Commission or to bring an action for damages in a Federal court, but not to do both. If the act said nothing more on the subject it well may be that no action for damages resulting from a violation of the act could be entertained by a state court. But the act shows that §§ 8 and 9 do not completely express the will of Congress as respects the injuries for which redress may be had or the modes in which it may be obtained, for § 22 contains this important provision: “Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.” The three sections, if broadly construed, are not altogether harmonious, and yet it evidently is intended that all shall be operative. Only by reading them together and in connection with the act as a whole can the real purpose of each be seen. They often have been considered and what they mean has become pretty well settled. Thus we have held that a manifest purpose of the provision in § 22 is to make it plain that such “appropriate common law and statutory remedies” as can be enforced consistently with the scheme and purpose of the act are not abrogated or displaced (Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 446, 447, 51 L. ed. 553, 561, 562, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075); that this provision is not intended to nullify other parts of the act, or to defeat rights or remedies given by earlier sections, but to preserve all existing rights not inconsistent with those which the act creates (*Pennsylvania R. Co. v. Puritan*

Coal Min. Co. 237 U. S. 121, 129, 59 L. ed. 867, 872, 35 Sup. Ct. Rep. 484); that the act does not supersede the jurisdiction of state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the Federal courts is otherwise made exclusive (id. 130); that claims for damages arising out of the application, in interstate commerce, of rules for distributing cars in times of shortage, call for the exercise of the administrative authority of the Commission where the rule is assailed as unjustly discriminatory, but where the assault is not against the rule, but against its unequal and discriminatory application, no administrative question is presented and the claim may be prosecuted in either a Federal or a state court without any precedent action by the Commission (id. 131, 132); and that, if no administrative question be involved, as well may be the case, a claim for damages for failing upon reasonable request to furnish to a shipper in interstate commerce a sufficient number of cars to satisfy his needs may be enforced in either a Federal or a state court without any preliminary finding by the Commission, and this whether the carrier's default was a violation of its common-law duty existing prior to the Hepburn Act of 1906, or of the duty prescribed by that act¹ (id. 132-135; Eastern R. Co. v. Littlefield, 237 U. S. 140, 143, 59 L. ed. 878, 882, 35 Sup. Ct. Rep. 489; Illinois C. R. Co. v. Mulberry*Hill Coal Co. 238 U. S. 275, 283, 59 L. ed. 1306, 1310, 35 Sup. Ct. Rep. 760; Pennsylvania R. Co. v. Clark Bros. Coal Min. Co. 238 U. S. 456, 472, 59 L. ed. 1406, 1413, 35 Sup. Ct. Rep. 896).

Applying these rulings to the case in hand, we are of opinion that a state court could entertain the action consistently with the Interstate Commerce Act. Not only does the provision in § 22 make strongly for this conclusion, but a survey of the scheme of the act and of what it is intended to accomplish discloses no real support for the opposing view. With the charge of unjust discrimination eliminated, the ground upon which a recovery was sought was that

¹"Sec. 1. . . . and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, . . . ; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, . . ." chap. 3591, 34 Stat. at L. 584, Comp. Stat. 1913, § 8563.

for a period of four years, during which the conditions were normal, the carrier had failed upon reasonable demand to supply to a shipper in interstate commerce a sufficient number of cars to transport the output of the latter's coal mine. Assuming that the conditions were normal and the demand reasonable, it was the duty of the carrier to have furnished the cars. That duty arose from the common law up to the date of the amendatory statute of 1906, known as the Hepburn Act, and thereafter from a provision in that act which, for present purposes, may be regarded as merely adopting the common-law rule. There was evidence tending to show, and the jury found, that the conditions in the coal trade were normal and the demand for the cars reasonable. Indeed, without objection from the carrier, the court said when charging the jury: "There is no testimony disputing the claim of the plaintiff that these were normal times." The carrier insisted and the jury found that the carrier had a generally ample car supply for the needs of the coal traffic under normal conditions, and the jury further found that the failure to furnish the cars demanded was without justifiable excuse. Thus far it is apparent that no administrative question was involved,—nothing which the act intends shall be passed upon by the Commission either to the exclusion of the courts or as a necessary condition to judicial action.

But there was testimony tending to show that the carrier was applying or following a rule for allotting cars which did not entitle the coal company to receive as many cars as it needed and requested, and because of this it is contended that the reasonableness of this rule was in issue and was an administrative question which the act intends that the Commission shall solve. We cannot accede to the contention. The conditions in the coal trade being normal, as just shown, the number of cars to which the coal company was entitled was to be measured by its reasonable requests based upon its actual needs. It is only in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs. Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 133, 59 L. ed. 867, 873, 35 Sup. Ct. Rep. 484. Such a rule being inapplicable in the conditions existing at the time, the rule mentioned in the testimony could not be a factor in the decision of the case, and whether in a time of

unforeseen car shortage it would be reasonable or otherwise was not then material.

Upon the trial carrier offered to prove by a witness then under examination "that during all of the period of this action the defendant had in effect . . . through routes and joint rates to points outside the state of Pennsylvania on the lines of other common carriers; that it was obliged to permit cars loaded by its shippers with bituminous coal consigned to such points outside the state of Pennsylvania to go through to destination, even when on the lines of other railroad companies; that, as a result of doing this, it had continuously throughout the period of this action a large number of cars off its own lines* and on the lines of other common carriers, which cars would otherwise have been available for shippers of coal on the railroad lines of the defendant, and these cars, if not on other railroad lines, would have increased the equipment available for distribution to the plaintiff's mine and would consequently have diminished the damage which plaintiff claims to have sustained by reason of the fact that it did not receive more cars than it did receive."

But on the coal company's objection the evidence was excluded. We think the ruling was right. The offer did not point to any unusual or abnormal condition, not reasonably to have been foreseen, but, on the contrary, to a situation which was described as continuous throughout the four-year period to which the action relates. It did not indicate that this condition was even peculiar to that period, or was caused by an extraordinary volume of coal traffic or an unusual detention of cars on other lines of railroad, or that it was other than a normal incident of the coal transportation in which the carrier was engaged. Without doubt the cars of this carrier when loaded with coal often went forward to destinations on the lines of other carriers. It is common knowledge that coal transportation has been conducted quite generally in this way for many years. Besides, a carrier extensively engaged in such transportation from mines along its lines, as this one was, naturally would expect to have a considerable number of cars on other lines in the ordinary course of business. Although possibly having a bearing upon the adequacy of the supply of cars provided by the carrier for the coal business as a whole,—a matter not within the contemplation of the offer,—it is certain that what was proposed to be proved had no tendency to show that the carrier had supplied to the coal company the number of cars to which it was entitled,

or to mitigate the carrier's default in that regard.

Judgment affirmed.

(242 U. S. 89)

PENNSYLVANIA RAILROAD COMPANY
v.

W. F. JACOBY & COMPANY.

COMMERCE — 97 — TRIAL — 260(5) — APPEAL — REVERSIBLE ERROR — REFUSING REQUESTED INSTRUCTION — DAMAGES.

The refusal, in an action upon an award to shippers made by the Interstate Commerce Commission upon a finding of illegal discrimination in the distribution of coal cars, of a requested instruction to the effect that there could be no recovery if the jury should find that the award was based upon the ratio which the cars furnished by the carrier to favored shippers bore to the latter's mine ratings, as shown by certain percentage tables in evidence before the Commission, is reversible error where the conclusion is irresistible from the evidence that the Commission may have used such percentages in reaching the amount of damages, and thus have based its award on the mistaken theory that the complaining shippers were entitled to receive cars equal in ratio to those illegally and preferentially given to the favored shippers. And such refusal was not cured by general observations in the main charge on the question of damages, however correct they may have been.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 147; Dec. Dig. — 97; Trial, Cent. Dig. § 655; Dec. Dig. — 260(5).]

[No. 22.]

Argued October 20, 1915. Reargued October 23 and 24, 1916. Decided December 4, 1916.

ON A CERTIFICATE from, and WRIT OF CERTIORARI to, the United States Circuit Court of Appeals for the Third Circuit, bringing up for review a cause pending in that court on writ of error to a judgment of the District Court for the Eastern District of Pennsylvania, enforcing an award of damages made by the Interstate Commerce Commission because of discrimination in the distribution of coal cars. Judgment of District Court reversed and case remanded to that court for a new trial.

The facts are stated in the opinion.

Messrs. Francis I. Gowen, John G. Johnson, and Frederic D. McKenney for the Pennsylvania Railroad Company.

Mr. William A. Glasgow, Jr., for W. F. Jacoby & Company.

* Mr. Justice Day delivered the opinion of the court:

Jacoby & Company, hereinafter called the plaintiffs, owned a coal mine known as Falcon No. 2 in the Clearfield district served

by the Tyrone division of the lines of the Pennsylvania Railroad Company, herein-after called the company, and shipped coal from their mine in interstate commerce. In April, 1907, the plaintiffs made complaint before the Interstate Commerce Commission of discriminatory practices against them in the distribution of coal cars, in violation of the Act to Regulate Commerce. The Commission made findings, among others, that Falcon No. 2 was not placed on an equal footing with the mines of the Berwind-White Coal Company in the matter of the distribution of the defendant's available coal car equipment during the period of the action. It also found a special allotment of 500 cars daily to the Berwind-White Company to be an undue preference and discrimination, and on March 7th, 1910, the Commission made an order, finding that the complainants had been unduly discriminated against, and set forth that it appeared "that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as 'assigned cars,' from the rated capacity in tons of the particular mine receiving such cars, and to regard the remainder as the rated capacity of that mine in the distribution of all 'unassigned' cars." The Commission ordered "that the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated and is in violation of the 3d section of the Act to Regulate Commerce . . . and that the defendant be, and it is hereby, notified and required, on or before the 1st day of November, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them."

At the same time, the Commission ordered that the question of damages sustained by the plaintiffs in respect to the matters and things in the report found to be discriminatory be deferred pending further argument. See also 19 Inters. Com. Rep. 392, where the decision is reported. In that case the Com-

mission referred to its report filed the same day in the case of Hillsdale Coal & Coke Co. v. Pennsylvania R. Co. 19 Inters. Com. Rep. 356, in which the discriminatory character of the rules of car distribution of the company is fully discussed (page 364) and the rules are condemned, largely because of the advantages given to the owners of private cars unless the same shall be counted against the distributive share of the mine receiving them. See also: the discussion of these rulings in *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co. 238 U. S. 456, 59 L. ed. 1406, 35 Sup. Ct. Rep. 896.

On March 11, 1912, the Commission made a further report, in which it found as follows:

"We find that by reason of the discriminations ascertained and set forth in our report in Jacoby v. Pennsylvania R. Co. 19 Inters. Com. Rep. 392, the complainants were damaged to the extent of \$21,094.39, which they are entitled to recover with interest from June 28, 1907.

"The claimants here demand \$51,950.49. The award above made we base upon evidence adduced of record, from which we find:

"(a) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

"(b) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138½ days.

"(c) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

"(d) That the average selling price of the complainants' product for the first period was \$1.212 per ton, and in the second period \$1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship.

* "(e) That the actual cost of production is shown by the record as \$1.016 per ton during the first period and \$1.049 per ton

during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits for the coal actually shipped during the period in question."

On March 11th, 1912, the Commission made a reparation order in favor of the plaintiffs, confirming its former orders, findings, and conclusions, and ordering that the company should pay to the plaintiffs on or before the 1st day of June, 1912, the sum of \$21,094.39, with interest thereon at the rate of 6 per cent per annum from June 28th, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination had been found by the Commission to be unlawful and unjust. Upon these orders of the Commission, suit was brought in the district court of the United States, for the eastern district of Pennsylvania, on July 19th, 1912, the action being based upon § 16 of the Act to Regulate Commerce (34 Stat. at L. 590, chap. 3591, Comp. Stat. 1913, § 8584). The case was heard in the district court, and resulted in a verdict for the amount awarded by the Commission, with interest thereon. On the case going to the circuit court of appeals, that court certified certain questions to this court, and upon writ of certiorari the whole record was brought here.

The case was argued before this court at the October term, 1915. At that term the judgment below was affirmed, with costs, by a divided court. Afterwards, and at the same term, a petition for rehearing was granted and the former judgment set aside, and the case restored to the docket for reargument. 239 U. S. 631, 60 L. ed. 476, 36 Sup. Ct. Rep. 166.

At the trial in the district court the plaintiffs offered no other testimony as to the amount of damages sustained by them than that contained in the orders of the Commission, before recited. Section 16 of the act makes the findings and orders of the Commission prima facie evidence of the facts therein stated, and it may be conceded that if no testimony was offered in the case to overcome the prima facie case thus made, the orders of the Commission would be controlling and determine the amount of recovery. The prima facie character of the findings of fact and award of damages by the Commission was established upon full consideration of the subject in *Meeker v. Lehigh Valley R. Co.* 236 U. S.

412, 426-431, 59 L. ed. 644, 656-658. P.U.R. 1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691, and second *Meeker* Case, 236 U. S. 434, 59 L. ed. 659, 35 Sup. Ct. Rep. 337. This court said in *Mills v. Lehigh Valley R. Co.* 238 U. S. 473, 481, 59 L. ed. 1414, 1418, 35 Sup. Ct. Rep. 888, after quoting from the *Meeker* Cases supra: "The statute was not concerned with mere forms of expression, and, in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the Commission effect as prima facie evidence, we think the court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim."

In order to meet the prima facie case made by the plaintiffs upon the orders of the Commission in awarding damages, in the course of the testimony the company put in evidence certain sheets, which were offered in evidence before the Commission by the plaintiffs, in the hearing before that body, known as exhibit No. 10. These sheets were entitled, "Detailed statements showing discrimination in favor of other mines and against Falcon No. 2 [the mine of the plaintiffs], from April 1st, 1904, to April 1st, 1905," and "from April 1st, 1905, to October 15th, 1905," respectively, these being the periods for which recovery was sought in this case by the plaintiffs. These sheets undertook to show the percentage of cars awarded to certain preferred companies by the railroad company, as compared to those awarded to the plaintiffs for use in their mine during the period stated. They were intended to show that the favored companies received cars during the first period to the extent of 59.9 per cent of their mine rating, and during the second, 59.6 per cent of their mine ratings, which percentages were much larger than the plaintiffs received for their mine during the like periods. In other words, it was thus sought to establish that the favored mines received, not their just proportion of the distributable cars, but a much larger, and highly discriminatory share when compared with the allotment made to the plaintiffs. It is the contention of the company that it is demonstrable from this record that these tables showing the percentages awarded to favored companies were made the basis of the Commission's award of damages.

We have already seen from the orders of the Commission, above recited, the manner in which it made its award and reached its conclusion as to the amount recoverable by the plaintiffs. At the trial in the district

court, the Company placed a witness upon the stand, who testified as follows:

Q. Referring to the order which has been put in evidence, made by the Interstate Commerce Commission, finding a certain amount as due Jacoby & Company, will you please say whether you have taken the daily rating fixed by the Commission as proper; namely, 450 tons per day, and multiply that by 275 days, the days which the Commission found the plaintiff's mine would have been able to work in the year ending March 31, 1905, and tell us what the aggregate number of tons is, based upon those two figures?

A. 123,750 tons.

Q. In that same order the Commission has found that the plaintiff shipped in that period 38,714.23 tons and that they ought to have received cars which would have enabled them to ship 35,412.02 tons additional. If they had made those additional shipments what would the total volume of shipments have been?

A. 74,126.25 tons.

Q. What percentage of the aggregate capacity of the mine, based upon 450 tons per day and 275 days, are the aggregate shipments which would have been made, which you have just spoken of?

A. 59.9 per cent.

Q. Coming to the second period of the action, the Commission found that 450 tons per day was a proper rating for the mine and that the mine would have been capable of working 138½ days. What, on that basis, is the aggregate capacity of the mine in that period?

A. 62,212.51 tons.

Q. In their order the Commission found that in that period the mine had shipped 17,973.88 tons and that it should have received cars which would have enabled it to ship 19,104.77 tons additional. If it had made those additional shipments, what would have been the total shipments in that period?

A. 37,078.65 tons.

Q. And what percentage is that of the aggregate rated capacity based on 450 tons a day and 138½ days?

A. 59.6.

This testimony was competent in order to meet the plaintiffs' case based on the orders of the Commission, and from it we think the conclusion is inevitable that the Commission may have used the percentages of 59.9 per cent and 59.6 per cent respectively in reaching the amount of damages awarded to the complainant. If so, the recovery was permitted, not upon the basis

of damages sustained by reason of the illegal discrimination practised against the plaintiffs, as found by the Commission, but upon the basis that they were entitled to receive cars equal in ratio to those illegally and preferentially given to the certain favored companies named in the tables. The effect of the enforcement of such rule would be not to give the shipper the damages which he actually suffered, but would base the recovery upon a rule which is condemned as to others, because of its discrimination in their favor,—a result manifestly not intended by the act of Congress.

The testimony being in the condition which we have stated, and the plaintiffs having offered no testimony to show the amount of damages sustained other than that contained in the order made by the Commission, the company made certain definite requests to charge, which were refused. In one of them, they requested a peremptory instruction in favor of the company upon the ground that as the award of the Interstate Commerce Commission was based upon the conclusion that, in the year ending April 1st, 1905, the plaintiffs should have received cars equal in capacity to 59.9 per cent of the aggregate of their daily mine rating for 275 days, and in the period between April 1st and October 18th, 1905, cars equal in capacity to 59.6 per cent of their daily mine rating for 138½ days, it was apparent that this conclusion of the Commission was based upon the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located had been equal in the earlier period to 59.9 per cent, and in the later period 59.6 per cent of the aggregate ratings of these selected mines. If the court should refuse to charge as above requested, the court was requested to instruct the jury as follows:

"8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs, in the year ending April 1, 1905, should have received cars equal in capacity to 59.9 per cent of the aggregate of their daily mine ratings, and in the period between April 1 and October 18, 1905, cars equal in capacity to 59.6 per cent of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located had been equal

in the earlier period to 59.9 per cent and in the later period to 59.6 per cent of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

In view of the testimony as we have already stated it, we think the company was entitled to have this eighth request given in charge to the jury. Nor do we think this refusal was cured by the charge that the finding of the Commission was prima facie correct, and entitled to weight as such unless the defendant produced evidence to show that some other state of facts existed, and that the plaintiffs had not suffered the damages awarded to them by the Commission, and the charge in general terms that it was the duty of the company to apportion and deliver to the plaintiffs their fair share of all cars available during the period of the action to shippers in the district in which plaintiffs' mine was located, and that, if plaintiffs received their full and proportionate share of cars in the district, they had no cause for complaint against the company, and the burden was upon the plaintiffs to establish by satisfactory proof that they did not receive their share; nor by other parts of the charge in which the jury was told in general terms that the shipper was entitled to recover the full amount of damages which he sustained, and that, in arriving at such damages, the jury could only take into consideration whether they had been discriminated against, and to what extent they were damaged by that discrimination, and that, if the Berwind-White Company got 59 per cent of its output when the average allottable was 28 per cent, it did not necessarily follow that the plaintiffs would be damaged the entire difference between *28 per cent and 59 per cent, but their damage would be the amount to which their number of cars

was reduced in the general allotment by favoring somebody else and taking the cars from them. However correct these general observations may have been, we think it was error in the state of the record to which we have already referred to refuse the specific charge requested.

It is urged that the testimony before the Commission is not all in the record, and that, for aught that appears, the Commission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as awarded and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the Commission. But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentages shown in the tables, except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The Commission might have approximated the same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the company was entitled to the specific request upon this subject submitting the matter to the jury.

For error in refusing to give this request in charge, the judgment of the District Court must be reversed, and the case remanded to that court for a new trial.

Reversed.

Dissenting, Mr. Justice Pitney.

(242 U. S. 100)

SETON HALL COLLEGE, Plff. in Err.,
v.

VILLAGE OF SOUTH ORANGE, in Essex
County, New Jersey, and Board of Equal-
ization of Taxes of New Jersey, Defts. in
Err.

CONSTITUTIONAL LAW §138 — IMPAIRING
CONTRACT OBLIGATIONS — EXEMPTION
FROM TAXATION.

The extension to Seton Hall College by N. J. Laws 1870, chap. 267, an act supplementing its charter, of the same exemption from taxation which had been granted to another educational institution, should not, in the face of a contrary ruling of the state courts, be deemed to have created a contract which could not be repealed by subsequent legislation without doing violence to the contract clause of the Federal Constitution, where such statute was not enacted until several years after Seton Hall College was incorporated and had entered upon the discharge of its charter obligations without reliance upon any legislative authority exempting it from taxation, and upon such enactment the college entered upon no new undertaking, and made no agreement by which it promised to do something, nor did it part with anything because of the immunity thus extended to it by the state,—especially since, at the time of the making of the alleged contract, a state statute was in force which made all corporate charters subject to legislative alteration and repeal.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 303, 408; Dec. Dig. §138.]

[No. 74.]

Submitted November 3, 1916. Decided December 4, 1916.

IN ERROR to the Supreme Court of the State of New Jersey to review a judgment, affirmed by the Court of Errors and Appeals of that state, sustaining the validity of a tax levied upon the property of an educational institution. Affirmed.

See same case below, 86 N. J. L. 365, 90 Atl. 1126.

The facts are stated in the opinion.

Mr. William J. Kearns for plaintiff in error.

Mr. Adrian Riker for defendants in error.

* Mr. Justice Day delivered the opinion of the court:

This is a writ of error to the supreme court of New Jersey, seeking to reverse a judgment of that court, which judgment was affirmed by the court of errors and appeals of New Jersey (86 N. J. L. 365, 90 Atl. 1126), and the record remitted to the supreme court. The case involves the validity of a tax levied by the assessor of the

village of South Orange, for the year 1911, the contention being that the act of the legislature of New Jersey of March 16th, 1870, hereinafter referred to, constituted a contract which could not be repealed by subsequent legislation without doing violence to the contract clause of the Constitution of the United States.

The case was heard by the Board of Equalization of Taxes of New Jersey, and by the supreme court of that state, upon a stipulation of facts:

"(1) Seton Hall College was incorporated under an act of the legislature of the state of New Jersey entitled, 'An Act to Incorporate Seton Hall College,' chapter 86 of the Laws of 1861, pages 198 and 199, approved March 8th, 1861.

"(2) A supplement to said act was passed, being chapter 267 of the Laws of 1870, entitled, 'Supplement to an Act to Incorporate Seton Hall College,' approved March 8th, 1861, which supplement was approved March 16th, 1870.

"(3) The act incorporating Drew Theological Seminary of the Methodist Episcopal Church, referred to in the supplement above mentioned, was approved February 12th, 1868 (Laws of 1868, chap. 2, p. 4).

"(4) That Seton Hall College accepted its charter contained in the Laws of 1861 aforesaid, and thereafter purchased real and personal property from time to time, erected college buildings thereon, and continuously since has been and still is actively engaged in carrying out the purposes of its creation and fulfilling its obligations imposed by its said charter, and has been and is exercising all the powers granted by said charter.

"(5) After the supplement to its charter was passed in 1870, Seton Hall College accepted the same, and purchased further lands and erected further buildings, and has continued ever since to live up to the terms of both acts and carry out the purposes of its creation, and has been and is exercising all the powers granted thereby.

"(6) That the lands in question, with other lands, were acquired by the college by a conveyance dated the 17th day of October, 1864, and recorded in the office of the register of the county of Essex on the 21st day of February, 1865, in book M-12 of deeds for said county, on page 343.

"(7) That no assessment or tax has been levied or imposed upon the property, real and personal, of Seton Hall College from the date of its original charter in 1861, down to the year 1911; and the tax in question, imposed in the year 1911, is the first tax imposed or attempted to be imposed upon the property of said Seton Hall College, real or personal."

From the act of 1861, under which Seton Hall College was incorporated, it appears that the object of the incorporation is the advancement of education, and that the corporation was given the right to have and possess the authority to confer academic and other degrees granted*by other colleges in the state. The act of 1870, referred to in the stipulation, extended to Seton Hall College the privileges which were granted to Drew Theological Seminary, in relation to the exemption of real and personal property of the corporation from assessment and taxation. The act incorporating the Drew Theological Seminary provided that the property of the corporation, real and personal, should be exempt from assessment and taxation. In 1875 the Constitution of New Jersey was amended so as to provide that property should be assessed for taxation under general laws and uniform rules, according to its true value. In 1903, the legislature passed a taxation law (4 N. J. Comp. Stat. 5079), which provided that all property not therein expressly exempted should be subject to taxation, and that all acts, general and special, inconsistent with its provisions, were repealed.

It appears that the lands so assessed are not those upon which the college buildings are erected, but are used for pasture lands for cows and the dwellings of the help on the farm, and that the same are essential and necessary to the use of the college, and that the college derives no pecuniary profit from the lands in question.

Upon the hearing before the Board of Equalization, the president of that body delivered an opinion, in which it was held that the act relied upon did not purport an intention to impose upon the state an irrevocable contract obligation, but was a privilege extended to the corporation by the state, and therefore subject to revocation. This opinion was adopted and affirmed by the supreme court of New Jersey, and also by the court of errors and appeals.

This court has the right to determine for itself whether there is a contract which has been impaired by subsequent legislation of the state. This principle has often been recognized and stated in decisions of this court. While this is true, the decision of the state court,*construing its own statutes, is entitled to much consideration and respect. *Milwaukee Electric R. & Light Co. v. Railroad Commission*, 238 U. S. 174, 182, 59 L. ed. 1254, 1260, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; *New York ex rel. Interborough Rapid Transit Co. v. Sohmer*, 237 U. S. 276, 284, 59 L. ed. 951, 954, 35 Sup. Ct. Rep. 549.

In this case, the stipulation of facts shows

that Seton Hall College was incorporated under an act of the legislature, and entered upon the discharge of its charter obligations without reliance upon any legislative authority exempting it from taxation upon its property. When the subsequent legislation was enacted,—nine years after,—extending to Seton Hall College the same exemption as was given to the Drew Theological Seminary, it entered upon no new undertaking, and made no agreement by which it promised to do something; nor did it part with anything because of the immunity thus extended to it by the state.

It is true that this court has held that a charter contract, express in its character, may arise from the acceptance of and action under the terms of a charter which grants such exemption. In this connection, much reliance is placed by the plaintiff in error upon certain rulings of this court; among others, in *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. ed. 495. In that case the corporation is shown to have entered upon its duties and expended its money in reliance upon the grant of the charter, which declared that the property of the corporation should be exempt from taxation, and that that grant was made for the purpose of encouraging such undertaking and enabling the parties engaged therein more fully and effectually to accomplish their purpose; and it was, moreover, provided that the sections of the act concerning corporations, which provided that the charter of every corporation should be subject to alteration, suspension, and repeal at the discretion of the legislature, should not apply to the act creating the *Home of the Friendless*. This court held that the corporation was thus expressly withdrawn from*the authority of the general act of the legislature giving a right to alter, suspend, and repeal, and that, under such circumstances, the acceptance of the charter, and the action under it and in reliance upon its terms, constituted an express contract.

So, in *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387, the act of the legislature declared that the property of the Northwestern University should be forever free from taxation, and this court, differing from the supreme court of Illinois in that respect, held that the exemption applied, in view of the language used in the statute, not only to lots and lands directly used for the purposes of the institution as a school, but also to other lots, lands, and property, the annual profits of which were applied to school purposes, and that the exempting authority of the legislature was not limited to real estate occupied, or in immediate use, by the university.

Furthermore, when the alleged contract exempting Seton Hall College from taxation was made, the New Jersey act of 1846 was in force, providing that

"The charter of every corporation which shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal in the discretion of the legislature."

It is true that this act of the legislature was held by this court, in the case of New Jersey v. Yard, 95 U. S. 104, 24 L. ed. 352, not to apply to a case where it appeared, from a subsequent act of the legislature, that a contract was made by requiring of the benefited company the performance of certain acts and a formal acceptance within sixty days, otherwise the act to become wholly inoperative. In that case, the company was obligated, in consideration of the tax limitation stated in the act, to commence and do certain work within a year; in consideration whereof the tax was fixed at the rate of $\frac{1}{2}$ of 1 per cent. This, said this court, had been a subject of disagreement, which was adjusted, additional rights were granted, and the tax fixed as to its rate and time of commencement, and, in view of these circumstances, it did appear that it was the legislative intention to make such contract in the same manner and on the same terms of equal obligation as other contracts are made, and not to pass a statute which it could repeal under another act of the legislature. But here there being no such express obligation shown, it is only reasonable to assume that the legislature extended the immunity from taxation to Seton Hall College subject to the right of alteration and repeal reserved in the act of 1846.

To all claims of contract exemption from taxation must be applied the well-settled rule that, as the power to tax is an exercise of the sovereign authority of the state, essential to its existence, the fact of its surrender in favor of a corporation or an individual must be shown in language which cannot be otherwise reasonably construed, and all doubts which arise as to the intent to make such contract are to be resolved in favor of the state. *Hoge v. Richmond* & D. R. Co. 99 U. S. 348, 354, 25 L. ed. 303, 304; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 195, 36 L. ed. 121, 122, 12 Sup. Ct. Rep. 406; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 294, 36 L. ed. 972, 978, 13 Sup. Ct. Rep. 72; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 179, 40 L. ed. 660, 662, 16 Sup. Ct. Rep. 471; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 22, 45 L. ed. 395, 407, 21 Sup. Ct. Rep. 240.

Applying these principles, we are unable

to conclude that the state court was wrong in finding no binding contract here. As we have said, the college was incorporated under no promise of such exemption, and could not have relied upon it in undertaking the work for which it was organized. After the privilege of the act in favor of the Drew Seminary was extended to it, it made no new promises and assumed no new burdens. It is true it has been kept in operation, and has doubtless continued and expanded its usefulness, but we fail to discover from anything in this record that it would not have done so except in reliance upon the tax exemption extended to it by the legislature. By the terms of that act, the state court has held a revocable privilege was extended, and no irrevocable contract was entered into. Bearing in mind our own right of independent examination of questions of this character, we are unable to say that the conclusion reached is not well founded in law and in fact.

It follows that the judgment of the state court must be affirmed.

(242 U. S. 107)

SWIFT & COMPANY et al., Pliffs. in Err.
and Appts.,
v.

J. NOBLE HOOVER.

BANKRUPTCY $\Leftrightarrow$ 448—APPEAL—FROM SUPREME COURT OF DISTRICT OF COLUMBIA.—BANKRUPTCY CASE.

Proceedings resulting in a decree adjudging a person not to be a bankrupt are but steps in a bankruptcy proceeding. They are not controversies arising in those proceedings, within the meaning of the provisions of the Bankrupt Act of July 1, 1898 (30 Stat. at L. 553, chap. 541, Comp. Stat. 1913, §§ 9608, 9609), §§ 24, 25, confining the appellate jurisdiction of the Federal Supreme Court over the supreme court of the District of Columbia in bankruptcy proceedings to controversies arising in such proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. $\Leftrightarrow$ 448.]

[No. 101.]

Submitted November 14, 1916. Decided December 4, 1916.

APPEAL from, and IN ERROR to, the Supreme Court of the District of Columbia to review a decree adjudging a person not to be a bankrupt. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Messrs. Arthur A. Birney, H. Winship, Wheatley, and Lucas P. Loving for plaintiffs in error and appellants.

Mr. Edward F. Colladay for defendant in error and appellee.

* Mr. Justice Day delivered the opinion of the court:

This case is brought here by appeal and allowance of writ of error, from a decree of the supreme court of the District of Columbia, adjudging Hoover not a bankrupt. Counsel for the appellee and defendant in error urges that the appeal and writ be dismissed, but does not argue the question of the jurisdiction of this court; but, as such matters are noticed by this court whether specially urged by counsel or not, as it concerns our jurisdiction, we proceed to consider it. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510.

The provisions of the Bankruptcy Act for consideration in this connection are:

"Section 24. The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

"The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

"Section 25. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; . . . " [30 Stat. at L. 553, chap. 541, Comp. Stat. 1913, §§ 9608, 9609.]

The same provision as to the review by this court of controversies arising in bankruptcy proceedings is carried into the Judicial Code, § 252 [36 Stat. at L. 1159, chap. 231, Comp. Stat. 1913, § 1229], in which provision is made for the review in this court of controversies arising in bankruptcy proceedings in the supreme court of the District of Columbia.

It is apparent from reading these sections of the statute that a direct appeal to this court from the supreme court of the District of Columbia is allowed only in controversies arising in bankruptcy proceedings, and not from the steps in a bankruptcy proceeding. The nature of such controversies has been frequently considered in decisions of this court, and needs little dis-

cussion now. Such controversies embrace litigation which arises after the adjudication in bankruptcy, sometimes by intervention, the parties claiming title to property in the hands of the trustee, or other actions, usually plenary in character, concerning the right and title to the bankrupt's estate. Such proceedings as the present one, resulting in a decree refusing to adjudicate the defendant a bankrupt, are but steps in a bankruptcy proceeding, and not controversies arising in bankruptcy proceedings within the meaning of the statute. *First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899.

The decisions of this court in *Tefft, W. & Co. v. Munsuri*, 222 U. S. 114, 56 L. ed. 118, 32 Sup. Ct. Rep. 67, and *Munsuri v. Fricker*, 222 U. S. 121, 56 L. ed. 121, 32 Sup. Ct. Rep. 70, are decisive of this point. In the first of these cases there was an attempt to prosecute a direct appeal to this court from the district court of the United States for Porto Rico, where the proceeding was based upon a claim in bankruptcy. It was there held that an order of the bankruptcy court of Porto Rico, disallowing the claim, was not a controversy arising in a bankruptcy proceeding within the meaning of the statute. The contention that such action, based upon a claim filed in a bankruptcy proceeding, was appealable to this court, was denied, the court saying:

"But the entire argument rests upon a misconception of the words 'controversies in bankruptcy proceedings,' as used in the section, since it disregards the authoritative construction affixed to those words. *Coder v. Arts*, 213 U. S. 223, 234, 53 L. ed. 772, 777, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; *Hewit v. Berlin Mach. Works*, 194 U. S. 296, 300, 48 L. ed. 936, 937, 24 Sup. Ct. Rep. 690. Those cases expressly decide that controversies in bankruptcy proceedings as used in the section do not include mere steps in proceedings in bankruptcy, but embrace controversies which are not of that inherent character, even although they may arise in the course of proceedings in bankruptcy."

It is true that in *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735, and in *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. ed. 514, 28 Sup. Ct. Rep. 419, this court did review proceedings in bankruptcy—in one case from the District of Columbia, and in the other from the district court of the United States for Porto Rico. Of the *Armstrong Case*, which was a review by appeal of an adjudication of bankruptcy, this court, in the *Tefft, W. & Co. Case*, supra, said:

"It is true, as suggested in argument

that in *Armstrong v. Fernandez*, supra, jurisdiction was exerted to review the action of the court below in a case which was not susceptible of being reviewed under the construction of the statute which we have here applied. But in that case there was no appearance of counsel for the appellee, and while a general suggestion was made in the argument of appellant as to the duty of the court not to exceed its jurisdiction, no argument concerning the want of jurisdiction was made. The case therefore in substance proceeded upon a tacit assumption of the existence of jurisdiction,—an assumption which would not be now possible in consequence of the authoritative construction given to § 24 (a) in *Coder v. Arts*, supra. Under these circumstances, the mere implication as to the meaning of the statute, resulting from the jurisdiction which was in that case merely assumed to exist, is not controlling, and the *Armstrong* Case, therefore, in so far as it conflicts with the construction which we here give the statute, must be deemed to be qualified and limited."

* It may be true that Congress has failed to give an appellate review in proceedings in bankruptcy from the supreme court of the District of Columbia from a decree with reference to an adjudication in bankruptcy, but, as observed in the *Tefft, W. & Co.* Case, that does not give this court authority to assume jurisdiction not given to it by law.

It follows that the appeal and writ of error must be dismissed for want of jurisdiction.

(242 U. S. 111)

KANSAS CITY, MEMPHIS, & BIRMINGHAM RAILROAD COMPANY, Plff. in Err.,

v.

JAMES P. STILES.

CONSTITUTIONAL LAW 43(2)—STATUTES—WHO MAY QUESTION VALIDITY.

1. Railroad corporations which have constituted themselves a consolidated corporation under Ala. Code 1886, § 1583, may not—constitutional objections excepted—complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. 43(2).]

COMMERCE 69 — CONSTITUTIONAL LAW 229(1), 283—DUE PROCESS OF LAW — EQUAL PROTECTION OF THE LAWS—COMMERCE—STATE TAXATION OF CONSOLIDATED RAILWAY COMPANY.

2. The state of Alabama, in imposing the annual franchise tax exacted from domestic corporations upon a consolidated railway corporation existing by virtue of the consolidation under concurrent acts of the states of Tennessee, Mississippi, and Alabama, of three independent and distinct railroad corporations created by, and for-

merly operating solely within, the respective states named, and in measuring such tax by the entire capital stock of the consolidated corporation instead of measuring it by the amount of capital employed in the state, as is done in the case of foreign corporations, violated neither the due process, commerce, or equal protection of the laws clauses of the Federal Constitution, where the Alabama consolidation statute expressly provided that the consolidated corporation shall in all respects be subject to the laws of the state as a domestic corporation.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113-119; Dec. Dig. 69; Constitutional Law, Cent. Dig. §§ 685, 891, 892, 904-906; Dec. Dig. 229(1), 283.]

[No. 212.]

Submitted October 17, 1916. Decided December 4, 1916.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the City Court of Birmingham, in that state, sustaining the demurrer to a complaint in an action by a consolidated railway corporation to recover back a tax alleged to have been wrongfully collected. Affirmed.

See same case below, 192 Ala. 687, 68 So. 1018.

The facts are stated in the opinion.

Messrs. Forney Johnston and W. F. Evans for plaintiff in error.

Mr. William L. Martin, Attorney General of Alabama, and Mr. Lawrence E. Brown for defendant in error.

* Mr. Justice Day delivered the opinion of the court:

The Kansas City, Memphis, & Birmingham Railroad Company, plaintiff in error herein (hereinafter called the railroad company), filed its complaint in the city court of Birmingham, Alabama, against James P. Stiles, probate judge of Jefferson county, Alabama, whereby it sought to recover sundry sums of money, aggregating \$2,434.40, paid to Stiles by virtue of the provisions of § 12 of an act of the Alabama legislature, entitled, "An Act to Further Provide for the Revenues of the State of Alabama." By this act it is provided that corporations organized under the laws of Alabama shall pay an annual franchise tax as follows: where the paid-up capital stock does not exceed \$50,000, \$1 per thousand of such paid-up capital stock; where paid-up capital stock is more than \$50,000, and up to \$1,000,000, \$1 per thousand on the first \$50,000, and 50 cents for each thousand of the remainder; where paid-up capital stock is more than \$1,000,000, and up to \$5,000,000, \$1 dollar per thousand on the first \$50,000,

and 50 cents per thousand for the next \$950,000, and 25 cents per thousand for the remainder; where the paid-up capital stock exceeds \$5,000,000, \$1 per thousand on the first \$50,000, 50 cents per thousand on the next \$950,000, 25 cents per thousand on the next \$4,000,000, and 10 cents per thousand on the remainder; and that corporations organized under the laws of any other state, and doing business within the state of Alabama, shall pay annually franchise tax as above, based, however, on the actual amount of capital employed in the state of Alabama. The act also contains provisions not relevant to this action and not necessary to be set forth here.

The railroad company is a consolidated corporation, existing by virtue of the consolidation, under concurrent acts of the states of Tennessee, Mississippi, and Alabama, of three independent and distinct railroad corporations created by and formerly operating solely within the respective states named. As regards this consolidation, plaintiff avers—

*114 "that it is a consolidated corporation, made up and consisting of the consolidation of three distinct and separate corporations, under the following circumstances: A railroad corporation organized and existing solely under the laws of the state of Tennessee acquired, constructed, owned, and operated all of that part of plaintiff's line and railway situated within the state of Tennessee; a separate and distinct railroad corporation, organized and existing solely under the laws of the state of Mississippi, acquired, constructed, owned, and operated all that part of plaintiff's line and railway situated within the state of Mississippi; and a separate and distinct railroad corporation, organized and existing solely under the laws of the state of Alabama, acquired, constructed, owned, and operated all that part of plaintiff's line and railway situated within the state of Alabama. Plaintiff avers that said separate railroad corporations, being desirous of operating said distinct and separately owned properties as a single system, for the conduct of the business of a common carrier in interstate commerce, as well as the continuation of intrastate commerce within said several states, before the period mentioned or involved herein, and by virtue of concurrent or contemporaneous laws or special acts of said several states, including the states of Tennessee and Mississippi, as well as the state of Alabama, consolidated themselves into a corporation known as Kansas City, Memphis, & Birmingham Railroad Company, the plaintiff herein, and, in pursuance of the laws of each of said states, duly filed there-

in agreements and instruments consolidating said companies, and complying with the laws of each of said states authorizing the same. And plaintiff avers that by said consolidation the shares of stock of said several companies were surrendered by the holders thereof, and in lieu thereof there were issued the shares of stock of said consolidated company, the plaintiff herein, being the capital stock of plaintiff issued and outstanding as aforesaid. Plaintiff further avers that the capital stock on which said franchise tax was estimated and exacted as aforesaid was and is the capital stock issued and outstanding under the circumstances aforesaid, although less than one half thereof was issued in lieu of the stock of or represents the property or assets or business of the Alabama corporation which became a constituent of the plaintiff by consolidation as aforesaid."

* The entire capital stock of the consolidated railroad company amounted to \$5,976,000, and it was upon this entire amount that the company was assessed. By this action the railroad company seeks to recover the full amount of the franchise tax exacted upon that basis, and contends that in any event it should have been assessed only upon that part of the capital employed by it in the state of Alabama.

The railroad company averred, if it was required to pay the franchise tax in question upon its entire capital, that it would be paying another and different rate of taxation, or another and different amount of franchise tax, from that which is required of like corporations doing business in Alabama, contrary to the provision of the 14th Amendment to the Federal Constitution that no state shall deny to any person within its jurisdiction the equal protection of its laws; that the enforcement of the act by subjecting to its operation the railroad company's property in other states constituted a taking of its property without due process of law; and that said act imposed a direct burden upon interstate commerce in requiring it to pay, in addition to all other fees and taxes provided by law, a tax upon its capital stock for the right and privilege of transacting and carrying on its interstate business as a common carrier, in violation of clause 3 of § 8, article I. of the Federal Constitution.

A demurrer was filed to this complaint, which demurrer was sustained. Upon appeal to the supreme court of Alabama, this judgment was affirmed (192 Ala. 687, 68 So. 1018), and a writ of error brings the action to this court.

The consolidated company was formed, so far as the state of Alabama is concerned,

under § 1583 of the Alabama Code of 1886, which provides in substance, as follows: That whenever the lines of any two or more railroads chartered under the laws of that or any other state, which, when completed, may admit the passage of burden or passenger cars over any two or more of such roads continuously without break or interruption, such companies are authorized before or after completion to consolidate themselves into a single corporation, in the manner following: The directors of such corporations may enter into an agreement, prescribing the terms and conditions thereof, mode of carrying into effect, name, number of directors, etc., and such new corporation shall possess all the powers, rights, and franchises conferred upon the two or more corporations, and shall be subject to all the restrictions, and perform all the duties, imposed by such statute. Provision is also made for ratification of such consolidation by the stockholders, after which ratification the agreement is deemed completed, as to each corporation. It is also provided that "every such new corporation so formed shall keep an office in the state of Alabama, and be in all respects subject to the laws of the state of Alabama as a domestic corporation." The corporation is to be deemed consolidated when a copy of the agreement is filed with the secretary of state, and after the election of the first board of directors the property and franchises of each corporation shall be vested in the new corporation, and it shall be subject to the liabilities of its integral parts, as if such debts had been incurred by it.

It will be noted that this statute, which is a grant of corporate rights from the state of Alabama to the consolidated company, contains the express provision that such company shall in all respects be subject to the laws of the state of Alabama as a domestic corporation. Applying § 12 of the statute, the Alabama supreme court has held that the railroad company is a corporation organized under the laws of that state, and, as such, subject to the franchise tax imposed by that section of the statute.

The Federal questions (which are alone within the jurisdiction of this court) are to be determined upon this construction of the state statute by its highest court.

*When the companies comprised in this consolidation sought to avail themselves of the laws of Alabama, they were asking a privilege and right which, subject to the limitations of the Federal Constitution, was within the authority of the state. This principle was succinctly stated in *Ashley v. Ryan*, 153 U. S. 436, 442, 38 L. ed. 773, 777,

4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865:

"Nor is the question at issue affected by the fact that some of the constituent elements which entered into the consolidated company were corporations owning and operating property in another state. The power of corporations of other states to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent on the will of that state as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws. *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Paul v. Virginia*, 8 Wall. 163, 181, 19 L. ed. 357, 360."

This doctrine has been affirmed since. *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 703, 40 L. ed. 849, 860, 16 Sup. Ct. Rep. 714, and previous cases in this court therein cited; *Interstate Consol. Street R. Co. v. Massachusetts*, 207 U. S. 79, 84, 52 L. ed. 111, 114, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555.

The railroads comprising this consolidation entered upon it with the Alabama statute before them and under its conditions, and, subject to constitutional objections as to its enforcement, they cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the state of Alabama.

The specific objections based upon the Federal Constitution remain to be noticed. It is said that the company is deprived of the equal protection of the laws, this contention being based upon the fact that domestic corporations, operating only within the state, are required to pay the tax upon property within the state, and foreign corporations are taxed only upon the basis of property within the state. To support this contention as to denial of equal protection of the laws, the company relies principally upon the decision of this court in *Southern R. Co. v. Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247. In that case, a foreign corporation, complying with the laws of Alabama, entered upon business within the state, paid both license and property taxes imposed by the laws of the state, and when it was attempted to impose upon it another tax for the privilege of doing business in the state, a business in all respects like that done by domestic corporations of a similar character who were not subjected to the additional

tax complained of, it contended that it was denied equal protection of the law, and this court so held.

That case is readily distinguishable from the one now under consideration. Here the state imposes the franchise tax equally upon all of its corporations, consolidated and otherwise. The fact that a wholly intrastate corporation may own no property outside of the state, while the consolidated company does, presents no case of arbitrary classification. In both cases, the franchise tax is based upon a percentage of the capital stock. There is no denial of equal protection of the laws because a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants in creating them.

It is urged that this tax is void because it undertakes to tax property beyond the jurisdiction of the state, and imposes a direct burden upon interstate commerce. Objections of this character were so recently discussed, and the previous cases in this court considered, in *Kansas City, Ft. S. & M. R. Co. v. Botkin*, 240 U. S. 227, 60 L. ed. 617, 36 Sup. Ct. Rep. 261, that it would be superfluous to undertake extended discussion of the subject now. In that case, after a full review of the previous decisions in this court, it was held that each case* must depend upon its own circumstances, and that while the state could not tax property beyond its borders, it might measure a tax within its authority by capital stock which in part represented property without the taxing power of the state. As to the objection based upon the due process clause of the Constitution, we think that principle controlling here. There is no attempt in this case to levy a property tax; a franchise tax within the authority of the state is in part measured by the capital stock representing property owned in other states.

The tax is not of the character condemned in *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190, and kindred cases. In the latter case, a tax of large amount was imposed upon a foreign corporation engaged in interstate commerce, for the privilege of doing local business within the state. Under the circumstances therein disclosed and the character of the business involved, this court held that the statute was in substance an attempt to tax the right to do interstate business, and to tax property beyond the confines of the state, and was therefore void. Here, a franchise tax is levied upon a corporation consolidated under the laws of the state by its own acceptance of that law in incorporating under it.

So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases and repeated in *Kansas City, Ft. S. & M. R. Co. v. Botkin*, supra, is the nature and character of the tax imposed. The state may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. In the present case, the franchise tax is imposed upon the capital stock of a corporation* consolidated under the state law, and engaged in both interstate and intrastate commerce.

We find nothing in the amount or character of the tax which makes it a burden upon interstate commerce, and so beyond the authority of the state to impose. It results that the judgment of the Supreme Court of Alabama must be affirmed.

(242 U. S. 60)

LOUISVILLE & NASHVILLE RAILROAD
COMPANY et al., Appts.,
v.

UNITED STATES OF AMERICA et al.

CARRIERS — 33 — INTERSTATE COMMERCE
COMMISSION — POWERS — COMPELLING
SWITCHING SERVICE — USE OF TERMINAL
FACILITIES.

Two railway carriers who are joint owners of a considerable portion of the terminals in a certain city used by them in common, and who manage them as a whole and deal with them in the same way as they would if their title were joint in every part, may not be compelled by the Interstate Commerce Commission, under the equal facilities requirement of the Act of February 4, 1887 (24 Stat. at L. 380, chap. 104, Comp. Stat. 1913, § 8565), § 3, respecting the interchange of traffic, which is qualified by the proviso that it "shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business," to discontinue as discriminatory their practice of refusing to switch interstate traffic to and from the tracks of a third carrier entering that city on the same terms which they contemporaneously maintain with respect to similar shipments to and from their own respective tracks in said city, although, instead of each carrier doing its own switching over the terminals used in common, they switch jointly through a single agency for both, each paying substantially as it would if it did its own work alone, since what is done is not reciprocal switching, but the

use of a joint terminal in the natural and practical way.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 86-90; Dec. Dig. 33.]

[No. 290.]

Argued October 13 and 16, 1916. Decided December 4, 1916.

A PPEAL from the District Court of the United States for the Middle District of Tennessee to review a decree which, dismissing the petition, denied a preliminary injunction against the enforcement of an order of the Interstate Commerce Commission. Reversed. Injunction to issue without prejudice to further orders by the Commission.

See same case below, 227 Fed. 258, 273.

The facts are stated in the opinion.

Messrs. Edward S. Jouett, H. L. Stone, W. A. Colston, Claude Waller, John B. Keeble, R. Walton Moore, and Frank W. Gwathmey for appellants.

Assistant Attorney General Underwood for the United States.

Messrs. Charles W. Needham, Joseph W. Folk, and Edward W. Hines for the Interstate Commerce Commission.

* * Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a decree, made by three judges sitting in the district court, which denied a preliminary injunction against the enforcement of an order of the Interstate Commerce Commission and dismissed the appellants' petition. 227 Fed. 258, id. 273. See 33 Inters. Com. Rep. 76, for the report of the Interstate Commerce Commission. The order complained of required the appellants, the Louisville & Nashville Railroad Company, the Nashville, Chattanooga, & St. Louis Railway, and the Louisville & Nashville Terminal Company to desist and abstain "from maintaining a practice whereby they refuse to switch interstate competitive traffic to and from the tracks of the Tennessee Central Railroad Company at Nashville, Tennessee, on the same terms as interstate noncompetitive traffic, while interchanging both kinds of said traffic on the same terms with each other, as said practice is found by the Commission in its said report to be unjustly discriminatory." It was further ordered: "That the Louisville & Nashville Railroad Company, Nashville, Chattanooga, & St. Louis Railway, and Louisville & Nashville Terminal Company be, and they are hereby, notified and required to establish, on or before May 1, 1915, upon notice to the Interstate Commerce Commission and to the

general public by not less than thirty days' filing and posting in the manner prescribed in § 6 of the Act to Regulate Commerce, and thereafter to maintain and apply to the switching of interstate traffic to and from the tracks of the Tennessee Central Railroad Company at said Nashville, rates and charges which shall not be different than they contemporaneously maintain with respect to similar shipments to and from their respective tracks in said city, as said relation is found by the Commission in its said report to be nondiscriminatory." The appellants contend as matter of law that the relations between them exclude any charge of discrimination that is based only upon a refusal to extend to the Tennessee Central road the advantages that they enjoy.

The order is based upon discrimination and is limited by the duration of the interchange between the appellants found to be discriminatory, and the question argued by the appellants is the only question in the case. Therefore it is necessary to consider relations between the appealing railroads that were left on one side in Louisville & N. R. Co. v. United States, 238 U. S. 1, 18, 59 L. ed. 1177, 1183, 35 Sup. Ct. Rep. 696.

The Louisville & Nashville traverses Nashville from north to south, the Nashville & Chattanooga from west to southeast, the Tennessee Central from northwest to east. They all are competitors for Nashville traffic. In 1872, contemplating a possible Union Station, the Louisville & Nashville acquired trackage rights from the Nashville & Chattanooga that connected its northern and southern terminals in the city (previously separate), and the terminal of the Nashville & Chattanooga. It now owns 71 per cent of the stock of the latter. In 1893 these two roads caused the appellant Terminal Company to be organized under the general laws of Tennessee, with the right to let its property. The Louisville & Nashville owns all the stock of this company. In 1896 the two roads respectively let to the Terminal Company their several properties in the neighborhood of the original depot grounds of the Nashville & Chattanooga for 999 years, and shortly afterwards the Terminal made what is termed a lease of the same, and subsequently acquired property to the two roads jointly for a like term. It covenanted to construct all necessary passenger and freight buildings, tracks, and terminal facilities, the roads to pay annually as rental 4 per cent of the actual cost, and to keep the properties in repair. The Terminal Company then made a contract with the city for the construction of a Union Station, the two roads guaranteeing the performance, and the construc-

tion was completed in 1900; the tracks connecting with those of the two roads, but not with those of the Tennessee Central. The Terminal Company, as part of the improvements, purchased large additional properties, the two roads advancing the funds, and the company executing a mortgage for \$3,000,000 guaranteed by the roads. \$2,535,000 of the bonds were issued and the proceeds used to repay the roads.

On August 15, 1900, the two roads, at that time being the only two roads entering Nashville, made the arrangement under which they since have operated. They made an unincorporated organization called the Nashville Terminals which was to maintain and operate the property let to the two roads jointly by the Nashville Terminal Company and also 8.10 miles of main track and 23.80 miles of side track contributed by the Louisville & Nashville, and 12.15 miles of main and 26.37 miles of side track contributed by the Nashville & Chattanooga. The agreement between the roads provided a board of control consisting of a superintendent and the general managers of the two roads, the superintendent having the immediate control and appointing under officers, etc. The total expense of maintenance and operation is apportioned monthly between the two roads on the basis of the total number of cars and locomotives handled for each. There is no switching charge to or from locations on tracks of the Nashville Terminals within the switching limits on freight from or to Nashville over either road. The Tennessee Central tracks now connect with those of the Nashville & Chattanooga at Shops Junction, in the western section of the city, within the switching limits, and with those of the Louisville & Nashville at Vine Hill, outside the switching limits, and just outside the city on the south.

It should be added that in December, 1902, a further agreement was made purporting to modify the lease to the railroads jointly by excluding from it the property that came from them respectively, and remitting the roads to their several titles as they stood before the lease, subject only to the mortgage, with some other changes that need not be mentioned. This partial change from joint tenancy back to several titles does not affect the substantial equality of the contribution of the two roads, and the joint tenure of the considerable property purchased by the Terminal Company was left unchanged.

Another matter that seems immaterial to the case before us is that, since the connection between the Tennessee Central and the appellant roads, the latter have interchanged

noncompetitive traffic with the former, but the Louisville & Nashville has refused to switch competitive traffic and coal except at its local rates, and the Nashville & Chattanooga has refused to switch it at all. The switching of coal was dealt with by this court in *Louisville & N. R. Co. v. United States*, 238 U. S. 1, 59 L. ed. 1177, 35 Sup. Ct. Rep. 696. But the case now before us is not concerned with the effect of the carriers having thrown the terminals open to many branches of traffic (238 U. S. 18). It arises only upon the question of the discrimination supposed to arise from the appellants' relations to each other, as we have explained,—a question grazed but not hit by the decision in 238 U. S. See p. 19.

If the intent of the parties or purpose of the arrangement was material in a case like this, obviously there was none to discriminate against the Tennessee Central road. That road did not enter Nashville when the plan was formed, and the two appellants had a common interest, although competitors,—an interest that also was public and in which the city of Nashville shared. By § 3 of the Act to Regulate Commerce as it now stands, the act "shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." [24 Stat. at L. 380, chap. 104, Comp. Stat. 1913, § 8565.] Therefore if either carrier owned and used this terminal alone, it could not be found to discriminate against the Tennessee Central by merely refusing to switch for it, that is, to move a car to or from a final or starting point from or to a point of interchange. We conceive that what is true of one owner would be equally true of two joint owners, and if we are right the question is narrowed to whether that is not, for all practical purposes, the position in which the appellants stand. They do still hold jointly a considerable portion of the terminals, purchased with their funds. They manage the terminals as a whole, and, in short, deal with them in the same way that they would if their title was joint in every part. Of course they do not own their respective original tracks jointly, and it is matter for appreciation that perhaps defies more precise argument whether the change back to a several tenure of those tracks changed the rights of the parties. We cannot see in this modification of the paper title any change material to the point in hand. Neither road is paid for the use of its tracks, but the severally owned and the jointly held are brought into a single whole by substantially equal contributions and are used by each as occasion requires.

The fact principally relied upon to up-

hold the order of the Commission is that, instead of each road doing its own switching over the terminals used in common, they switch jointly; and it is said that therefore each is doing for the other a service that it cannot refuse to a third. We cannot believe that the rights to their own terminals, reserved by the law, are to be defeated by such a distinction. We take it that a several use by the roads for this purpose would open no door to a third road. If the title were strictly joint throughout in the two roads, we can see no ground for prejudice in the adoption of the more economical method of a single agency for both, each paying substantially as it would if it did its own work alone. But, as we have indicated, a large part of the terminals is joint property in substance, and the whole is held and used as one concern. What is done seems to us not reciprocal switching, but the use of a joint terminal in the natural and practical way. It is objected that, upon this view, a way is opened to get beyond the reach of the statute and the Commission. But the very meaning of a line in the law is that right and wrong touch each other, and that anyone may get as close to the line as he can if he keeps on the right side. And further, the distinction seems pretty plain between a bona fide joint ownership or arrangement so nearly approaching joint ownership as this, and the grant of facilities for the interchange of traffic that should be extended to others on equal terms. The joint outlay of the two roads has produced much more than a switching arrangement; it has produced a common and peculiar interest in the station and tracks even when the latter are not jointly owned. In our opinion the order was not warranted by the law; but, in overturning it upon the single point discussed, we do so without prejudice to the Commission's making orders to prevent the appellants from discriminating between competitive and noncompetitive goods, so long as they open their doors to the latter, the appellants being entitled to reasonable compensation, taking into account the expense of the terminal that they have built and paid for.

Decree reversed. Injunction to issue, without prejudice to further orders by the Interstate Commerce Commission as stated in the opinion.

Mr. Justice Pitney, with whom concurred Mr. Justice Day, Mr. Justice Brandeis, and Mr. Justice Clarke, dissenting:

I am unable to concur in the opinion of the court, and, in view of the far-reaching effect of the decision upon the commercial

interests of the country, deem it a duty to set forth the grounds of my dissent.

The Interstate Commerce Commission found as matter of fact (33 Inters. Com. Rep. 76, 84): "Defendants [the two railroad companies, now appellants] unquestionably interchange traffic with each other and without distinction between competitive and noncompetitive traffic. The cars of both roads are moved over the individually owned terminal tracks of the other to and from industries on the other, and both lines are rendered equally available to industries located exclusively on one. The movement, it is true, is not performed immediately by the road over whose terminal tracks it is performed, but neither is it performed immediately by the road whose cars are moved. It is performed by a joint agent for both roads, and that being so, we are of the opinion that the arrangement is essentially the same as a reciprocal switching arrangement, and accordingly constitutes a facility for the interchange of traffic between, and for receiving, forwarding, and delivering property to and from defendants' respective lines, within the meaning of the second paragraph of § 3 of the act. [Interstate Commerce Act.] . . . We cannot agree with defendants' contention that they have merely exchanged trackage rights. But, even if they have, we think the term 'facility,' as used in § 3 of the act, also includes reciprocal trackage rights over terminal tracks, the consequences and advantages to shippers being identical with those accruing from reciprocal switching arrangements."

The district court, three judges sitting (227 Fed. 258, 269), after careful consideration, reached the following conclusions: "The operation jointly carried on by the Louisville & Nashville and the Nashville & Chattanooga under the Terminals agreement is not a mere exchange of trackage rights to and from industries on their respective lines at Nashville, under which each does all of its own switching at Nashville and neither switches for the other. It is, on the contrary, in substance and effect, an arrangement under which the entire switching service for each railroad over the joint and separately owned tracks is performed jointly by both, operating as principals through the Terminals as their joint agent, each railroad, as one of such joint principals, hence performing through such agency switching service for both itself and the other railroad. . . . And, viewed in its fundamental aspect, and considered with reference to its ultimate effect, we entirely concur in the conclusion of the Commission that such joint switching operation is es-

essentially the same as a reciprocal switching arrangement,' constituting a facility for the interchange of traffic between the lines of the two railroads, within the meaning of the second paragraph of § 3 of the Interstate Commerce Act. That each railroad does not separately switch for the other, but that such switching operations are carried on jointly, is not, in our opinion, material. If it were, all reciprocal switching operations carried on by two railroads at any connecting point of several carriers could be easily put beyond the reach of the act, and its remedial purpose defeated, by the simple device of employing a joint agency to do such reciprocal switching. The controlling test of the statute, however, lies in the nature of the work done, rather than in the particular device employed or the names applied to those engaged in it."

With these views I agree. Elaborate argument is made in behalf of appellants in the effort to show that the method of operating the Nashville Terminals is not "reciprocal switching" within a certain narrow definition of that term. This is an immaterial point; the real question being whether it constitutes a facility for the interchange of traffic between the respective lines of appellants, and for the receiving, forwarding, and delivering of property between connecting lines, within the meaning of § 3 of the Interstate Commerce Act (chap. 104, 24 Stat. at L. 380, Comp. Stat. 1913, § 8565), so that it must be rendered to the patrons of the Tennessee Central upon equal terms with those of the Louisville & Nashville and the Nashville & Chattanooga. I cannot doubt that it bears this character.

The section reads as follows: "Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such con-

necting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

It is clear, I think, that in the second paragraph of this section the word "facilities" is employed in two meanings. Where it first occurs, it means those acts or operations that facilitate or render easy the interchange of traffic; *while, in the final clause, "to give the use of its tracks or terminal facilities," the words "terminal facilities" are employed in a figurative sense and as equivalent to "terminal properties." This is obvious from the association together of tracks and terminal facilities as things subject to use. And the same words are used in the same sense in the 1906 amendment to § 1 of the act (chap. 3591, 34 Stat. at L. 584, Comp. Stat. 1913, § 8563), by which the definition of the term "railroad" was expanded so as to include "all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein."

There is nothing in the order of the Commission now under review that requires appellants or either of them, or their agency, the Nashville Terminals, to give the use of tracks or terminal facilities to the Tennessee Central, either physically or in any other sense, within the meaning of the final clause of § 3. It requires them merely to interchange interstate competitive traffic to and from the tracks of the Tennessee Central on the same terms as interstate noncompetitive traffic, so long as they interchange both kinds of traffic with each other on the same terms; and also to establish and apply to the switching of interstate traffic to and from the Tennessee Central rates and charges not different from those that they contemporaneously maintain with respect to similar shipments as between themselves. Undoubtedly the expenditures made by appellants in the construction of the joint terminal property, so far as that property is used in interchange switching, is an element to be taken into consideration in fixing the amount of the switching charges. And the same is true with respect to the value of the separately owned tracks of appellants, so far as necessarily used in mutual interchanges.

The practice of the Louisville & Nashville and the Nashville & Chattanooga in refusing² to interchange *competitive on the same terms as noncompetitive traffic with the Tennessee Central, while interchanging both kinds of traffic as between themselves, was found by the Commission to be unduly dis-

criminary, there being no substantial difference in the conditions of the interchange, nor any increased cost of interchanging competitive as compared with noncompetitive traffic.

The tracks included in the joint terminal arrangement of appellants include 8.10 miles of main and 23.80 miles of side tracks separately owned by the Louisville & Nashville, 12.15 miles of main and 26.37 miles of side tracks separately owned by the Nashville & Chattanooga, and some yard tracks owned by the Louisville & Nashville Terminal Company, whose entire stock is owned by the Louisville & Nashville R. R. Company. It may be conceded that, by virtue of the lease from the Terminal Company to the appellant railroads, even as modified in December, 1902, there remains in some sense a joint tenure of the property of the Terminal Company. But, in my view, the question of the ownership of the property is entirely aside from the real point. The discrimination charged and found by the Commission is not so much in the use of terminal property as in the performance of interchange services; and for such discrimination a community of interest in the property affords neither justification nor excuse.

So far as the nondiscriminatory performance of those services requires that cars from the Tennessee Central shall be admitted to the terminal tracks of the Louisville & Nashville and the Nashville & Chattanooga, and to tracks in which these companies have a joint interest, this is so only because appellants have, as between themselves, and also as regards traffic from the Tennessee Central, thrown their terminals open to the public use. The argument for appellants rests upon the essential fallacy that the terminal facilities are, in an absolute sense, and for all purposes, private property. But they, like all other parts of the railroad line, are, with respect to their use, devoted to the benefit of the public. And the final clause of § 3, while it protects each carrier to a certain extent in the separate use of its terminal property, does so not otherwise than it protects its particular use of the main line of railroad. "Tracks" are mentioned together with "terminal facilities," and the same rule is applied to both. The fact that a carrier owns its own terminals is no more an excuse for discriminatory treatment of its patrons with respect to services performed therein than its ownership of the main line is an excuse for discrimination with respect to transportation thereon.

It is said that if either of the appellants were the sole owner of the terminal proper-

ties in question and used them alone, it could not be deemed to discriminate against the Tennessee Central because of a mere refusal to switch for it in the interchange of traffic. Of course, if it refused all connecting carriers alike, it could not be held for discrimination. But whether it would be at liberty to refuse to switch for the Tennessee Central would depend upon circumstances; for instance, upon whether the Interstate Commerce Commission, pursuant to its authority under § 15 of the act, as amended in 1910 (chap. 309, 36 Stat. at L. 552, Comp. Stat. 1913, § 8583), should establish the two lines as a through route, or (without that) should determine upon adequate evidence that the refusal of switching privileges was a failure to afford reasonable and proper facilities for the interchange of traffic between the connecting lines under § 3. Car interchange between connecting lines was made by the 1910 amendment of § 1 of the act a positive duty on the part of the carrier, even without action by the Commission. 36 Stat. at L. 545, chap. 309, Comp. Stat. 1913, § 8563.

I deem it a most material fact that the appellants already interchange noncompetitive traffic with the Tennessee Central, upon terms like those upon which they interchange both competitive and noncompetitive traffic* between themselves. So far as their method of doing this amounts to an interchange of trackage rights they have by their voluntary action thrown open the use of their terminals to all branches of traffic, excepting so far as they discriminate against competitive traffic over the Tennessee Central. Not only so, but the Commission has expressly found (33 Inters. Com. Rep. 82) that the Louisville & Nashville will switch competitive coal and other competitive traffic to and from the Tennessee Central, the interchange being usually effected at Shops Junction and over the rails of the Nashville & Chattanooga. But the Louisville & Nashville insists upon charging local rates as if for transportation between Nashville and Overton, Tennessee, which amount to from \$12 to \$36 per car, and are therefore in effect prohibitory. For a time the Nashville & Chattanooga in like manner offered to perform the same switching service to and from the Tennessee Central at its local rates, and published a terminal tariff December 14, 1913, expressly providing that such local rates would apply to competitive traffic from and destined to the Tennessee Central. This, however, was revoked shortly after the complaint in the present case was filed. There is here a very plain discrimination, found by the Commission to be an undue discrimination, not merely

against the Tennessee Central, but against a "particular description of traffic," which is distinctly prohibited by § 3. The conduct of appellants is quite analogous to the making of a discrimination in the charge for carriage, not because of any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere basis of the ownership of the goods,—a discrimination condemned by this court in *Interstate Commerce Commission v. Delaware, L. & W. R. Co.* 220 U. S. 235, 252, 55 L. ed. 448, 456, 31 Sup. Ct. Rep. 392.

The present system of interchanging traffic between appellants was established in August, 1900, a year or two before the line of the Tennessee Central was constructed into Nashville. Emphasis was laid upon this, in argument, as refuting the suggestion that the arrangement could be deemed a "device" to avoid the discrimination clause of § 3 of the Interstate Commerce Act. The findings of the Commission show, however (33 Inters. Com. Rep. 81), that when the Tennessee Central entered Nashville it was only after strong opposition from the Louisville & Nashville; and (p. 79) that, prior to the year 1898, the people of Nashville had become desirous of better terminal facilities, particularly of a union passenger depot, and an ordinance authorizing a contract to that end between the city and the Terminal Company was proposed, containing a proviso that the terminal facilities should also be available on an equitable basis to railroads which might be built in the future. The present appellants opposed this proviso and an ordinance omitting it was passed, but was vetoed by the mayor on account of the omission. It clearly enough appears, therefore, that the agreement of August, 1900, was made by appellants in view of the probability of some other road entering Nashville thereafter.

But were it otherwise, the result should be the same. The obligation to avoid discrimination and to afford "all reasonable, proper, and equal facilities for the interchange of traffic" is not qualified by any rights of priority. The new road is a servant of the public, equally with the others; subject to the same duty and entitled, for its patrons, to demand reasonable and impartial performance of the reciprocal duty from carriers that preceded it in the field.

In my opinion the present case is controlled by our decisions in the former case between the same parties (*Louisville & N. R. Co. v. United States*, 238 U. S. 1, 18, 19, 59 L. ed. 1177, 1183, 1184, 35 Sup. Ct. Rep. 696), and the earlier case of *Pennsylvania Co. v. United States*, 236 U. S. 351, 366

et seq., 59 L. ed. 616, 625, P.U.R.1915B, 261, 35 Sup. Ct. Rep. 370. In these cases many of the same arguments that are here advanced were considered and overruled by the court. The latter case concerned the switching of interstate carload traffic between industrial tracks and junction points within the switching limits at New Castle, Pennsylvania. The Pennsylvania Company undertook to sustain a practice of doing such switching at \$2 per car for three railroads while refusing to do it for the Buffalo, Rochester, & Pittsburgh, upon the ground of its sole ownership of the terminals and the fact that the three other carriers were in a position, either at New Castle or elsewhere, to offer it reciprocal advantages fully compensatory for the switching done for them in New Castle, whereas the Buffalo, Rochester, & Pittsburgh was not in a position to offer similar advantages. The Interstate Commerce Commission (29 Inters. Com. Rep. 114) overruled this contention, and in this was sustained by the district court (214 Fed. 445), and by this court. We there held (236 U. S. 361) that the question what was an undue or unreasonable preference or advantage under § 3 of the Interstate Commerce Act was a question not of law, but of fact; and that if the order of the Commission did not exceed its constitutional and statutory authority and was not unsupported by testimony, it could not be set aside by the courts; held (p. 363), that the provisions of § 3, although that section remains unchanged, must be read in connection with the amendments of 1906 and 1910 to other parts of the act, and that by these amendments the facilities for delivering freight at terminals were brought within the definition of transportation to be regulated; and also (pp. 363, 369) that the order did not amount to a compulsory taking of the use of the Pennsylvania tracks by another road within the inhibition of the final clause of § 3; no right being given to the Buffalo road to run its cars over the terminals of the Pennsylvania Company, or to use or occupy its stations or depots for purposes of its own.

In the former case between the present parties (*Louisville & N. R. Co. v. United States*, 238 U. S. 1, 59 L. ed. 1177, 35 Sup. Ct. Rep. 696), we sustained the district court (216 Fed. 672) in refusing an injunction to restrain the putting into effect of an order of the Commission (28 Inters. Com. Rep. 533, 540) requiring appellants to interswitch interstate coal with the Tennessee Central as they did with each other. The findings of the Commission (p. 542) recognized that the terminals were in part jointly owned and in part the separate prop-

erty of the two appellants. The district court (216 Fed. 682, 684) alluded to this fact. And this court (238 U. S. 17-20) did not ignore that fact, but laid it aside as immaterial, declaring: "If the carrier, however, does not rest behind that statutory shield [the final clause of § 3], but chooses voluntarily to throw the terminals open to many branches of traffic, it to that extent makes the yard public. Having made the yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of § 3 of the statute, which prohibits the facility from being used in such manner as to discriminate against patrons and commodities."

If the decision reached in the present case is adhered to, and remains uncorrected by remedial legislation, it will open a wide door to discriminatory practices repugnant alike to the letter and the spirit of the Act to Regulate Commerce.

Mr. Justice Day, Mr. Justice Brandeis, and Mr. Justice Clarke concur in this dissent.

(242 U. S. 85)

UNITED STATES, Plff. in Err.,

v.

HERMAN H. OPPENHEIMER et al.

COURTS ⇨385(1)—APPEAL — BY GOVERNMENT IN CRIMINAL CASE — "SUSTAINING SPECIAL PLEA IN BAR."

1. A judgment of a Federal district court quashing an indictment because of a previous adjudication upon a former indictment for the same offense, that it was barred by the statute of limitations, is one sustaining a special plea in bar, within the meaning of the Act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, Comp. Stat. 1913, § 1704), governing the right of the government to a review in a criminal case, although the defense was presented by demurrer and motion to quash, and the court granted what was styled the motion to quash.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1022-1025, 1031; Dec. Dig. ⇨385(1).]

COURTS ⇨385(1)—APPEAL — BY GOVERNMENT IN CRIMINAL CASE—"SUSTAINING SPECIAL PLEA IN BAR."

2. The clause of the Act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, Comp. Stat. 1913, § 1704) giving a writ of error to the United States to review a decision of a Federal district court in a criminal case sustaining a special plea in bar, when the defendant has not been put in jeopardy, is not limited, like the earlier clauses of that statute, to judgments based on the invalidity or construction of the statute upon which the indictment is founded.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1022-1025, 1031; Dec. Dig. ⇨385(1).]

CRIMINAL LAW ⇨177—RES JUDICATA — DISMISSAL OF INDICTMENT.

3. A judgment dismissing an indictment on the ground that the offense charged

is barred by the statute of limitations is a bar—irrespective of any question of former jeopardy—to a second prosecution under a new indictment for the same offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 313-319; Dec. Dig. ⇨177.]

[No. 412.]

Argued October 19 and 20, 1916. Decided December 4, 1916.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment quashing an indictment because of a previous adjudication upon a former indictment for the same offense that it was barred by the statute of limitations. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General Warren and Mr. A. J. Clopton for plaintiff in error.

Messrs. Benjamin Slade, L. Laffin Kellogg, and Abram J. Rose for defendants in error.

Mr. Justice Holmes delivered the opinion of the court:

The defendant in error and others were indicted for a conspiracy to conceal assets from a trustee in bankruptcy.* Act of July 1, 1898, chap. 541, § 29, 30 Stat. at L. 544, 554, Comp. Stat. 1913, §§ 9585, 9613. The defendant Oppenheimer set up a previous adjudication upon a former indictment for the same offense that it was barred by the one-year statute of limitations in the Bankruptcy Act for offenses against that act, § 29d,—an adjudication since held to be wrong in another case. *United States v. Rabinowich*, 238 U. S. 78, 59 L. ed. 1211, 35 Sup. Ct. Rep. 682. This defense was presented in four forms entitled respectively, demurrer, motion to quash, plea in abatement, and plea in bar. After motion by the government that the defendant be required to elect which of the four he would stand upon, he withdrew the last-mentioned two, and subsequently the court granted what was styled the motion to quash, ordered the indictment quashed, and discharged the defendant without day. The government brings this writ of error, treating the so-called motion to quash as a plea in bar, which in substance it was. *United States v. Barber*, 219 U. S. 72, 78, 55 L. ed. 99, 101, 31 Sup. Ct. Rep. 209.

The defendant objects that the statute giving a writ of error to the United States from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy, Act of March 2, 1907, chap. 2564, 34 Stat. at L. 1246, Comp. Stat. 1913, § 1704, is limited like the earlier clauses to judgments based on the invalidity or construction of the

statute upon which the indictment is founded. But that limitation expressly in each of the two preceding paragraphs of the statute is not repeated here. The language used in *United States v. Keitel*, 211 U. S. 370, 399, 53 L. ed. 230, 245, 29 Sup. Ct. Rep. 123, had reference only to the construction of the indictment and to its sufficiency upon matters not involving a statute, in cases brought up by the United States under the earlier clauses of the act. That quoted from *United States v. Kissel*, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124, so far as material also meant that the sufficiency of the indictment would not be considered here upon a writ of error to the allowance of a plea in bar. In view of our opinion upon the merits,* we do not discuss the preliminary objections at greater length.

Upon the merits the proposition of the government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the 5th Amendment, that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offense charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt. It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the government's consent before a jury is empaneled; or that it is conclusive if entered upon the general issue (*United States v. Kissel*, 218 U. S. 601, 610, 54 L. ed. 1168, 1179, 31 Sup. Ct. Rep. 124), but if upon a special plea of the statute, permits the defendant to be prosecuted again. We do not suppose that it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words. *State v. Fields*, 106 Iowa, 406, 76 N. W. 802; *Whart. Crim. Pl. & Pr.* 9th ed. § 406.

Of course, the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law, and one judgment that he is

free as matter of substantive law is as good as another. A plea of the statute of limitations is a plea to the merits (*United States v. Barber*, 219 U. S. 72, 78, 55 L. ed. 99, 101, 31 Sup. Ct. Rep. 209), and however the issue was raised in the former case,⁹ after judgment upon it, it could not be re-opened in a later prosecution. We may adopt in its application to this case the statement of a judge of great experience in the criminal law: "Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, the adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings." *Hawkins, J.*, in *Reg. v. Miles*, L. R. 24 Q. B. Div. 423, 431. The finality of a previous adjudication as to the matters determined by it is the ground of decision in *Com. v. Evans*, 101 Mass. 25, the criminal and the civil law agreeing, as Mr. Justice *Hawkins* says. *Com. v. Ellis*, 160 Mass. 165, 35 N. E. 773; *Brittain v. Kinnaird*, 1 Brod. & B. 432, 129 Eng. Reprint, 789, 4 J. B. Moore, 50, Gow, N. P. 164, 21 Revised Rep. 680. Seemingly the same view was taken in *Frank v. Mangum*, 237 U. S. 309, 334, 59 L. ed. 969, 983, 35 Sup. Ct. Rep. 582, as it was also in *Coffey v. United States*, 116 U. S. 436, 445, 29 L. ed. 684, 687, 6 Sup. Ct. Rep. 437.

The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter v. Hewitt*, 22 How. 352, 364, 16 L. ed. 345, 348) in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time.

Judgment affirmed.

(242 U. S. 56)

ATLANTIC CITY RAILROAD COMPANY,
Plff. in Err.

v.

LEWIS S. H. PARKER.

MASTER AND SERVANT ⚡286(13)—TRIAL—
QUESTION FOR JURY—NEGLIGENCE—SAFETY APPLIANCES.

There was enough evidence to go to the jury on the question whether a railway company had failed to furnish such couplers "coupling automatically by impact" as are required by the Safety Appliance Act of March 2, 1893 (27 Stat. at L. 531, chap.

196, Comp. Stat. 1913, § 8606), where there was testimony showing that an engine having backed for the purpose of coupling the tender to a car, on a curve which the jury were warranted in finding was so slight as not to affect the case, and having failed to effect the coupling automatically by impact, the brakeman, noticing that the drawhead on the car was not in line with the one on the tender, put in his arm for the purpose of straightening it and thus making the coupling possible, and was injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1020; Dec. Dig. 236(13).]

[No. 111.]

Argued November 16, 1916. Decided December 4, 1916.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a judgment which affirmed a judgment of the Supreme Court of that state in favor of plaintiff in an action brought under the Federal Safety Appliance and Employers' Liability Acts. Affirmed.

See same case below, 87 N. J. L. 148, 93 Atl. 574.

The facts are stated in the opinion.

Messrs. Thomas E. French, Samuel H. Richards, and Charles Heebner for plaintiff in error.

Mr. David O. Watkins for defendant in error.

*Mr. Justice Holmes delivered the opinion of the court:

This is an action brought by the defendant in error to recover for the loss of an arm crushed while he was coupling a tender to a car. There is no dispute that the case is governed by the acts of Congress—the Safety Appliance Act of March 2, 1893, chap. 196, §§ 2, 8, 27 Stat. at L. 531, Comp. Stat. 1913, §§ 8606, 8612,*and the Employers' Liability Act of April 22, 1908, chap. 149, §§ 3, 4, 35 Stat. at L. 65, Comp. Stat. 1913, §§ 8659, 8660. The facts material here are few. The engine had backed for the purpose of coupling with the car and had failed to couple automatically by impact. Thereupon the plaintiff, noticing that the drawhead was not in line with the one on the engine, put in his arm for the purpose of straightening it and thus making the coupling possible, and was caught. An exception was taken to the refusal of a ruling that no negligence was shown on the part of the railroad company, but the court of errors and appeals affirmed the judgment of the court below. 87 N. J. L. 148, 93 Atl. 574.

If there was evidence that the railroad

failed to furnish such "couplers coupling automatically by impact" as the statute requires (*Johnson v. Southern P. Co.* 196 U. S. 1, 18, 19, 49 L. ed. 363, 369, 370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412), nothing else needs to be considered. We are of opinion that there was enough evidence to go to the jury upon that point. No doubt there are arguments that the jury should have decided the other way. Some lateral play must be allowed to drawheads, and, further, the car was on a curve, which, of course, would tend to throw the coupler out of line. But the jury were warranted in finding that the curve was so slight as not to affect the case, and in regarding the track as, for this purpose, a straight line. If couplers failed to couple automatically upon a straight track, it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, in the absence of any explanation believed by them, the failure indicated that the railroad had not fully complied with the law. *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 571, 55 L. ed. 582, 586, 31 Sup. Ct. Rep. 612; *Chicago, R. I. & P. R. Co. v. Brown*, 229 U. S. 317, 320, 321, 57 L. ed. 1204-1206, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826; *San Antonio & A. Pass R. Co. v. Wagner*, 241 U. S. 476, 484, 60 L. ed. 1110, 1117, 36 Sup. Ct. Rep. 626.

Judgment affirmed.

(242 U. S. 53)
DAN. S. LEHON, Plff. in Err.,
v.

CITY OF ATLANTA.

COURTS 394(10)—ERROR TO STATE COURT—FRIVOLOUS FEDERAL QUESTION.

1. The contention that municipal ordinances, which subject the business of a private detective or detective agency to police supervision, and provide that no person shall carry on such business without first being recommended by the board of police commissioners and taking the oath of a city detective and giving a bond, offend against the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., is not so frivolous as not to serve as the basis of a writ of error from the Federal Supreme Court to a state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1056; Dec. Dig. 394(10).]

CONSTITUTIONAL LAW 238(1), 275(1) —
DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS—REGULATING PRIVATE DETECTIVES—POLICE POWER.

2. Municipal ordinances which subject the business of a private detective or detective agency to police supervision, and provide that no person shall carry on such

business without first being recommended by the board of police commissioners and taking the oath of a city detective and giving a bond, do not offend against the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., but are valid exercises of the police power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 695, 830, 839, 843; Dec. Dig. §§ 238(1), 275(1).]

CONSTITUTIONAL LAW § 42—**STATUTES—WHO MAY ASSAIL VALIDITY—DISCRIMINATION AGAINST NONRESIDENT.**

3. A nonresident private detective who made no effort to comply with municipal ordinances which subject the business of a private detective or detective agency to police supervision, and provide that no person shall carry on such business without first being recommended by the board of police commissioners and taking the oath of the city detective and giving a bond, cannot complain that in their enforcement an unconstitutional discrimination was made against citizens of other states.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.]

[No. 103.]

Submitted November 14, 1916. Decided December 4, 1916.

IN ERROR to the Court of Appeals of the State of Georgia to review a judgment which affirmed a conviction in the Recorder's Court of the City of Atlanta of a violation of municipal ordinances regulating private detectives. Affirmed.

See same case below, 16 Ga. App. 64, 84 S. E. 608.

The facts are stated in the opinion.

Messrs. John D. Little, Arthur G. Powell, Marion Smith, and Max F. Goldstein for plaintiff in error.

Messrs. Samuel D. Hewlett and James L. Mayson for defendant in error.

* Mr. Justice McKenna delivered the opinion of the court:

The question in the case is the validity of ordinances of the city of Atlanta, Georgia, which subject the business of a private detective or detective agency to police supervision, and provide that no person shall carry on such business without being first recommended by the board of police commissioners, and taking the oath of a city detective, and giving a bond in the sum of \$1,000, as prescribed by the ordinances.

Plaintiff in error was convicted in the recorder's court of the city of a violation of the ordinances, and sentenced to pay a fine, with the alternative of imprisonment. Under the local procedure a petition for certiorari was presented to the judge of the superior court of the county to review the conviction, and was refused "sanction," to use the local word. This action was ap-

proved by the court of appeals and the judgment affirmed.

The court of appeals rejected the contention that the ordinances were unreasonable and void under the Constitution of the state, to review which decision we, of course, have no power; and it also sustained the ordinances against the contention that they offended the clauses of the 14th Amendment to the Constitution of the United States. The latter contention is repeated here.

His contention, in its most general form, is that the ordinances abolish the occupation of private detective by the requirements of application for a permit to the police commission of the city, the approval of the chief of police, oath of office, and to work under police supervision. These requirements, it is insisted, offend the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

The contention makes a Federal question, and, as we are not disposed to consider it frivolous, a motion to dismiss which is made will be denied.

In passing upon the merits we assume the facts of the complaint were established; that is, that plaintiff in error was proved to have acted as a private detective, though he denied and denies it, and that his services were those of a "sleuth," though he asserts they were only those of a clerk. We make these assumptions against the denials of plaintiff in error because, to sustain the denials, he selects parts of the testimony only, and ignores also the deduction that it was possible to make even from that testimony.

The only question for our decision is the validity of the law, and of that we have no doubt. Nor are we disposed to take much time in its discussion, notwithstanding the earnest argument of plaintiff in error. The extent of the police power of the state has been too recently explained to need further enunciation. The present case is easily within its principle. It would be very commonplace to say that the exercise of police is one of the necessary activities of government, and all that pertains to it may be subjected to regulation and surveillance as a precaution against perversion. The Atlanta ordinances do no more. They provide in effect that all who engage in it or are connected with it as a business shall have the sanction of the state, have the stamp of the state as to fitness and character, take an oath to the state for faithful execution of its duties, and give a bond for their sanction. This the state may do against its own citizens and may do against

a citizen of Louisiana, which plaintiff in error is, or against a citizen of any other state.

But the ruling of the local officers in refusing approval of applications of nonresidents of Georgia is urged as a construction of the ordinances or laws of the state, and, it is contended, makes them discriminatory against citizens of other states. Plaintiff in error, however,*admits he made no effort to comply with the ordinances. The court of appeals, therefore, was of opinion that, whether certain sections of the Penal Code of the state did or did not exclude citizens of other states from engaging as private detectives, plaintiff in error was deprived of no constitutional right, for "as to him the ordinances were not construed at all." In other words, that he had not asserted a right, and, in the absence of assertion, could not have it judicially passed on. We concur in the ruling. It is within the principle of *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633. To complain of a ruling, one must be made the victim of it. One cannot invoke, to defeat a law, an apprehension of what might be done under it, and which, if done, might not receive judicial approval.

Judgment affirmed.

(242 U. S. 27)

EX PARTE UNITED STATES, Petitioner.

MANDAMUS $\S$ 61—WHEN MAY ISSUE—TO COURT—VACATION OF ULTRA VIRES ORDER.

1. Mandamus is the proper remedy where a Federal district court has exceeded its power by ordering that the execution of a sentence to imprisonment imposed by it upon a plea of guilty be suspended indefinitely during good behavior upon considerations wholly extraneous to the conviction.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. $\S$ 122-126; Dec. Dig. $\S$ 61.]

MANDAMUS $\S$ 160(5) — RULE TO SHOW CAUSE—TO WHOM DIRECTED—COURT OR CLERK.

2. A rule to show cause why mandamus should not issue where a Federal district court has exceeded its power by ordering that the execution of a sentence to imprisonment imposed by it upon a plea of guilty be suspended indefinitely during good behavior upon considerations wholly extraneous to the legality of the conviction is properly directed to the judge, to compel the vacation of the order of suspension, rather than to the clerk of the court, to compel him to issue a commitment.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. $\S$ 331; Dec. Dig. $\S$ 160(5).]

CRIMINAL LAW $\S$ 1001—SUSPENDING EXECUTION OF SENTENCE — POWER OF FEDERAL COURT.

3. A Federal district court exceeds its power by ordering that the execution of a sentence to imprisonment imposed by it

upon a plea of guilty be suspended indefinitely during good behavior upon considerations wholly extraneous to the legality of the conviction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. $\S$ 2554-2559; Dec. D.g. $\S$ 1001.]

[No. 11, Original.]

Argued January 10 and 11, 1916. Decided December 4, 1916.

APPLICATION for a writ of mandamus to the United States District Court Judge for the Northern District of Ohio, directing him to vacate an order suspending during good behavior the execution of a sentence to imprisonment. Rule made absolute.

The facts are stated in the opinion.

Attorney General Gregory, Assistant Attorney General Wallace, and Solicitor General Davis for the United States.

Mr. Edwin J. Marshall for respondent.

Mr. John M. Killits, in propria persona, also for respondent.

Messrs. Richard W. Hale, Frank W. Grinnell, Homer Folks, and Charles L. Chute as amici curiae.

* Mr. Chief Justice White delivered the opinion of the court:

The accused pleading guilty to an indictment charging him in several counts with embezzling the money of a national bank of which he was an officer, and making false entries in its books, in violation of $\S$ 5209, Revised Statutes (Comp. Stat. 1913, $\S$ 9772), was sentenced to imprisonment in the penitentiary for five years, the shortest term which, under the statute, could have been imposed upon him. At once at his request, over the objection of the United States district attorney, the court ordered "that the execution of the sentence be, and it is hereby, suspended during the good behavior of the defendant, and for the purpose of this case this term of this court is kept open for five years." The United States moved to set this order aside on the ground that, as it was not a mere temporary suspension of the sentence to enable legal proceedings pending or contemplated to revise it to be taken, or application for pardon to be made, or any other legal relief against the sentence to be resorted to, but, on the contrary, as it was a permanent suspension based upon considerations extraneous to the legality of the conviction or the duty to enforce the sentence, the order of suspension was void, as it was equivalent to a refusal to carry out the statute. The motion was denied. In the opinion giving its reasons for so doing, the court, conceding that the suspension was permanent, stated

the* general considerations which it deemed it was required to take into view in deciding whether the sentence should be enforced, conceding the legality of the conviction and sentence and their finality, as follows:

"Modern notions respecting the treatment of law breakers abandon the theory that the imposition of the sentence is solely to punish, and now the best thought considers three elements properly to enter into the treatment of every criminal case after conviction. Punishment in some measure is still the object of sentence, but, affecting its extent and character, we consider the effect of the situation upon the individual, as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in the effect of the disposition of it upon others of criminal tendencies."

After pointing out the peculiar aptitude possessed by a trial judge for the appreciation of such conditions, and the imperative duty which rested upon such judge to consider and weigh the matters stated, and to determine, as an inherent attribute of judicial power, whether a permanent suspension of the term of imprisonment fixed by the statute should be ordered, the circumstances upon which it was concluded that a permanent suspension should be directed were stated in part as follows:

"We took into account the peculiar circumstances under which his crime was committed, having regard to the temptations which from time to time encompassed him, and his personal necessities, and the purposes for which his appropriations were made. Also, the fact that his friends made his employers whole, and that otherwise he had so commended himself to the favor of his employers suffering by his crime, that they at all times, as well as now, evince a disposition to forgive his abuse of their confidence, and to support him against the punishment which the law provides. We find that otherwise than for this crime, his disposition, character, and habits have so strongly* commended him to his friends, acquaintances, and persons of his faith, that they are unanimous in the belief that the exposure and humiliation of his conviction are a sufficient punishment, and that he can be saved to the good of society if nothing further is done with him."

After further elaborating considerations of a like nature, and stating very many circumstances confirming those mentioned, to leave no room for doubt that its action was intended to be permanent and was based alone on the extraneous circumstances stated, the court said:

"Passing now to the concrete case, we ob-

serve for the benefit of the United States that nothing exists in this case which moved the court to suspend the execution of sentence to prevent an abuse of the court's process, or to prevent an injustice being done to the defendant,' so far as it may be said that abstract justice required defendant to suffer for his crime. However, we considered the defendant from many standpoints to be as worthy of the benefit of the discretion to suspend the execution of his sentence as any other convict upon whom that favor has hitherto been bestowed."

Following a written demand which was thereafter made upon the clerk to issue a commitment, which was refused by him on the ground that the sentence had been suspended, and the further refusal of the judge to direct the clerk to issue such commitment, the United States sought and obtained a rule to show cause why a mandamus should not be awarded directing the judge to vacate the order of suspension, under which the subject is now before us for consideration.

The remedial appropriateness of the writ of mandamus is at the threshold questioned, but we dispose of the subject by a mere reference to adjudged cases conclusively establishing the want of foundation for the contention. *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. ed. 949; *Re Winn*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515; *Re Metropolitan Trust Co.* 218 U. S. 312, 54 L. ed. 1051, 31 Sup. Ct. Rep. 18; *Ex parte Metropolitan Water Co.* 220 U. S. 539, 55 L. ed. 575, 31 Sup. Ct. Rep. 600. In addition, however, it is urged that, as the right to resort to the extraordinary remedy by mandamus must rest upon the assumption that the order of suspension was absolutely void, therefore the rule for the writ should have been directed not against the judge, but against the clerk, to compel him to issue the commitment. But we pass from its consideration, as we are of opinion that its want of merit will be completely demonstrated by the slightest appreciation of the judicial duties of the court below and the ministerial relation of the clerk of the court to the same.

The return to the rule and the statement in support of the same lucidly portray the contentions involved in the question of power to be decided, and the subject in all its aspects has been elaborately discussed, not only by the printed arguments of the parties, but, in addition, light has been thrown on the general question by an argument submitted by the New York State Probation Commission, explaining the statutory system of parol prevailing in that state, and

by an able argument presented by members of the bar of the first circuit in behalf of a practice of mitigating or premitting, when deemed necessary, the statutory punishment for crimes, which it is declared has prevailed in the United States courts in that circuit for many years.

The argument on behalf of the respondent concedes that the order of suspension was permanent, and absolutely removed the accused from the operation of the punishment provided by the statute; and it is further conceded that a suspension of this character was the equivalent of an absolute and permanent refusal to impose, under the statute, any sentence whatever. However absolute may be the right thus asserted, it is nevertheless said it is not without limitation, since it may not be capriciously called into play. Passing the question whether this assumed restriction is not in the nature of things imaginary as the result of the scope of the authority asserted, let us come to dispose of the contention made by examining the propositions relied upon to sustain it.

They are: 1. That the right to refuse to impose a sentence fixed by statute, or to refuse to execute such a sentence when imposed, is a discretion inhering in the judicial power to try and punish violations of the criminal law. 2. That even if there be doubt on this subject as an original proposition, such doubt is dispelled as the right was recognized and frequently exerted at common law. 3. That the power claimed has also been recognized by decisions of state courts and of United States courts of original jurisdiction to such an extent that the doctrine is now to be considered as not open to controversy. 4. That whatever may be the possibility of dispute as to this last view, at least it cannot be denied that in both the state and Federal courts, over a very long period of time, the power here asserted has been exercised, often with the express, and constantly with the tacit, approval of the administrative officers of the state and Federal governments, and has been also tacitly recognized by the inaction of the legislative department during the long time the practice has prevailed, to such an extent that the authority claimed has in practice become a part of the administration of criminal law, both state and Federal, not subject to be now questioned or overthrown because of mere doubts of the theoretical accuracy of the conceptions upon which it is founded.

1. The contention as to inherent judicial power.

Indisputably under our constitutional system the right to try offenses against the

criminal laws, and, upon conviction, to impose the punishment provided by law, is judicial, and it is equally to be conceded that, in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority. But these concessions afford no ground for the contention as to power here made, since it must rest upon the proposition that the power to enforce begets inherently a discretion to permanently refuse to do so. And the effect of the proposition urged upon the distribution of powers made by the Constitution will become apparent when it is observed that indisputable also is it that the authority to define and fix the punishment for crime is legislative, and includes the right in advance to bring within judicial discretion for the purpose of executing the statute elements of consideration which would be otherwise beyond the scope of judicial authority, and that the right to relieve from the punishment fixed by law and ascertained according to the methods by it provided, belongs to the executive department.

The proposition might well be left with the demonstration which results from these considerations, but the disregard of the Constitution which would result from sustaining the proposition is made, if possible, plainer by considering that, if it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments, and hence leave no law to be enforced.

2. The contention as to support for the proposition at common law.

* The common law is thus stated in Hale's Pleas of the Crown, vol. 2, chap. 58, p. 412:

"Reprieves or stays of judgment or execution are of three kinds, viz.:

"I. Ex mandato regis. . . .

"II. Ex arbitrio iudicis. Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within

clergy; and sometimes after judgment, if it be a small felony, tho out of clergy, or in order to a pardon or transportation. *Crompt. Just.* 22b, and these arbitrary reprieves may be granted or taken off by the justices of gaol-delivery, altho their sessions be adjourned or finished, and this by reason of common usage. 2 *Dyer*, 205a, 73 *Eng. Reprint*, 452.

"III. *Ex necessitate legis*, which is in case of pregnancy, where a woman is convict of felony or treason."

Blackstone thus expresses it:

"The only other remaining ways of avoiding the execution of the judgment are by a reprieve or a pardon; whereof the former is temporary only, the latter permanent.

"I. A reprieve (from *reprendre*, to take back), is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first *ex arbitrio judicis*; either before or after judgment; as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offense be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the Crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commission expired; but this rather by common usage, than of strict right.

* "Reprieves may also be *ex necessitate legis*: as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, in *favorem prolis*." *Bk. 4*, chap. 31, pp. 394, 395.

While it may not be doubted under the common law as thus stated that courts possessed and asserted the right to exert judicial discretion in the enforcement of the law to temporarily suspend either the imposition of sentence or its execution when imposed to the end that pardon might be procured, or that a violation of law in other respects might be prevented, we are unable to perceive any ground for sustaining the proposition that, at common law, the courts possessed or claimed the right which is here insisted upon. No elaboration could make this plainer than does the text of the passages quoted. It is true that, owing to the want of power in common-law courts to grant new trials, and to the absence of a right to review convictions in a higher court, it is, we think, to be conceded: (a) That both suspensions of sentence and

suspensions of the enforcement of sentences temporary in character were often resorted to on grounds of error or miscarriage of justice which, under our system, would be corrected either by new trials or by the exercise of the power to review. (b) That not infrequently where the suspension either of the imposition of a sentence or of its execution was made for the purpose of enabling a pardon to be sought or bestowed, by a failure to further proceed in the criminal cause in the future, although no pardon had been sought or obtained, the punishment fixed by law was es aped. But neither of these conditions serve to convert the mere exercise of a judicial discretion to temporarily suspend for the accomplishment of a purpose contemplated by law into the existence of an arbitrary judicial power to permanently refuse to enforce the law.

* And we can deduce no support for the contrary contention from the rulings in 2 *Dyer*, 165a, 205a, and 235a, 73 *Eng. Reprint*, 359, 452, 519, since those cases but illustrate the exercise of the conceded, reasonable, discretionary power to reprieve to enable a lawful end to be attained. Nor from the fact that common-law courts possessed the power by recognizance to secure good behavior, that is, to enforce the law, do we think any support is afforded for the proposition that those courts possessed the arbitrary discretion to permanently decline to enforce the law. The cases of *Hart's Trial*, 30 *How. St. Tr.* 1344 and *Reg. v. Dunn*, 12 *Q. B.* 1026, 1041, 116 *Eng. Reprint*, 1155, 18 *L. J. Mag. Cas. N. S.* 41, certainly do not tend to so establish, since they simply manifest the exertion of the power of the courts after a conviction and the suffering of the legal penalty to exact from the convicted person a bond for his good behavior thereafter.

3. The support for the power asserted claimed to be derived from the adjudication of state and Federal courts.

Coming first to the state courts, undoubtedly there is conflict in the decisions. The area, however, of conflict will be narrowed by briefly stating and contrasting the cases. We shall do so by referring chronologically to the cases denying the power, and then to those relied upon to establish it.

In 1838 the supreme court of North Carolina in *State v. Bennett*, 20 *N. C.* 170 (4 *Dev. & B. L.* 43), was called upon to decide whether a trial court had the right to permanently remit upon condition a part of a criminal sentence fixed by statute. The court said:

"We know that a practice has prevailed to some extent of inflicting fines with a

provision that they should be diminished or remitted altogether upon matter thereafter to be done, or shown to the court by the person convicted. But we can find no authority in law for this practice, and feel ourselves bound, upon this first occasion when it is brought judicially to our notice, to declare it illegal."

* In 1860, in *People v. Morrisette*, 20 How. Pr. 118, an accused, after pleading guilty, asked a suspension of sentence and to be then discharged from custody. The court said:

"I am of the opinion the court does not possess the power to suspend sentence indefinitely in any case. As I understand the law, it is the duty of the court, unless application be made for a new trial, or a motion in arrest of judgment be made for some defect in the indictment, to pronounce judgment upon every prisoner convicted of crime by a jury, who pleads guilty. An indefinite suspension of the sentence prescribed by law is a quasi pardon, provided the prisoner be discharged from imprisonment. No court in the state has any pardoning power. That power is vested exclusively in the governor."

In *People v. Brown*, 54 Mich. 15, 19 N. W. 571, in deciding that no power to permanently suspend a sentence existed, speaking through Mr. Chief Justice Cooley the court said:

"Now it is no doubt competent for a criminal court, after conviction, to stay for a time its sentence; and many good reasons may be suggested for doing so; such as to give opportunity for a motion for a new trial or in arrest, or to enable the judge to better satisfy his own mind what the punishment ought to be (*Com. v. Dowdican*, 115 Mass. 133); but it was not a suspension of judgment of this sort that was requested or desired in this case; it was not a mere postponement; it was not delay for any purpose of better advising the judicial mind what ought to be done; but it was an entire and absolute remission of all penalty and the excusing of all guilt. In other words, what was requested of the judge was that he should take advantage of the fact that he alone was empowered to pass sentence, and, by postponing indefinitely the performance of this duty, indirectly, but to complete effect, grant to the respondent a pardon for his crime."

And considering the doctrine as to the want of power* thus expounded from the point of view of the common law and of every argument here relied upon, state courts have, in the cases which are in the

margin, in careful opinions denied the existence of the power now claimed.¹

The cases to the contrary are these, omitting one in a court of original jurisdiction in Massachusetts, referred to by counsel, but in which there is no written opinion:

In 1874 in *Com. v. Dowdican*, supra, the right in a criminal case "to lay the case on file" and postpone the sentence was sustained, the court declaring that the practice had long existed, and was recognized by statutes, one of which regulated the granting of parol by courts in liquor cases.

* The case just cited was approvingly referred to in *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954, and declared to express the practice long prevailing in New Hampshire.

In 1894, in *People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 288, 23 L.R.A. 856, 36 N. E. 386, 15 Am. Crim. Rep. 675, in holding that a trial court had power to permanently suspend a sentence for reasons dehors the legality of the conviction, it was declared that such power existed at common law and hence prevailed in the

¹ *People v. Kennedy*, 58 Mich. 372, 25 N. W. 318 (1885); *Gray v. State*, 107 Ind. 177, 8 N. E. 16 (1886); *People v. Blackburn*, 6 Utah, 347, 23 Pac. 759 (1890); *State v. Voss*, 80 Iowa, 467, 8 L.R.A. 767, 45 N. W. 898 (1891); *People ex rel. Benton v. Court of Sessions*, 8 N. Y. Crim. Rep. 355, 19 N. Y. Supp. 508 (1892) affirmed in 66 Hun, 550, 50 N. Y. S. R. 234, 21 N. Y. Supp. 659 (1893); *Re Strickler*, 51 Kan. 700, 33 Pac. 620 (1893); *People ex rel. Smith v. Allen*, 155 Ill. 61, 41 L.R.A. 473, 39 N. E. 568 (1895); *Re Markuson*, 5 N. D. 180, 64 N. W. 939 (1895); *Re Webb*, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702 (1895); *United States v. Folsom*, 8 N. M. 651, 46 Pac. 447 (1896); *State v. Murphy*, 23 Nev. 390, 48 Pac. 628 (1897); *Neal v. State*, 104 Ga. 509, 42 L.R.A. 190, 69 Am. St. Rep. 175, 30 S. E. 858 (1898); *Republic v. Pedro*, 11 Haw. 287 (1898); *Re Beck*, 63 Kan. 57, 64 Pac. 971 (1901); *Miller v. Evans*, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198 (1901); *People ex rel. Boenert v. Barrett*, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23 (1903); *Re Flint*, 25 Utah, 338, 95 Am. St. Rep. 853, 71 Pac. 531 (1903); *State v. Dalton*, 109 Tenn. 544, 72 S. W. 456, 15 Am. Crim. Rep. 653 (1902); *Grundel v. People*, 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022 (1905); *Tuttle v. Lang*, 100 Me. 123, 60 Atl. 892 (1905); *McCampbell v. State*, 116 Tenn. 98, 93 S. W. 100 (1905); *Re St. Hilaire*, 101 Me. 522, 64 Atl. 882, 8 Ann. Cas. 335 (1906); *Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459, 14 Ann. Cas. 718 (1907); *State v. Hockett*, 129 Mo. App. 639, 108 S. W. 599 (1908); *Ex parte Clendenning*, 22 Okla. 108, 19 L.R.A. (N.S.) 1041, 132 Am. St. Rep. 628, 97 Pac. 650

state, this being supported by a quotation from Hale's Pleas of the Crown. In addition it was said, referring to a state parol statute enacted subsequent to the conviction, that such statute, while it conferred no new or other power than that possessed at common law, nevertheless imposed the duty to see to it that the power was not lost to impose future punishment after the release if the condition of suspension was violated.

In the cases cited in the margin the power was upheld upon the rulings in *Com. v. Dowdican*, and the *Forsyth Case*, *supra*, or because of a practice long prevailing.²

Leaving aside the question of the asserted duty to sustain the doctrine because of the long-established practice, which we shall hereafter consider, we think it clear that the long and settled line of authority to which we have previously referred, denying the existence of the power, is in no way weakened by the rulings which lie at the basis of the cases relied upon to the contrary. In the first place, on the face of the opinion in *Com. v. Dowdican*, *supra*, it would seem certain that that case treated the power as being brought by the state legislation which was referred to within the domain of reasonable discretion, since by the effect of that legislation the right to exert such power, if not directly authorized, was at least, by essential implication, sanctioned by the state law. In the

second place, in so far as the *Forsyth Case*, *supra*, is concerned and its declaration as to what was the common law upon the subject, the error thus fallen into is not only demonstrated by what we have said as to the common law, but is additionally shown by the fact that the quotation from Hale's Pleas of the Crown, made in the opinion, contains clauses supporting the opinion expressed as to the common law when in fact the clauses in question, it would seem, were, by some error of citation, mistakenly attributed to Hale. We say this because the clauses referred to and attributed to Hale in the quotation are not found in any edition of the Pleas of the Crown which we have been able to examine, and it is stated by counsel for the United States that, after diligent search, no passage containing the clauses has been discovered, and the existence of any edition of the work containing them is not pointed out by opposing counsel. But whether this be well founded or not, as the conclusion concerning the common law which the case expressed is, we think, obviously unsound, we are unable, on the authority of such a mistaken view, to disregard the long established and sound rule laid down in the many state cases which we have quoted.

So far as the courts of the United States¹²⁰ are concerned it suffices to say that we have been referred to no opinion maintaining the asserted power, and, on the contrary, in

(1908); *Ex parte Cornwall*, 223 Mo. 259, 135 Am. St. Rep. 507, 122 S. W. 666 (1909); *Wall v. Jones*, 135 Ga. 425, 69 S. E. 548 (1910); *State v. Smith*, 173 Ind. 388, 90 N. E. 607 (1909); *State ex rel. Cary v. Langum*, 112 Minn. 121, 127 N. W. 465 (1910); *Re Peterson*, 19 Idaho, 433, 33 L.R.A.(N.S.) 1067, 113 Pac. 729 (1911); *State v. Abbott*, 87 S. C. 466, 33 L.R.A.(N.S.) 112, 70 S. E. 6, Ann. Cas. 1912B, 1189 (1911); *Spencer v. State*, 125 Tenn. 64, 38 L.R.A.(N.S.) 680, 140 S. W. 597 (1911); *State ex rel. Dawson v. Sapp*, 87 Kan. 740, 42 L.R.A.(N.S.) 249, 125 Pac. 78 (1912); *Daniel v. Persons*, 137 Ga. 826, 74 S. E. 260 (1912); *State v. Sturgis*, 110 Me. 96, 43 L.R.A.(N.S.) 443, 85 Atl. 474 (1912); *State v. Talberth*, 109 Me. 575, 85 Atl. 296 (1912); *Fuller v. State*, 100 Miss. 811, 39 L.R.A.(N.S.) 247, 57 So. 806, Ann. Cas. 1914A, 98 (1912); *Ex parte Bugg*, 163 Mo. App. 44, 145 S. W. 831 (1912); *Snodgrass v. State*, 67 Tex. Crim. Rep. 615, 41 L.R.A.(N.S.) 1144, 150 S. W. 162 (1912); *Roberts v. Wansley*, 137 Ga. 439, 73 S. E. 654 (1912); *Hancock v. Rogers*, 140 Ga. 638, 79 S. E. 558 (1913); *Brabandt v. Com.* 157 Ky. 130, 162 S. W. 786 (1914); *Re Hart*, 29 N. D. 38, L.R.A.1915C, 1169, 149 N. W. 568 (1914); *Reese v. Olsen*, 44 Utah, 318, 139 Pac. 941 (1914).

² *State v. Addy*, 43 N. J. L. 113, 39 Am.

Rep. 547 (1881); *People v. Mueller*, 15 Chicago Leg. News, 364 (1883); *Com. v. Maloney*, 145 Mass. 205, 13 N. E. 482 (1887); *Ex parte Williams*, 26 Fla. 310, 8 So. 425 (1890); *State v. Crook*, 115 N. C. 760, 29 L.R.A. 260, 20 S. E. 513 (1894); *State v. Whitt*, 117 N. C. 804, 23 S. E. 452 (1895); *People ex rel. Dunigan v. Webster*, 14 Misc. 617, 36 N. Y. Supp. 745 (1895); *Weber v. State*, 58 Ohio St. 616, 41 L.R.A. 472, 51 N. E. 116 (1898); *Schaefer v. State*, 7 Ohio C. C. N. S. 292, 27 Ohio C. C. 791 (1905); *Re Lee*, 3 Ohio N. P. N. S. 533, 16 Ohio S. & C. P. Dec. 259 (1905); *State v. Hilton*, 151 N. C. 687, 65 S. E. 1011 (1909); *State ex rel. Buckley v. Drew*, 75 N. H. 402, 74 Atl. 875 (1909); *State ex rel. O'Connor v. Drew*, 75 N. H. 604, 76 Atl. 191 (1910); *Re Hinson*, 156 N. C. 250, 36 L.R.A.(N.S.) 352, 72 S. E. 310 (1911); *State ex rel. Gehrman v. Osborne*, 79 N. J. Eq. 430, 82 Atl. 424 (1911); *People v. Goodrich*, 149 N. Y. Supp. 406 (1914); *State v. Tripp*, 168 N. C. 150, 83 S. E. 630 (1914); *State v. Johnson*, 169 N. C. 311, 84 S. E. 767 (1915). See *Greene v. State*, 88 Ark. 290, 114 S. W. 477 (1908); *Joiner v. State*, 94 Ark. 198, 126 S. W. 723 (1910); *People v. Patrick*, 118 Cal. 332, 50 Pac. 425 (1897); *Com. ex rel. Nuber v. Keeper*, 6 Pa. Super. Ct. 420 (1898); *Com. v. Dunleavy*, 16 Pa. Super. Ct. 380 (1901).

the opinion in the only case in which the subject was considered, it was expressly decided the power was wanting. *United States v. Wilson*, 46 Fed. 748 (1891). It is true that in the District of Columbia the existence of the power was maintained. *Miller v. United States*, 41 App. D. C. 52 (1913). But the unsoundness of the grounds upon which the conclusion was based is demonstrated by what we have previously said; and, aside from this, as the subject was covered by an act of Congress conferring power of parol (Act of June 25, 1910, 36 Stat. at L. 864, chap. 433), the case requires no further consideration.

4. The duty to recognize the power as lawful because of its exertion in practice by the state and Federal courts, and the implications arising therefrom.

There is no doubt that in some states, without reference to probation legislation or an affirmative recognition of any doctrine supporting the power, it was originally exerted, and the right to continue to do so came to be recognized solely as the result of the prior practice. *State ex rel. Gehrman v. Osborne*, 79 N. J. Eq. 430, 82 Atl. 424.

As to the courts of the United States, in one of the circuits, the first, especially in the Massachusetts district, it is admitted the practice has in substance existed for probably sixty years, as the result of a system styled "laying the case on file." The origin of this system is not explained, but it is stated in the brief supporting the practice that courts of the United States have considered the existing state laws as to probation, and have endeavored in a certain manner to conform their action thereto. It is true, also, that in the courts of the United States, sometimes in one or more districts in a circuit and sometimes in other circuits, in many instances the power here asserted was exerted, it would seem without any question, there being no objection raised by the representatives of the United States; indeed, it is said that in Ohio, where the power, as we have seen, was recognized as existing, it was exerted by Mr. Justice Matthews of this court when sitting at circuit, and there and elsewhere, it is pointed out, the power was also exerted in some instances by other judges then or subsequently members of this court. But yet it is also true that, numerous as are the instances of the exertion of the power, the practice was by no means universal, many United States judges, even in a district where the power had been exerted, on a change of incumbency, persistently refusing to exert the power on the

ground that it was not possessed. Indeed, so far was this the case that we think it may be said that the exertion of the power under the circumstances stated was intermittent, and was not universal, but partial.

As amply shown by the case before us, we think also it is apparent that the situation thus described was brought about by the scrupulous desire of judges not to abuse their undoubted discretion as to granting new trials, and yet to provide a remedy for conditions in cases where a remedy was called for in the interest of the administration of the criminal law itself, as well as by the most obvious considerations of humanity and public well-being,—conditions arising in the nature of things from the state of proof in cases coming before them which could not possibly have been foreseen and taken into consideration by the law-making mind in fixing in advance the penalty to be imposed for a particular crime. And the force of this conclusion will become more manifest by considering that nowhere except sporadically was any objection made to the practice by the prosecuting officers of the United States, who, indeed, it is said, not infrequently invoked its exercise. Albeit this is the case, we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things,* amounts to a refusal by the judicial power to perform a duty resting upon it, and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution. The fact that it is said in argument that many persons, exceeding two thousand, are now at large who otherwise would be imprisoned as the result of the exertion of the power in the past, and that misery and anguish and miscarriage of justice may come to many innocent persons by now declaring the practice illegal, presents a grave situation. But we are admonished that no authority exists to cure wrongs resulting from a violation of the Constitution in the past, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instrument in the future. On the contrary, so far as wrong resulting from an attempt to do away with the consequences of the mistaken exercise of the power in the past is concerned, complete remedy may be afforded by the exertion of the pardoning power; and, so far as the future is concerned, that is, the causing of the imposition of penalties as fixed to be subject, by probation legislation or such other means as the legislative mind may devise, to such judicial discretion as may be adequate to enable courts to

meet, by the exercise of an enlarged but wise discretion, the infinite variations which may be presented to them for judgment, recourse must be had to Congress, whose legislative power on the subject is, in the very nature of things, adequately complete.

While the conclusions just stated inevitably exact that the rule which is before us be made absolute and that the mandamus issue, nevertheless we are of opinion that the exceptional conditions which we have described require that we exercise that reasonable discretion with which we are vested to temporarily suspend the issue of the writ so as to afford ample time for executive clemency or such other action as may be required to meet the situation. And for this purpose the issue of the writ will be stayed until the end of this term, unless the United States otherwise requests, when it will go as a matter of course.

Rule made absolute.

(212 U. S. 272)

LONG SAULT DEVELOPMENT COMPANY, Plff. in Err.,

v.

HOMER D. CALL (as Successor of John J. Kennedy), as Treasurer of the State of New York, Deft. in Err.

COURTS $\hookrightarrow$ 394(9)—ERROR TO STATE COURT—FEDERAL QUESTION—DECISION ON NON-FEDERAL GROUND—IMPAIRING CONTRACT OBLIGATIONS.

A decision of the highest court of the state refusing to recognize the existence of alleged property rights of the Long Sault Development Company in the bed and waters of the St. Lawrence river, purporting to have been granted by N. Y. Laws 1907, chap. 355, is not reviewable in the Federal Supreme Court on the theory that contract obligations were impaired by the effect given by the state court to the repealing act (N. Y. Laws 1913, chap. 452), where such decision was based upon the ground that irrespective of, and without reference to, the subsequent repealing legislation, the original grant was an unconstitutional attempt by the state to bargain away lands under navigable waters to a private corporation agreeing to maintain navigation thereover "in as good condition as . . . at present," thereby parting with its power to improve such navigation, and in effect abdicating the trust upon which the state held control over the river as navigable water.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1055; Dec. Dig. $\hookrightarrow$ 394(9).]

[No. 49.]

Argued April 14 and 17, 1916. Reargued October 31, 1916. Decided December 11, 1916.

IN ERROR to the Supreme Court of the State of New York in and for the County of Albany, in that state, to review a judgment entered pursuant to the mandate of the Court of Appeals, which affirmed a judgment of the Appellate Division of the Supreme Court for the Third Department, affirming orders of the Supreme Court at a Special Term, denying the application of a corporation for a writ of mandamus to compel the treasurer of the state to recognize the validity of the statute incorporating such corporation. Dismissed for want of jurisdiction.

See same case below, in appellate division, 158 App. Div. 398, 143 N. Y. Supp. 454; in court of appeals, 212 N. Y. 1, 105 N. E. 849, Ann. Cas. 1915D, 56.

The facts are stated in the opinion.

Messrs. Henry W. Taft and Francis Sims McGrath for plaintiff in error.

Messrs. Merton E. Lewis, C. T. Dawes, and Mr. E. E. Woodbury, Attorney General of New York, for defendant in error.

* Mr. Justice Clarke delivered the opinion of the court:

This proceeding was commenced in the supreme court of New York by the Long Sault Development Company, hereinafter called the plaintiff, for the purpose of testing the constitutionality of an act of the legislature of that state, passed in 1907, to incorporate the plaintiff and to grant to it important rights in the bed of, and with respect to the use of the waters of, the St. Lawrence river. Laws of 1907, chap. 355.

The case is now in this court on the claim that this Act of 1907 is a valid law, and that the property rights springing from the grants therein and the acceptance of them by the plaintiff were impaired by a later act, passed in 1913, purporting to repeal the Act of 1907, and by the effect given to this later act by the decision of the court of appeals, rendered in June, 1914.

The title of the Act of 1907 indicates the comprehensive character of the grants which the legislature attempted to make by it. It reads as follows: "An Act to Incorporate the Long Sault Development Company, and to Authorize Said Company to Construct and Maintain Dams, Canals, Powerhouses, and Locks at or near Long Sault Island, for the Purpose of Improving the Navigation of the St. Lawrence River and Developing Power from the Waters Thereof, and to Construct and Maintain a Bridge, and Carry on the Manufacture of Commodities."

The act proceeds, first, to incorporate the Long Sault Development Company, giving it perpetual corporate*existence, and then in terms to authorize it to construct, main-

tain, and operate dams, canals, reservoirs, and the appurtenances necessary or useful for the purpose of developing water power and electrical energy, at such point or points adjacent to the south shore of the St. Lawrence river, and in and upon the river bed near Long Sault island or Barnhart's island, as may be selected by the company; to erect and maintain power houses and electrical transmission appliances; and to construct a bridge or bridges across the river, in connection with the dam authorized, and to charge tolls for passage thereon.

These important rights are declared to be granted upon various specified conditions, the most important of which is "that the rights hereby granted shall never be so used as to impair or obstruct the navigation of the Saint Lawrence river, but, on the contrary, that such navigation shall be preserved in as good condition as, if not better than, the same is at present, regard being always had to the amount of the natural flow of water in said river as affecting its navigability from time to time." [Section 3.]

The act further provides that, after the Congress of the United States shall authorize the construction of the proposed dams, locks, and canals, and after the payment of certain sums of money into the state treasury, then the Commissioners of the Land Office shall, upon application of said corporation, "*grant unto it the title and interest of the people of the state in and to lands under the waters of the Saint Lawrence river to be covered or occupied by said works and locks and power houses.*" [Section 4.] The payments to be made, after the year 1911, shall be not less than \$25,000 for each year. The petition alleges that the river at Long Sault rapids is now practically unnavigable, being navigated only by light draft passenger vessels down stream during the summer tourist season, and that all other traffic up and down the river passes around the rapids by way of the Cornwall canal, on the Canadian side of the river.

* * The plaintiff was duly organized as a corporation, and expended a large sum of money in preparing to utilize the grants of the act.

By an act which became a law on the 8th day of May, 1913, the legislature of the state in terms repealed this Act of 1907, under which the plaintiff in error is claiming.

Almost three months before this repealing act was passed, this suit was commenced by the filing of a petition in the supreme court of New York, praying for a writ of mandamus, to be directed to the treasurer of that state, requiring him to receive as a

payment into the treasury of the state the sum of \$25,000, as a sum due and payable on February 1st, 1913, for the year 1912, under the provisions of the Act of 1907, which sum had theretofore been tendered to the treasurer and had been by him refused, for the reason, it is alleged, that he had been advised by the attorney general of the state that said act was unconstitutional and void. The application of the petitioner for a writ of mandamus was denied by the supreme court, and this decision was affirmed by the appellate division and by the court of appeals, which ordered the record in the case remitted to the supreme court, to be proceeded upon according to law.

Up to this time there is nothing in the record before us to indicate that any question was presented to the state courts, excepting the single one as to whether or not the Act of 1907 was valid under the Constitution of the state of New York.

More than a month later, on the 14th day of July, 1914, the court of appeals, on motion of the plaintiff, requested the supreme court to return the remittitur to the court of appeals, which court then amended the same by incorporating therein the statement that "upon the argument of the appeal in this cause before the court of appeals" there was submitted a brief, containing five*specified points. Of these in "Point III." alone counsel for the plaintiff for the first time, and then only by way of argument, attempt to present a Federal question by claiming that if the repealing act is to be regarded as an attempted condemnation of the special franchises claimed by the plaintiff, it "would be unconstitutional in that such franchises were not taken by the state for public use," in violation of the 14th Amendment to the Constitution of the United States.

It is significant to note that the court of appeals, in its decision, rendered before the remittitur was thus amended, did not treat or regard the repealing act as "an attempted condemnation of the special franchises claimed by the plaintiff," nor did it afterwards so treat it.

Upon the record thus described the plaintiff in error comes into this court, claiming that the act of the legislature of the state of New York of 1907 is a valid, constitutional law, and that, it having been accepted and acted upon by the plaintiff, contract and other property rights resulted which, under the decision of the court of appeals, have been impaired or taken away by the repealing act of 1913, in violation of the Constitution of the United States and of the 14th Amendment thereto, and it therefore prays for a reversal of the judgment of

the supreme court, entered pursuant to the decision of the court of appeals.

The defendant in error meets this claim of the plaintiff by a denial of the jurisdiction of this court, for the claimed reason that the court of appeals reached the conclusion that the Act of 1907 was unconstitutional and void without reference to, and without giving any effect to, the subsequent repealing statute.

The grants of the Act of 1907 are such that, if it was a valid law, upon their being accepted, they constituted property or contract rights, of which the plaintiff could not be deprived, and which could not be impaired, by* subsequent legislation, and, therefore, the denial by the defendant in error of the jurisdiction of this court renders it necessary for us to determine whether the court of appeals, in its decision, gave any effect to the repealing act. If it did not give effect to that act, either expressly or by implication, this court is without jurisdiction to review its decision, for the reason that the provisions of the Constitution of the United States for the protection of contract rights are directed only against the impairment of them by constitutions or laws adopted or passed subsequent to the date of the contract from which such rights spring, and do not reach decisions of courts construing constitutions or laws which were in effect when the contract was entered into, as has been held by a long line of decisions extending from *Knox v. Exchange Bank*, 12 Wall. 379, 20 L. ed. 414, to *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 56 L. ed. 924, 32 Sup. Ct. Rep. 577.

In deciding this question, this court is not limited to the mere consideration of the language of the opinion of the state court, but will consider the substance and effect of the decision, and will for itself determine what effect, if any, was given by it to the repealing act. *Fisher v. New Orleans*, 218 U. S. 438, 54 L. ed. 1099, 31 Sup. Ct. Rep. 57; *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 56 L. ed. 924, 32 Sup. Ct. Rep. 577, and *Louisiana R. & Nav. Co. v. Behrman*, 235 U. S. 164, 59 L. ed. 175, 35 Sup. Ct. Rep. 62. While this court will exercise independent judgment as to the scope of the decision of the state court, it will give to that decision that respectful and sympathetic attention which is always due to the highest court of a state (*Fisher v. New Orleans*, supra), with the presumption always in mind that the state courts will do what the Constitution and laws of the United States require. *Neal v. Delaware*, 103 U. S. 370, 389, 26 L. ed. 567, 571; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 37 S. C.—6.

614, 617; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905, and *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63.

* An examination of the opinion of the court of appeals shows that the court, in its consideration of the repealing act of 1913, not only did not give to it an effect which would impair any contract relation springing from the Act of 1907, but that, on the contrary, it concluded that the repeal "could not operate to confiscate any valid franchise or property right which the Long Sault Development Company had previously acquired under the act repealed," and that this conclusion made it necessary for the court to "consider and determine whether the legislature possessed the constitutional power to convey away the state control over the navigation of the St. Lawrence river to the extent attempted by the Act of 1907." [212 N. Y. 8, 105 N. E. 849, Ann. Cas. 1915D, 56.]

And then, addressing itself to the constitutional problem thus stated, the court proceeds, upon principle and authority, to decide: That, under the Constitution of the state of New York, the power of the legislature of that state to grant lands under navigable waters to private persons or corporations is limited to purposes which may be useful, convenient, or necessary to the public; that it has no power to so part with the title to such lands that the state may not in the future improve navigation over them, if the public interest shall so require; and that they are held by the state on such a trust for the public use that the legislature has no power to authorize the conveyance of them to a private corporation to maintain navigation thereover "in as good condition as . . . at present," thereby parting for all time with its power to improve such navigation.

The court finds its principal authority for these legal positions in the decision of this court in *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, in which it was decided: That the title which a state holds to land under navigable waters is different in character from that which it holds in land intended for sale and occupation; in the former case it being held in trust for the people of the state, in order that they may enjoy the navigation of the waters and carry on commerce over them, free from obstruction or interference by private parties; that this trust devolving upon the state in the public interest is one which cannot be relinquished by a transfer of the property; that a state can no more abdicate its trust over such property, in

which the whole people are interested, so as to leave it under the control of private parties, than it can abdicate its police powers in the administration of government and the preservation of the peace, and that the trust under which such lands are held is governmental, so that they cannot be alienated, except to be used for the improvement of the public use in them.

This was a pioneer decision upon the subject at the time it was rendered by a divided court, but the principles upon which it proceeds have been frequently approved by this court. *Morris v. United States*, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649; *United States v. Mission Rock Co.* 189 U. S. 391, 406, 47 L. ed. 865, 869, 23 Sup. Ct. Rep. 606; *Kean v. Calumet Canal & Improv. Co.* 190 U. S. 452, 481, 47 L. ed. 1134, 1145, 23 Sup. Ct. Rep. 651; and they have been very widely approved by many of the highest courts of the states of the Union. *Rose's Notes on U. S. Reports*, vol. 12, p. 270; *Supp. 3*, p. 291; *Supp. 5*, p. 369.

Having arrived at these conclusions of law, the court of appeals proceeds to make application of them to the Act of 1907, and concludes that that act, in terms, virtually turns over to the corporation the entire control of the navigation of the Long Sault rapids (provided that the consent of Congress to the grant could be obtained), requiring only that the company shall pay certain stipulated sums of money, and that it shall preserve the navigation of the river "in as good condition as . . . the same is at present," and says that, no matter how much the interest of the public might demand the improvement of the river in the future, the state would be powerless to act, either directly or by constraint upon the corporation; and for this reason it concludes that the act is, in substance, an abdication of the trust upon which the state holds control over the St. Lawrence river as navigable water and that, therefore, it is unconstitutional and void. Whether this construction placed upon the act is the one which this court would place upon it if coming to an original interpretation of it, we need not inquire; for, under the authorities hereinbefore cited, the prohibition of the Constitution against the impairing of contracts by state legislation does not reach errors committed by state courts when passing upon the validity and effect of a contract under a constitution or laws existing when it is made.

This discussion of the decision by the court of appeals makes it very clear that that decision does not give any effect whatever to the repealing act of 1913, but that, wholly independent of that act, and proceeding upon sound principle and abundant au-

thority, the court arrived at the conclusion that the Act of 1907 was unconstitutional and void; and therefore it results that this case does not present any question for decision under the Federal Constitution, and that, for want of jurisdiction, the writ of error must be dismissed.

Mr. Justice McKenna and Mr. Justice Pitney dissent upon the ground that chapter 355 of the Laws of 1907 of the state of New York, creating the Long Sault Development Company and conferring upon it certain rights and franchises, when accepted, as it was, by the company, constituted a contract between the state and the company; that the repealing act and accompanying legislation passed in 1913 (chaps. 452 and 453) had the effect of impairing the obligation of that contract, in contravention of § 10 of article I of the Federal Constitution; and that effect was given to the latter legislation by the decision under review.

(242 U. S. 261)

MINERALS SEPARATION, Limited, and
Minerals Separation American Syndicate,
Limited,

v.

JAMES M. HYDE.

PATENTS 42—INVENTION—PROCESS—OIL
CONCENTRATION OF ORES—PRIOR ART —
COMMERCIAL SUCCESS.

1. The process of oil concentration of ores, as described in and practised under the Sulman-Picard-Ballot patent, No. 835,120, which consists in the use of an amount of oil which is "critical" and minute, as compared with the amount used in prior processes, "amounting to a fraction of 1 per cent on the ore," and in so impregnating with air the mass of ore and water used by agitation as to cause to rise to the surface of the mass or pulp a froth peculiarly coherent and persistent, composed of air bubbles with but a trace of oil in them, which carry in mechanical suspension a very high percentage of the metal and metalliferous particles of ore which were contained in the mass of crushed ore subjected to treatment, must be deemed to constitute a new and patentable discovery, prior processes requiring the use of so much oil that they were too expensive to be used on lean ores, to which they were intended to have their chief application, and the new process, because of its economy and simplicity, having largely replaced all the earlier processes.

[Ed. Note.—For other cases, see *Patents*, Cent. Dig. § 49; Dec. Dig. 42.]

PATENTS 93—WHO ENTITLED TO DISCOVERY—EMPLOYER AND EMPLOYEES.

2. Patentees were none the less discoverers of the process patented because an employee happened to make the analyses and observations which resulted immediately in the discovery, where the patentees

planned the experiments in progress when the discovery was made, directed the investigations day by day, conducted them in large part personally, and interpreted the results.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 125; Dec. Dig. 293.]

PATENTS 29—DESCRIPTION OF PROCESS—CERTAINTY.

3. The Sulman-Picard-Ballot patent, No. 835,120, for an improved process for oil concentration of ores, is not invalid because when different ores are treated preliminary tests must be made to determine the amount of oil and the extent of agitation necessary in order to obtain the best results, the range of treatment within the terms of the claims, while leaving something to the skill of persons applying the invention, being clearly sufficiently definite to guide those skilled in the art to its successful application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. 29.]

PATENTS 170—INVENTION — PROCESS—PRIOR STATE OF ART.

4. The prior state of the art requires that the Sulman-Picard-Ballot patent, No. 835,120, for an improved process for oil concentration of ores, be sustained only so far as it claims the results obtained by the use of oil within the proportions described therein as "critical proportions," "amounting to a fraction of 1 per cent on the ore."

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 245; Dec. Dig. 170.]

[No. 46.]

Argued October 27, 30, 31, and November 1, 1916. Decided December 11, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which reversed a decree of the District Court for the District of Montana in favor of complainants in a patent infringement suit, and remanded the case with instructions to dismiss the bill. Decree of the Circuit Court of Appeals reversed. Decree of District Court modified, and as modified affirmed.

See same case below, 130 C. C. A. 576, 214 Fed. 100.

The facts are stated in the opinion.

Messrs. Henry D. Williams, William Houston Kenyon, Lindley M. Garrison, Frederic D. McKenney, John H. Miller, and Odell W. McConnell for petitioners.

Messrs. Walter A. Scott, Thomas F. Sheridan, George L. Wilkinson, K. R. Babbitt, J. Bruce Kremer, and John F. Neary for respondent.

* * Mr. Justice Clarke delivered the opinion of the court:

In this suit the complainants, the first named as the owner and the other as general licensee, claim an *infringement of United States letters patent No. 835,120,

issued on the 6th day of November, 1906, to Henry Livingstone Sulman, Hugh Fitzalis Kirkpatrick-Picard, and John Ballot. The usual injunction, accounting, and damages are prayed for. The district court sustained the patent as to claims numbered 1, 2, 3, 5, 6, 7, 9, 10, 11, and 12; found that the defendant had infringed each of these claims, and granted the prayer of the petition. The circuit court of appeals for the ninth circuit reversed the decree of the district court and remanded the case with instructions to dismiss the bill. The case is here on writ of certiorari to review that decision.

As stated in the specification, the claimed discovery of the patent in the suit relates "to improvements in the process for the concentration of ores, the object being to separate metalliferous matter from gangue by means of oils, fatty acids, or other substances which have a preferential affinity for such metalliferous matter over gangue."

The answer denies all of the allegations of the bill and avers that in twenty-five designated United States and five British patents the process described in suit was "fully and clearly described and claimed;" and it also avers that the claimed discovery was invented, known, and used by many persons long prior to the time when the application was made for the patent in suit. Notwithstanding this elaboration of denial, counsel for the defendant in the summarized conclusion to their brief rely upon only five of the many patents referred to as showing that the patent in suit was anticipated and is therefore invalid for want of novelty and invention, viz.: Everson (1886), Froment (Italy, 1902; Great Britain, 1903), Glogner (1903), Schwarz (applied for April 19, 1905, issued December 19, 1905), and Kirby (applied for October 17, 1903, issued December 18, 1906). And the defendant, a man obviously experienced in the subject, says that, in his opinion, the *whole basis of flotation concentration was disclosed in the Everson United States patent No. 348,157 and in the Froment British patent.

It is clear that in the prior art, as it is developed in this record, it was well known that oil and oily substances had a selective affinity or attraction for, and would unite mechanically with, the minute particles of metal and metallic compounds found in crushed or powdered ores, but would not so unite with the quartz, or rocky nonmetallic material, called "gangue." Haynes British patent (1860), and United States patents, Everson (1885), Robson (1897), and Elmore (1901). It was also well known that this selective property of oils and oily substances was increased when ap-

plied to some ores by the addition of a small amount of acid to the ore and water used in process of concentration. United States patents, Everson (1885), Elmore (1901), and Cattermole (1904).

Prior to the date of the patent in suit a number of patents had been granted in this and other countries for processes aiming to make practical use of this property of oil and of oil mixed with acid in the treatment of ores, all of which, speaking broadly, consisted in mixing finely crushed or powdered ore with water and oil, sometimes with acid added, and then in variously treating the mass—"the pulp"—thus formed so as to separate the oil, when it became impregnated or loaded with the metal and metal-bearing particles, from the valueless gangue. From the resulting concentrate the metals were recovered in various ways.

The processes, of this general character, described in the prior patents, may be roughly divided into two classes. The process in the patents of the first class is called in the record the "surface flotation process," and it depends for its usefulness on the oil used being sufficient to collect and hold in mechanical suspension the small particles of metal and metalliferous compounds, and by its buoyancy to carry them to the surface of the mixture of ore, water, and oil, thus making it possible, by methods familiar to persons skilled in the art, to float off the concentrate thus obtained into any desired receptacle. The waste material, or gangue, not being affected by the oil, and being heavier than water, sinks to the bottom of the containing vessel and may be disposed of as desired.

The process of the other class, called in the record the "metal sinking process," reverses the action of the surface flotation process and is illustrated by the Cattermole U. S. patent, No. 777,273, in which oil is used to the extent of 4 per cent to 6 per cent to 10 per cent of the weight of the metalliferous mineral matter, depending on the character of the ore, for the purpose of agglomerating the oil-coated concentrate into granules heavier than water, so that they will sink to the bottom of the containing vessel, permitting the gangue to be carried away by an upward flowing stream of water.

The process of the patent in suit, as described and practised, consists in the use of an amount of oil which is "critical," and minute as compared with the amount used in prior processes, "amounting to a fraction of 1 per cent on the ore," and in so impregnating with air the mass of ore and water used, by agitation—"by beating the air into the mass"—as to cause to rise to the surface of the mass, or pulp, a froth,

peculiarly coherent and persistent in character, which is composed of air bubbles with only a trace of oil in them, which carry in mechanical suspension a very high percentage of the metal and metalliferous particles of ore which were contained in the mass of crushed ore subjected to treatment. This froth can be removed and the metal recovered by processes with which the patent is not concerned.

It is obvious that the process of the patent in suit, as we have described it, is not of the metal sinking class, and while it may, in terms, be described as a surface flotation process, yet it differs so essentially from all prior processes in its character, in its simplicity of operation, and in the resulting concentrate, that we are persuaded that it constitutes a new and patentable discovery.

The prior processes which we have described required the use of so much oil that they were too expensive to be used on lean ores, to which they were intended to have their chief application, and the efforts of investigators for several years prior to the discovery of the process in suit had been directed to the search for a means or method of reducing the amount of oil used; and it is clear from the record that approach was being made, slowly, but more and more nearly, to the result which was reached by the patentees of the process in suit in March, 1905. The Froment Great Britain patent (1903) and the Kirby United States patent (applied for in 1903 and granted in 1906) are especially suggestive of the advance which was being made toward the desired result, but the Froment process was little more than a laboratory experiment, and has never proved of value in practice, and the Kirby process, though approaching in some respects more nearly to the end attained by the process of the patent in suit, found its preferred application in the use of an amount of oil solution equal to one fourth to three fourths in weight of the ore treated, which was prohibitive in cost.

Into this field of investigation at this stage of its development came the patentees of the patent in suit. They were experienced metallurgists of London, of inventive genius and with financial resources, and they entered upon an investigation of the processes of oil concentration of ores which was continued through several years, and consisted of a very extended series of experiments in which the quantities of oil, of water, and of acid used and the extent and character of the agitation of the mass under treatment resorted to, were varied to an almost unparalleled extent as to each factor, and the results were carefully tabu-

lated and interpreted. It was while pursuing a comprehensive investigation of this character, having, as the evidence shows, the special purpose in mind at the time to trace the effect on the results of the process of a reduction to the vanishing point of the quantity of oil used, that the discovery embodied in the patent in suit was made. The experimenters were working on the Cattermole "metal sinking process" as a basis when it was discovered that the granulation on which the process depended practically ceased when the oleic acid (oil) was reduced to about $\frac{1}{10}$ of 1 per cent "on the ore." It was observed, however, that, as the amount of oleic acid was further reduced and the granulation diminished, there was an increase in the amount of "float froth," which collected on the surface of the mass, and that the production of this froth reached its maximum when about $\frac{1}{10}$ of 1 per cent or slightly less "on the ore" of oleic acid was used. This froth, on collection, was found to consist of air bubbles modified by the presence of the minute amount of oil used, and holding in mechanical suspension between 70 per cent and 80 per cent of the total mineral content of the mass treated. It was promptly recognized by the patentees that this froth was not due to the liberation of gas in the mass treated by the action of the dilute acid used, and its formation was at once attributed in large part to the presence of the air introduced into the mixture by the agitation which had been resorted to to mix the oil with the particles of crushed ore, which air, in bubbles, attached itself to the mineral particles, slightly coated as they were with what was necessarily an infinitesimal amount of oil, and floated them to the surface. The extent of the agitation of the mass had been increased as the experiments proceeded until the "series of Gabbett mixers, fitted with the usual baffles, were speeded at from 1,000 to 1,100 revolutions per minute."

* A careful consideration of the record in this case convinces us that the facts with respect to the process of the patent in suit are not overstated by the plaintiffs' witness, Adolph Liebmann, an expert of learning and experience, when he says in substance:

"The present invention differs essentially from all previous results. It is true that oil is one of the substances used, but it is used in quantities much smaller than was ever heard of, and it produces a result never obtained before. The minerals are obtained in a froth of a peculiar character, consisting of air bubbles which, in their covering film, have the minerals embedded in such manner that they form a complete surface all over the bubbles. A remarkable fact

with regard to this froth is that, although the very light and easily destructible air bubbles are covered with a heavy mineral, yet the froth is stable and utterly different from any froth known before, being so permanent in character that I have personally seen it stand for twenty-four hours without any change having taken place. The simplicity of the operation, as compared with the prior attempts, is startling. All that has to be done is to add a minute quantity of oil to the pulp, to which acid may or may not be added, agitate for from two and one half to ten minutes, and then, after a few seconds, collect from the surface the froth, which will contain a large percentage of the minerals present in the ore."

It is not necessary for us to go into a detailed examination of the process in suit to distinguish it from the processes of the patents relied on as anticipations, convinced as we are that the small amount of oil used makes it clear that the lifting force which separates the metallic particles of the pulp from the other substances of it is not to be found principally in the buoyancy of the oil used, as was the case in prior processes, but that this force is to be found, chiefly, in the buoyancy of the air bubbles introduced into the mixture by an agitation greater than and*different* from that which had been resorted to before, and that this advance on the prior art and the resulting froth concentrate so different from the product of other processes make of it a patentable discovery as new and original as it has proved useful and economical. It results without more discussion, that we fully agree with the decision of the House of Lords, arrived at upon a different record and with different witnesses, but when dealing with the equivalent of the patent in suit, in *Minerals Separations v. British Ore Concentration Syndicate*, 27 R. P. C. 33. In this decision Lord Shaw, speaking for the court and distinguishing the process there in suit especially from the Elmore oil flotation process, which had gone before, but which was typical of the then prior art, said: "They (the patentees of the agitation froth process of the patent in suit) are not promoting a method of separation which had before been described, but they are engaged upon a new method of separation. Instead of relying upon the lesser specific gravity of oil in bulk, they rely upon the production of a froth by means of an agitation which not only assists the process of the minute quantities of oil reaching the minute particles of metal, but forms a multitude of air cells, the buoyancy of which air cells, form-

ing around single particles of the metal, floats them to the surface of the liquid."

And Lord Atkinson said: "In their process this mysterious affinity of oil for the metallic particles of the ore is availed of, yet the oil is used in such relatively infinitesimal quantities that the metallic particles are only coated with a thin film of it, and the lifting force is found not in the natural buoyancy of the mass of added oil, but in the buoyancy of air bubbles, which, introduced into the mixture by the more or less violent agitation of it, envelop or become attached to, the thinly oiled metallic particles, and raise them to the surface, where they are maintained by what is styled the surface tension of the water."

* The record shows not only that the process in suit was promptly considered by the patentees as an original and important discovery, but that it was immediately generally accepted as so great an advance over any process known before that, without puffing or other business exploitation, it promptly came into extensive use for the concentration of ores in most, if not all, of the principal mining countries of the world, notably in the United States, Australia, Sweden, Chile, and Cuba, and that, because of its economy and simplicity, it has largely replaced all earlier processes. This, of itself, is persuasive evidence of that invention which it is the purpose of the patent laws to reward and protect. *Diamond Rubber Co. v. Consolidated Rubber Tire Co.* 220 U. S. 428, 55 L. ed. 527, 31 Sup. Ct. Rep. 444; *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 429, 430, 46 L. ed. 968, 983, 22 Sup. Ct. Rep. 698; *Barbed Wire Patent (Washburn & M. Mfg. Co. v. Beat Em All Barbed Wire Co.)* 143 U. S. 275, 36 L. ed. 154, 12 Sup. Ct. Rep. 443, 450; *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, 23 L. ed. 952.

The claim that the patentees of the patent in suit are not the original discoverers of the process patented because an employee of theirs happened to make the analyses and observations which resulted immediately in the discovery cannot be allowed. The record shows very clearly that the patentees planned the experiments in progress when the discovery was made; that they directed the investigations day by day, conducting them in large part personally, and that they interpreted the results. *Agawam Woolen Co. v. Jordan*, 7 Wall, 583-603, 19 L. ed. 177-182, rules this claim against the defendant.

Equally untenable is the claim that the patent is invalid for the reason that the evidence shows that when different ores are treated preliminary tests must be made to determine the amount of oil and the ex-

tent of agitation necessary in order to obtain the best results. Such variation of treatment must be within the scope of the claims, and the certainty which the law requires in patents is not greater than is reasonable, having regard to their subject-matter.* The composition of ores varies infinitely, each one presenting its special problem, and it is obviously impossible to specify in a patent the precise treatment which would be most successful and economical in each case. The process is one for dealing with a large class of substances and the range of treatment within the terms of the claims, while leaving something to the skill of persons applying the invention, is clearly sufficiently definite to guide those skilled in the art to its successful application, as the evidence abundantly shows. This satisfies the law. *Mowry v. Whitney*, 14 Wall. 620, 20 L. ed. 860; *Ives v. Hamilton*, 92 U. S. 426, 23 L. ed. 494; and *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 436, 437, 46 L. ed. 968, 985, 936, 22 Sup. Ct. Rep. 698.

The evidence of infringement is clear.

While we thus find in favor of the validity of the patent, we cannot agree with the district court in regarding it valid as to all of the claims in suit. As we have pointed out in this opinion, there were many investigators at work in this field to which the process in suit relates when the patentees came into it, and it was while engaged in study of prior kindred processes that their discovery was made. While the evidence in the case makes it clear that they discovered the final step which converted experiment into solution, "turned failure into success" (*Barbed Wire Patent [Washburn & M. Mfg. Co. v. Beat Em All Barbed Wire Co.]* 143 U. S. 275, 36 L. ed. 154, 12 Sup. Ct. Rep. 443, 450), yet the investigations preceding were so informing that this final step was not a long one, and the patent must be confined to the results obtained by the use of oil within the proportions often described in the testimony and in the claims of the patent as "critical proportions," "amounting to a fraction of 1 per cent on the ore," and therefore the decree of this court will be that the patent is valid as to claims No. 1, 2, 3, 5, 6, 7, and 12, and that the defendant infringed these claims, but that it is invalid as to claims 9, 10, and 11. Claims No. 4, 8, and 13 were not considered in the decrees of the two lower courts and are not in issue in this proceeding.

* The decision of the Circuit Court of Appeals will be reversed, and the decision of the District Court, modified to conform to the conclusions expressed in this opinion, will be affirmed.

(242 U. S. 238)

DETROIT UNITED RAILWAY, Plff. in
Err.,
v.
PEOPLE OF THE STATE OF MICHIGAN.
(No. 1.)

DETROIT UNITED RAILWAY, Plff. in
Err.,
v.
CITY OF DETROIT. (No. 4.)

COURTS ⇐394(9)—ERROR TO STATE COURT
—FEDERAL QUESTION—IMPAIRING CON-
TRACT OBLIGATIONS—DECISION ON NON-
FEDERAL GROUND.

1. A decision of the highest court of the state that reduced street railway fares must be given in the territory annexed to Detroit by Mich. Acts of June 16, 1905 (Loc. Acts 1905, No. 655) June 19, 1907 (Loc. Acts 1907, No. 665) and October 24, 1907 (Acts [Ex. Sess.] No. 1) on lines operated there under village and township franchises which had theretofore been acquired by the Detroit United Railway, under the authority of Mich. Comp. Laws 1897, § 6448, necessarily gives effect to the annexation acts so as to sustain a writ of error from the Federal Supreme Court, where the Detroit United Railway contends that it had a right, under such village and township franchises, protected by the contract clause of the Federal Constitution, to charge a higher fare, although the state court rests its decision upon the theory that the terms of such franchises had been modified by the assent of the predecessors of the Detroit United Railway to city ordinances for the extension of their lines in certain other previously annexed territory, which contain stipulations for a single fare and reduced rates over "the entire route," or over "any of its lines in said city," and by the subsequent acquisition of these lines by the Detroit United Railway, followed by its acquisition of the suburban lines in question.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1055; Dec. Dig. ⇐394(9).]

COURTS ⇐399(1)—ERROR TO STATE COURT
—SCOPE OF REVIEW — IMPAIRING CON-
TRACT OBLIGATIONS.

2. When the Federal Supreme Court is called upon, in the exercise of its appellate jurisdiction over state courts, to decide whether state legislation impairs the obligation of a contract, it is required to determine upon its independent judgment (1) Was there a contract? (2) If so, what obligation arose from it? (3) Has that obligation been impaired by subsequent legislation?

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1089; Dec. Dig. ⇐399(1).]

CONSTITUTIONAL LAW ⇐135—IMPAIRING
CONTRACT OBLIGATIONS—STREET RAIL-
WAY FARE IN ANNEXED TERRITORY.

3. Contract obligations of the Detroit United Railway, which, under the authority of Mich. Comp. Laws 1897, § 6448, had acquired, with all their "rights, privileges, and franchises," certain suburban lines operating under village and township grants contractual in their nature, fixing the fares to be charged, were unconstitutionally im-

paired by the effect given to the Detroit annexation acts (Mich. Acts of June 16, 1905, June 19, 1907, and October 24, 1907) by a decision of the highest state court requiring reduced fares to be put in force in such annexed territory on these suburban lines on the theory that the terms of said village and township grants had been modified by the assent of the predecessors of the Detroit United Railway to city ordinances for the extension of their respective lines in certain other previously annexed territory, which contain stipulations for single fares and reduced rates over the "entire route" or "any of its lines in said city," and by the subsequent acquisition of these lines by the Detroit United Railway, followed by its acquisition of the suburban lines in question.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 380-387; Dec. Dig. ⇐135.]

[Nos. 1 and 4.]

Argued October 20, 1916. Decided December 11, 1916.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a conviction of a street railway company in the Recorder's Court for the City of Detroit of having failed to accept workmen's tickets on its lines within certain annexed territory. Reversed and remanded for further proceedings. Also

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a judgment of the Circuit Court of Wayne County, in that state, awarding a mandamus to compel a street railway company to observe the provisions of the Detroit ordinances respecting fares upon its lines in certain annexed territory. Reversed and remanded for further proceedings.

See same case below in No. 1, 162 Mich. 460, 139 Am. St. Rep. 582, 125 N. W. 700, 127 N. W. 748; in No. 4, 173 Mich. 314, 139 N. W. 56.

The facts are stated in the opinion.

Messrs. Elihu Root, John C. Donnelly, William L. Carpenter, Fred A. Baker, and Henry L. Lyster for plaintiff in error.

Messrs. P. J. M. Hally and Harry J. Dingeman for defendants in error.

* Mr. Justice Pitney delivered the opinion* of the court:

These two cases involve identical questions, were argued together, and may be disposed of in a single opinion. They concern the rates of fare that may be charged by plaintiff in error upon certain street railway lines within the present limits of the city of Detroit, and in both cases it is insisted that the state court of last resort has given such an effect to statutes enacted in the years 1905 and 1907 for extending

the corporate limits as to impair the obligation of the contracts contained in franchises theretofore granted by the governing authorities of the annexed territory to the predecessors in title of plaintiff in error.

Plaintiff in error was incorporated December 28, 1900, under the Street Railway Act of 1867 and amendments thereto (1 Mich. Laws 1867, p. 46; Comp. Laws 1897 chap. 168), for the purpose, as its corporate name indicates, of acquiring, maintaining, and operating various lines theretofore constructed by other companies. Section 15 of the Act (Comp. Laws, § 6448) provides that any street railway company may purchase and acquire any street railway in any city, village, or township owned by another corporation, together with the rights, privileges, and franchises thereof, "and may use and enjoy the rights, privileges, and franchises of such company, the same, and upon the same terms as the company whose road and franchises were so acquired might have done." Under this authority it shortly thereafter acquired and united under one organization certain lines previously constructed and operated independently throughout the city and its suburbs under different and distinct franchises, of which the following is a summary:

In November, 1862, the city, by ordinance, granted to the incorporators of the Detroit City Railway the right to construct railways in certain streets, including Jefferson avenue, which extends from the center of the city in a northeasterly direction to and beyond the city limits. All the lines authorized were to commence at Campus Martius, and run thence on their several courses to the city limits, and the route along Jefferson avenue to the eastern limits was to be completed within six months after March 31, 1863. In 1873 a section was added authorizing the construction of a second track along Jefferson avenue. In 1862 the city limits on Jefferson avenue were at Mt. Elliott avenue. In 1885 they were extended to a point 200 feet east of Baldwin avenue, and while they remained as thus fixed, and in the year 1889, a supplemental ordinance was passed granting to the Detroit City Railway, among other things, the right to extend its double track along Jefferson avenue from its then present easterly terminus to the easterly city limits, and fixing a time within which the same should be constructed. There was a provision that the additional lines should be operated in connection with and as parts of the then present system of the Detroit City Railway, and that the company should agree, among other things, to make arrangements for carrying passengers between the hours of 5:30 and 7:00 A. M., and between 5:15 and 6:15 P. M., over any of its lines in the city

for a single fare upon tickets sold at the rate of eight for 25 cents, with specified transfer rights.

In 1891 the city limits were further extended along Jefferson avenue to Hurlburt avenue, which was the easterly line of the township of Hamtramck. The railroad on Jefferson avenue in the territory covered by this extension was constructed under franchises granted by the authorities of that township, respecting which no question is now raised.

From Hurlburt avenue eastwardly to the Country Club in the township of Grosse Point—a distance of about $4\frac{1}{2}$ miles—the railroad on Jefferson avenue was constructed under several grants made by the township and village of Grosse Point and the village of Fairview, in the years 1891, 1893, and 1895, and further powers were conferred upon plaintiff in error, after its acquisition of these lines, by ordinance of the village of Fairview, passed May 16, 1905. These several village and township grants were for terms that have not yet expired, and contain provisions for 5-cent fares within the territory covered by them.

The Jefferson avenue lines are operated together as a single system in connection with lines leading from the city northwardly on Grand River avenue to and beyond the city limits, constructed under rights derived by predecessors in title of plaintiff in error, as follows:

By ordinance of May 1, 1868, the city granted to the incorporators of the Grand River Street Railway Company the right to construct lines on certain streets, including Grand River avenue to its intersection with the Michigan Central Railway at or near the then present city limits, with the right to build a second track within five years after the completion of the first. By § 8 this line was to be completed to a specified point contemporaneously with the paving of the street, and thence to the western city limits whenever public necessity, as determined by the common council, should require. By Acts of 1875 and 1885 the limits were extended from the railroad intersection to a point just beyond the Boulevard. By ordinance of August 3, 1888, there was granted the right to construct single tracks on Grand River avenue from its then present terminus to the westerly city limits, and by ordinance of January 3, 1889, the city granted the right, among others, to construct a double track railway on Grand River avenue from Woodward avenue to the city limits, and under this authority tracks were built to the limits just beyond the Boulevard. The latter ordinance required the company to stipulate that it would sell tickets, eight for 25 cents, good over the entire route of the company,

when offered during the morning and afternoon hours specified in the ordinance passed on the same date respecting the Detroit City lines and already referred to.

In 1897 the township of Greenfield granted to the incorporators of the Grand River Electric Railway (a different corporation from that last mentioned) a franchise for tracks along the Grand River road from the westerly line of the township to the then present city limits of Detroit, with a right to charge not exceeding 5 cents as the fare for any distance in Greenfield, or six tickets for 25 cents, with school tickets at ten for 30 cents. Under this franchise a railroad was built along the Grand River road from the then city limits near the Boulevard throughout the township of Greenfield.

As already indicated, all of these lines of railway, with the appurtenant rights, privileges, and franchises, were acquired by plaintiff in error shortly after its incorporation, under the authority of § 15 of the Act of 1867.

Afterwards, by an act of the legislature approved October 24, 1907 (Mich. Laws, Ex. Sess. 1907, p. 55), a part of the former village of Fairview, including Jefferson avenue for a distance of about 12,500 feet northeastwardly from Hurlburt avenue, was annexed to the city of Detroit. And by Acts of June 16, 1905, and June 19, 1907 (Mich. Local Acts 1905, p. 1144; Local Acts 1907, p. 940), the city limits were extended northwestwardly along Grand River avenue for a distance of about one-half mile in territory previously part of Greenfield township. Each of these acts provided that the annexed territory should be subject to all the laws of the state applicable to the city, and to all the ordinances and regulations of the city, with exceptions not now material.

It is the contention of defendants in error that the provisions respecting fares in the two ordinances of January 3, 1889, assented to by the predecessors of plaintiff in error²⁴ in the ownership of the city lines on Jefferson and Grand River avenues, were intended to be applicable throughout the city as it might from time to time be enlarged, and that plaintiff in error is bound by the limitations of those ordinances as to all its lines within the city, not only as its limits existed in 1889, but also including the territory annexed in 1905 and 1907.

In case No. 1, the supreme court of the state sustained the imposition of a fine for failure to accept workingmen's tickets, so called, within the hours prescribed by the ordinance of 1889 upon the Jefferson avenue line within the territory formerly part of the village of Fairview, but annexed to the city by the Act of October 24, 1907.

162 Mich. 460, 139 Am. St. Rep. 582, 125 N. W. 700, 127 N. W. 748.

In No. 4, the court sustained a judgment awarding a mandamus requiring plaintiff in error to observe the provisions of the ordinances of 1889 upon the entire Jefferson avenue,—Grand River avenue route, so far as included within the city limits as extended in 1907. 173 Mich. 314, 139 N. W. 56.

In each case plaintiff in error seasonably and expressly insisted that the several township and village grants above referred to were subsisting and valid contracts at and before the legislature of Michigan passed the acts extending the city limits, and that those acts, if so construed or applied as to affect or modify the contracts, were in conflict with § 10 of article 1 of the Constitution of the United States. And it is upon the overruling of these contentions that the cases are brought here, under § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214].

Defendants in error challenge our jurisdiction, upon the ground that the judgments of the state court of last resort were based solely upon the meaning that it attributed to the ordinances of January 3, 1889, without reference to any subsequent legislation.

It is true, as this court has many times decided, that the "contract clause" of the Constitution is not addressed to such impairment of contract obligations, if any, as may arise by mere judicial decisions in the state courts without action by the legislative authority of the state. *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 639, 56 L. ed. 924, 928, 32 Sup. Ct. Rep. 577; *Frank v. Mangum*, 237 U. S. 309, 344, 59 L. ed. 969, 987, 35 Sup. Ct. Rep. 582.

But in this case there were state laws passed subsequent to the making of the alleged contracts in question, in the form of the legislation of 1905 and 1907 extending the corporate limits of the city. And it is not correct to say that the decisions of the state court turned upon the mere meaning of the contracts without reference to these subsequent laws. Assuming what in effect is conceded, that the village and township franchises constituted contracts within the protection of the Federal Constitution, the force of the decisions was to abrogate the rights acquired by plaintiff in error through its acquisition of the suburban lines, not merely because of the assent of the owners of the city lines to the ordinances of January 3, 1889, but because of the combined effect of those ordinances and the acts of the legislature of Michigan that thereafter extended the city limits. It is

true that no question is or can be here made respecting the authority of the legislature to add new territory to the city; and it is likewise true that the annexation acts contain no reference to existing contracts, nor any specific mention of the subject matter of street railway rights. But, in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation. *McCullough v. Virginia*, 172 U. S. 102, 116, 117, 43 L. ed. 382, 387, 388, 19 Sup. Ct. Rep. 134; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 77, 44 L. ed. 673, 680, 20 Sup. Ct. Rep. 545; *Terre Haute & I. R. Co. v. Indiana*, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 Sup. Ct. Rep. 767; *Louisiana ex rel. Hubert v. New Orleans*, 215*U. S. 170, 175, 54 L. ed. 144, 147, 30 Sup. Ct. Rep. 40; *Fisher v. New Orleans*, 218 U. S. 438, 440, 54 L. ed. 1099, 1100, 31 Sup. Ct. Rep. 57; *Carondelet Canal & Nav. Co. v. Louisiana*, 233 U. S. 362, 376, 58 L. ed. 1001, 1006, 34 Sup. Ct. Rep. 627; *Louisiana R. & Nav. Co. v. Behrman*, 235 U. S. 164, 170, 59 L. ed. 175, 180, 35 Sup. Ct. Rep. 62. The necessary operation of the decisions under review is to give an effect to the annexation acts that substantially impairs the alleged contract rights of plaintiff in error as they theretofore stood; and it makes no difference that that result was reached in part by invoking the provisions of another agreement supposed to be binding upon plaintiff in error. Whether the agreement thus invoked, when properly construed, has the effect attributed to it, is a question that touches upon the merits, and not upon the jurisdiction of this court.

Coming, then, to the merits: Not only is it not disputed, but it is not open to serious dispute, that the original village and township grants were contractual in their nature. It appears that the recipients of those grants, like their successor, the plaintiff in error, became incorporated under the Street Railway Act of 1867, of which § 13 provides that consent for the construction and maintenance of a street railway is to be given by the corporate authorities in an ordinance to be enacted for the purpose, and under such rules, regulations, and conditions as may be prescribed by such ordinance, but that no such railway shall be constructed until the company shall have accepted in writing the terms and conditions upon which they are permitted to use the streets. By § 14, after

any city, village, or township shall thus have consented to the construction and maintenance of street railways, or granted rights and privileges to the company, and such consent and grant shall have been accepted by the company, the consent shall not be revoked or the company deprived of the rights and privileges conferred. And by § 20 the rates of toll or fare to be charged by the company are to be established by agreement between it and the corporate authorities, and are not to be increased without consent of such authorities.*²⁴⁰ It is plain, as was pointed out by this court in *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 385, 46 L. ed. 592, 607, 22 Sup. Ct. Rep. 410, that the legislature regarded the fixing of the rate of fare as a subject for agreement between the municipality and the company. And in these cases, as in that, the terms of the several ordinances are such as clearly to import a purpose to contract under the legislative authority thus conferred.

But it is insisted—and to this effect was the decision of the state court—that the terms of these contracts were in effect modified by the assent of the owners of the city lines on Jefferson and Grand River avenues to the ordinances of January 3, 1889, and the subsequent acquisition of these lines by plaintiff in error, followed by its acquisition of the suburban lines. It is, indeed, argued that the construction placed by the state court upon the ordinances of 1889 as contracts is not subject to the review of this court, and a declaration to this effect is cited from *Henderson Bridge Co. v. Henderson City*, 141 U. S. 679, 689, 35 L. ed. 900, 904, 12 Sup. Ct. Rep. 114, quoted in a subsequent case of the same title in 173 U. S. 592, 602, 43 L. ed. 823, 826, 19 Sup. Ct. Rep. 553. But, notwithstanding what was there said, it is too well settled to be open to further debate, that where this court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obligation of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2) If so, what obligation arose from it? and (3) Has that obligation been impaired by subsequent legislation? *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 77, 44 L. ed. 673, 680, 20 Sup. Ct. Rep. 545; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 147, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; *Terre Haute & I. R. Co. v. Indiana*, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 Sup. Ct. Rep. 767.

But of course in the present cases the crucial question is, What were the obligations of the contracts as they stood at the

time of the subsequent legislation? And therefore it becomes material to determine whether, by voluntary action of the parties between the making of the suburban grants and the passage of the annexation acts, the obligations arising out of those grants had been modified. The state court deemed that the assent of the Detroit City Railway to that provision of the first-mentioned ordinance of January 3, 1889, which required it to carry passengers at reduced rates "over any of its lines in said city" applied to any and all lines it either then owned or might thereafter acquire, and comprehended all territory within the limits of the city, including any extension of the municipal boundaries or of the company's lines within those boundaries; and that by the acquisition of the lines of the Detroit City Railway plaintiff in error became bound by this agreement, and was obliged to observe it, even with respect to the lines that it afterwards acquired as assignee of the Grosse Point and Fairview franchises, so far as those lines were included in the extended city limits. It was said (162 Mich. 462, 139 Am. St. Rep. 582, 125 N. W. 700, 127 N. W. 748) that there were two methods of extending street railways: one by construction, the other by purchase under § 6448 (2 Comp. Laws 1897), being § 15 of the Act of 1867; that "the purchased railway becomes as much a part of the system as does the railroad as constructed;" and that the ordinance of 1889 was made in view of the power of the legislature to increase or diminish the territory within the city, and the real intent was to provide for single fares within the city limits as they should from time to time be fixed. In 173 Mich. 314, 139 N. W. 56, similar reasoning was applied to the ordinance of 1889 respecting the Grand River Avenue line and the obligation imposed upon the owner of that line to apply the single fare and the reduced rates "over the entire route of said company." The court considered (173 Mich. 325, 326) that certain of the language used in the original ordinance of 1862 to the Detroit City Railway and in that of 1868 to the Grand River Street Railway Company showed that the probable growth of the city and development of its public utilities were anticipated, and*indicated a purpose that the grants should apply as far as the city might be extended.

Notwithstanding our disposition to lean towards concurrence with the view of the state court of last resort in a matter of this nature, we are unable to accept its construction of the ordinances of 1889. In the first place, we are unable to view the original ordinances as intended to extend

the rights of the respective grantees beyond the then existing city limits and as far as the limits should be extended in the future. Their language does not seem to us to admit of this interpretation, and the practical construction placed upon them by the parties was to the contrary. As the city limits on Jefferson avenue and on Grand River avenue were extended, the respective companies obtained, and presumably were required to obtain, new grants authorizing an extension of the railways from their then present termini to the new city limits. Both of the ordinances of 1889 contained express grants to this effect with respect to Jefferson avenue and Grand River avenue respectively. Each of the original city grants, and each of the ordinances of 1889, contained particular and comparatively brief limitations of time within which the authorized lines of railway were to be constructed and placed in operation. For these reasons, and because in other respects the grants are quite specific in their terms, and because the city at that time had no authority to extend its corporate limits nor to make a grant of street railway rights beyond them, we are compelled to conclude that the ordinances of 1889 had no such extensive meaning as that attributed to them by the state court.

Defendants in error invoke the established rule that the terms of a municipal grant or franchise should be construed strictly as against the grantee, and as favorably to the grantor as its terms permit. The state court deemed the rule to be applicable. 162 Mich. 465; 173 Mich. 323. It is at least doubtful, however, whether the*rule, properly applied to the facts of these cases, does not bear altogether in favor of plaintiff in error. For of course it is not possible to adopt an extensive construction of the obligations imposed upon the city companies by the ordinances without adopting a like construction as to the extent of the franchises thereby conferred upon the companies. And can it be supposed that if either of these companies had claimed the right to lay down tracks and operate railways in the annexed territory by virtue of the ordinances of 1889, they would not have been met with the rule that municipal grants are to be construed strictly against the grantee, and cannot be extended beyond their express terms? In any view, the ordinances, just because they were intended to be contracts, and not merely legislative enactments, ought to be regarded as having reference to a specific subject matter.

But were we in error about the construction of these ordinances, we still think that the acquisition of the city lines by plaintiff

in error, and its subsequent acquisition of the suburban lines, did not bind it to put the reduced fare provisions in effect upon the suburban lines if and when the city limits should thereafter be extended to include any parts of the latter. If the city lines had been extended into the annexed territory by either of the city railway companies under any authority conferred by or assumed under the ordinances of 1889, a very different question would be presented. But such is not the case. And although we may follow the state court to the extent of considering the acquisition of the suburban lines under § 6448, Comp. Laws, as being in effect an extension of the city railways, we cannot, without doing violence to the provisions of that section, regard such acquisition as abrogating any part of the franchise rights that pertained to the suburban lines; for the section itself declares that upon such purchase being made, the purchasing company "may use and enjoy the rights, privileges, and franchises* of such company, the same and upon the same terms as the company whose road and franchises were so acquired might have done." The rate of fare being among the most material and important of the terms and conditions referred to (*Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 384, 46 L. ed. 592, 606, 22 Sup. Ct. Rep. 410; *Minneapolis v. Minneapolis Street R. Co.* 215 U. S. 417, 434, 54 L. ed. 259, 270, 30 Sup. Ct. Rep. 118), we find it impossible to regard the purchase of the suburban lines, with their rights, privileges, and franchises, as being in effect an extension of the city lines, but at the same time an abrogation of an essential part of the rights and privileges appurtenant to the acquired lines.

The state court cited and relied upon *Indiana R. Co. v. Hoffman*, 161 Ind. 593, 69 N. E. 399, 15 Am. Neg. Rep. 527, and *Peterson v. Takoma R. & P. Co.* 60 Wash. 406, 140 Am. St. Rep. 936, 111 Pac. 338. In their particular facts and circumstances those cases differ somewhat from the cases now before us; and, without stopping here to analyze them, we deem it sufficient to say that we are unable to accept their reasoning so far as it is inconsistent with the views we have expressed.

It results that the provisions of the township and village ordinances respecting the rates of fare remained in full force and effect after the acquisition of the suburban lines by plaintiff in error, notwithstanding its previous acquisition of the city lines or the previous assent of the city railway companies to the ordinances of 1889. Because of the provision of § 10 of art. 1 of the Constitution of the United States, it was

not within the power of the state of Michigan by any subsequent legislation to impair the obligations of those contracts, and since the judgments of the supreme court of that state gave such an effect to the annexation acts of 1905 and 1907, in conjunction with the ordinances of 1889, as to impair those obligations, the judgments must be reversed.

We have made no particular mention of an agreement entered into between the city and plaintiff in error in the year 1909, because we agree with the state court (173 Mich. 321, 139 N. W. 56) that it was no more than a temporary provision for a *modus operandi*, and had not the effect of waiving any of the rights of either party.

Judgments reversed, and the causes remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Clarke, dissenting:

I greatly regret that I cannot concur in the decision just announced. The opinion of the majority of the court plainly regards the act of the legislature of the state of Michigan, extending the corporate limits of the city of Detroit, as a valid law, passed in the exercise of an undoubted power in the legislature to deal as it does with the municipal corporations of that state, and its validity for the purposes for which it was intended is not questioned. It will remain a valid law after this decision as it was before. In substance the decision of this court is that the supreme court of Michigan, in deciding that there is an implied condition in the contract between the city of Detroit and the railway company that the rates of fare therein provided for shall apply within the city limits when extended, and in requiring the railway company to accept the same fares throughout the new city limits as were accepted throughout the former limits, gives an effect to the extension act which impairs the railway company's contract with the city. I am of the opinion that for the state supreme court thus to interpret the terms of the contract of the railway company with the city is not to give an effect to the valid extension act of the legislature which violates the provision of the Constitution prohibiting a state from passing "any law impairing the obligation of contracts." The passing of the valid extension act merely created a situation under which the implied condition, *existing in the fare contract from*beginning*, finds an application¹² to the new territory. This is giving effect not to the terms of the act of the legislature, but to the terms of the contract with the city, and the most that can be said against the decision of the supreme court of Michigan is that it gives an erroneous

construction to the contract. But since it is settled by many decisions of this court that the contract clause of the Federal Constitution does not protect contracts against impairment by the decisions of courts except where such decisions give effect to constitutions adopted or laws passed subsequent to the date of such contracts (*Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 56 L. ed. 924, 32 Sup. Ct. Rep. 577), I am of opinion that there is no Federal question before this court in this case and that the writ of error should be dismissed. This is a high and delicate power which the court is exercising in this case, and it should be resorted to only in cases which are clear; and, for the reasons thus briefly stated, I am convinced that this is not such a case.

I am authorized to state that Mr. Justice Brandeis concurs in this dissent.

(242 U. S. 255)

VANDALIA RAILROAD COMPANY, Plff.
in Err.,
v.

PUBLIC SERVICE COMMISSION OF INDIANA, as the Successor of the Railroad Commission of Indiana.

COMMERCE 10—STATE REGULATION — CONGRESSIONAL INACTION—REGULATING HEADLIGHTS ON LOCOMOTIVES.

1. Until Congress acts in the matter there is no unconstitutional interference with interstate commerce in an order of a state railroad commission, made under legislative authority, requiring all engines used in the transportation of trains over any line of railroad within the state to be equipped with headlights of not less than 1,500 candle power.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 8; Dec. Dig. 10.]

COURTS 399(1)—ERROR TO STATE COURT —SCOPE OF REVIEW—QUESTION NOT INVOLVED IN RECORD.

2. Whether Congress has so far covered the subject of headlights for locomotives by the amendment of March 4, 1915 (38 Stat. at L. 1192, chap. 169), to the boiler inspection act of February 17, 1911 (36 Stat. at L. 913, chap. 103, Comp. Stat. 1913, § 8630), as to invalidate, when applied to interstate commerce, an order of a state railroad commission, made under legislative authority, requiring all engines used in the transportation of trains over any line of railway in the state to be equipped with headlights of not less than 1,500 candle power, is not open to review in the Federal Supreme Court on writ of error to a state court, where the state court's decision under review, refusing to enjoin the enforcement of the order, was rendered, and judgment thereon entered, before the passage by Congress of such amendatory act.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1089; Dec. Dig. 399(1); *Appeal and Error*, Cent. Dig. § 3384.]

CONSTITUTIONAL LAW 297—"DUE PROCESS OF LAW"—NOTICE AND HEARING.

3. The absence of any provision for notice and hearing in Ind. Acts 1909, p. 323, empowering the State Railroad Commission to investigate the condition and efficiency of headlights then in use on locomotive engines on the railroads in the state to determine the most practicable and efficient headlight for all purposes, and to make and enforce against the railway companies the necessary orders for the installation of such headlights, does not make the Commission's order requiring the installation of headlights of 1,500 candle power repugnant to the due process of law clause of U. S. Const. 14th Amend., where the highest state court construes such act as supplemental to Ind. Act of February 28, 1905 (Laws 1905, c. 53), which, as amended by Ind. Act of March 9, 1907 (Laws 1907, c. 241) gave to any carrier or other party dissatisfied with any order made by the Commission a right to resort to the courts in an action to suspend it or set it aside, and the order in question was made after notice and full hearing, and the complaining carrier had, and exercised, the right to a judicial review by action at law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 832-834; Dec. Dig. 297.

For other definitions, see *Words and Phrases*, First and Second Series, *Due Process of Law*.]

COURTS 396(1)—ERROR TO STATE COURT —WHO MAY RAISE FEDERAL QUESTION—"DUE PROCESS OF LAW."

4. A carrier which has abandoned its application for a modification of the order of a state railroad commission requiring the installation on its locomotives of headlights of not less than 1,500 candle power is not in a position to urge upon the Federal Supreme Court, on writ of error to a state court, that the Commission's order is so indefinite and uncertain in its terms as not to furnish an intelligible measure of the carrier's duty, and is therefore a denial of due process of law.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1080; Dec. Dig. 396(1).]

[No. 81.]

Submitted November 6, 1916. Decided December 11, 1916.

IN ERROR to the Supreme Court of the State of Indiana to review a decree which affirmed a decree of the Superior Court of Marion County, in that state, in favor of defendant in a suit to enjoin the enforcement of an order of the State Railroad Commission, requiring locomotives to be equipped with headlights of not less than 1,500 candle power. Affirmed.

See same case below, 182 Ind. 382, 101 N. E. 85.

The facts are stated in the opinion.

Messrs. Samuel O. Pickens, Frederic D. McKenney, D. P. Williams, and Owen Pickens for plaintiff in error.

Messrs. Bert Winters, Burt New, Wilbur T. Gruber, and Mr. Evan B. Stotsenburg, Attorney General of Indiana, for defendant in error.

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*Mr. Justice Pitney delivered the opinion of the court:

The Railroad Commission of Indiana was created and broad powers were conferred upon it by an act approved February 28, 1905, and an amendatory act approved March 9, 1907 (Acts 1905, p. 83; Acts 1907, p. 454; Burns's Anno. Stat. [Ind.] 1908, §§ 5531 et seq.). By a later act (Acts 1909, p. 323), the Commission was specifically authorized and directed to investigate the condition and efficiency of headlights then in use on locomotive engines on the railroads in the state, determine the most practicable and efficient headlight for all purposes, and make and enforce against the railroad companies the necessary orders for the installation of such headlights. Pursuant to this authority it conducted an investigation, upon notice to plaintiff in error and all other steam railroad companies operating in the state, the result of which was an order, made January 6, 1910, reciting the investigation, declaring that the oil headlights commonly in use were inadequate for the protection of persons and property, and ordering that all engines used in the transportation of trains over any line of railroad in the state should be equipped "with headlights of not less than 1,500 candle power." About one month thereafter plaintiff in error brought an action in a state court of competent jurisdiction seeking to enjoin enforcement of the order upon the ground that the act of 1909 and the order made pursuant to it were repugnant to the "commerce clause" of the Constitution of the United States and the statutes enacted thereunder, and to the "due process clause" of the 14th Amendment. Among other grounds of attack it was averred that the order was so vague, indefinite, and uncertain in its description of the headlight required as to be meaningless and void, because it failed to specify at what distance from the source of light the illuminating power was to be measured, and whether it was to be determined by averaging the intensity of the light at a given distance from its source, and if so, at what distance; that the order did not specify the character of the reflector, nor whether the required candle power might be developed by reflectors or lenses, or whether the light must be of 1,500 candle power independent of such lenses or reflectors; it being averred that each of these elements was an essential factor in the ascertainment and measurement of the illuminating capacity of headlights, and that there was no known standard by which such capacity might be measured and expressed in terms of candle power in the absence of those factors. From an amended complaint, and from the Commis-

sion's answer thereto, it was made to appear that, after the making of the order, Mr. Houghton, chairman of a committee appointed to represent the plaintiff and the other railroad companies named in the order with respect to presenting a petition to the Commission for a modification of its provisions, made written application to the Commission for a suspension of the order and a further hearing upon the subject; that the Commission replied that, under the statute and the practice of the Commission, it had authority to alter, change, or modify any final order made by it, and that the Commission would not suspend the order in question, but would treat Mr. Houghton's communication as an application for its modification, and specifying a time for the hearing of that application; that on the date specified the carriers appeared by Mr. Houghton, chairman of the committee, and by counsel, and withdrew the application for modification, whereupon it was dismissed. Plaintiff demurred to the answer, the demurrer was overruled, and, plaintiff refusing to plead further, final judgment was rendered against it, and, on appeal, this was affirmed by the supreme court of Indiana; that court holding that plaintiff's complaint did not show ground for the relief sought. 182 Ind. 382, 101 N. E. 85. The case comes here upon the Federal questions, under § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214].

So far as the attack upon the Act of 1909 and the order made pursuant to it is based upon interference with interstate commerce, it very properly is conceded that, but for a recent act of Congress, the case would be controlled by *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 290, 58 L. ed. 1312, 1317, 34 Sup. Ct. Rep. 829,* where it was held that, in the absence of Federal legislation, the states are at liberty, in the exercise of their police power, to establish regulations for securing safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce; and that (p. 293) the Safety Appliance Acts of Congress, since they provided no regulations for locomotive headlights, showed no intent to supersede the exercise of state power with respect to this subject.

But it is insisted that this decision is no longer controlling, because Congress has since then "exercised its power as to equipment over the entire locomotive and tender and all parts and appurtenances thereof." The reference is to the act of March 4, 1915 (chap. 169, 38 Stat. at L. 1192), amendatory of the act of February 17, 1911, requiring common carriers engaged in interstate commerce to equip their locomotives with

safe and suitable boilers and appurtenances thereto (chap. 103, 36 Stat. at L. 913, Comp. Stat. 1913, § 8630). The latter act was among those referred to in the Georgia Case, and held not to oust the authority of the state because it did not appear either that Congress had acted, or that the Interstate Commerce Commission, under the authority of Congress, had established any regulations concerning headlights. The amendment of 1915 extends the provisions respecting inspection, etc., to the entire locomotive and all its appurtenances. Whether those provisions authorize the Interstate Commerce Commission to prescribe any particular type of headlight, or other appliance, is a question upon which we need not now pass, for the reason that the decision of the supreme court of Indiana, refusing an injunction to restrain the enforcement of the state Commission's order, was rendered and judgment thereon entered before the passage by Congress of the act referred to. Obviously, we cannot say that by that decision and judgment any right of plaintiff in error under a law of the United States was infringed, within the meaning of § 237, Judicial Code, when the law creating the supposed right was not enacted until after the judgment. If, however, by virtue of the provisions of the Act of 1915, or of any action heretofore or hereafter taken by the Interstate Commerce Commission under it, plaintiff in error is entitled to an injunction against the further enforcement of the order of the state Commission, that right may be asserted in another action and will not be prejudiced by our present decision.

With respect to the question of due process of law, it is unnecessary to determine whether the 14th Amendment requires that state action, legislative in its nature, of the character of the order of the Railroad Commission, shall be preceded by notice and an opportunity for a hearing. In the case before us, the supreme court of Indiana construed the act of 1909 as supplemental to the act of 1905, which, as amended in 1907 (Acts 1907, p. 469, § 6; Burns's Anno. Stat. [Ind.] 1908, § 5536), gave to any carrier or other party dissatisfied with any order made by the Commission a right to resort to the courts in an action to suspend it or set it aside. Since the order in question was made after notice and a full hearing, and plaintiff in error had and exercised the right to a judicial review by action at law, we concur in the view of the state court that there has been in this respect no deprivation of property without due process of law.

The only other point requiring mention is the insistence that the order is so indefinite and uncertain in its terms as not to furnish

an intelligible measure of the duty of plaintiff in error, and is therefore a denial of due process of law. Upon this point the state court held, following its previous decision in *Chicago, I. & L. R. Co. v. Railroad Commission*, 175 Ind. 630, 638, 95 N. E. 364, that the Railroad Commission itself, by virtue of the act, had power to grant relief through a rehearing, and that without first resorting to that method of procedure plaintiff in error was not entitled to have the order set aside by the courts. The general rule is that one aggrieved by the rulings of such an administrative tribunal may not complain that the Constitution of the United States has been violated if he has not availed himself of the remedies prescribed by the state law for a rectification of such rulings. *Bradley v. Richmond*, 227 U. S. 477, 485, 57 L. ed. 603, 606, 33 Sup. Ct. Rep. 318. And since the record shows that plaintiff in error and its associates were accorded a rehearing upon the very question of modification, but abandoned it, nothing more need be said upon that point.

Judgment affirmed.

Mr. Justice Clarke took no part in the consideration or decision of this case.

(242 U. S. 208.)

UNITED STATES and Interstate Commerce Commission, Appts.,

v.

PENNSYLVANIA RAILROAD COMPANY.
(No. 340.)

UNITED STATES, Interstate Commerce Commission, and Crew-Levick Company, Appts.,

v.

PENNSYLVANIA RAILROAD COMPANY.
(No. 341.)

COMMERCE — 85 — INTERSTATE COMMERCE COMMISSION — POWERS — REQUIRING CARRIER TO FURNISH TANK CARS — "TRANSPORTATION."

1. The Interstate Commerce Commission was given no power to order a carrier to provide and furnish to shippers tank cars for interstate shipments of petroleum products by the amendment of the Act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), to the Act of February 4, 1887 (24 Stat. at L. 379, chap. 104), § 1, defining the term "transportation" as including "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported," and making it the duty of every carrier subject to

the provisions of the act "to provide and furnish such transportation upon reasonable request therefor," although by § 12 as amended by the Act of March 2, 1889 (25 Stat. at L. 858, chap. 382, Comp. Stat. 1913, § 8576), the Commission was authorized and required to execute and enforce the provisions of the act, and by § 13, as amended by the Act of June 18, 1910 (36 Stat. at L. 550, chap. 309, Comp. Stat. 1913, § 8581), was given power to enter orders not only regarding rates, but regarding classifications, regulations, or practices, whether affecting rates or not. If any duty to furnish such cars exists, it is enforceable in the courts, not by the Commission.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 138; Dec. Dig. ¶ 85.
For other definitions, see *Words and Phrases*, First and Second Series, *Transportation*.]

COMMERCE ¶ 95 — INTERSTATE COMMERCE COMMISSION—JUDICIAL REVIEW—FACTS.

2. A finding of the Interstate Commerce Commission that a carrier has held itself out to carry oil in tank cars is one of law, not of fact, and therefore is reviewable in the courts, where it is based upon a rule in the official classification providing rates for articles in tank cars, which states that the carriers whose tariffs are covered by such classification assumed no obligation to furnish tank cars.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 145; Dec. Dig. ¶ 95.]

[Nos. 340 and 341.]

Argued October 18 and 19, 1916. Decided December 11, 1916.

TWO APPEALS from the District Court of the United States for the Western District of Pennsylvania to review a decree enjoining the enforcement of an order of the Interstate Commerce Commission, requiring a carrier to provide and furnish to shippers tank cars for interstate shipments of petroleum products. Affirmed.

See same case below, 227 Fed. 911.

Statement by Mr. Justice McKenna:

* On petition of the Pennsylvania Paraffin Works and the Crew-Levick Company the Interstate Commerce Commission made the following order:

"It is ordered, that the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.

"It is further ordered, that said defendant be, and it is hereby, notified and re-

quired to provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

"And it is further ordered, that this order shall continue in force for a period of not less than two years from the date when it shall take effect."

The time of compliance was subsequently extended to November 15, 1915, on which date the railroad company brought this suit to enjoin the enforcement of the order. A preliminary injunction was prayed, and, upon a hearing by three judges, was granted. 227 Fed. 911. To review that action this appeal is prosecuted.

The Commission made quite elaborate findings, which, however, we do not think it is necessary to quote in full. It found the production of the oil companies, and the following additional facts:

(1) That 91 per cent of the oil produced by the Paraffin Company was shipped in tanks, 1½ per cent in barrels loaded in cars other than tank cars, and 7½ per cent in pipe lines, while of the shipments made by the other company 86.8 per cent moved in tank cars, 4.7 per cent in barrels and 8.5 per cent in pipe lines.

(2) For a long time the bulk of refined oil in the United States has been shipped in tank cars and at present 91 per cent is so transported. The railroad has been using tank cars for twenty-five years. The capacity of the cars is found, and they are so constructed that they may be rapidly loaded* at the refineries, and jobbers and dealers in refined oil throughout the country have the proper and necessary facilities for unloading the cars by gravity at their various stations.

(3) The only other method of transporting oil is in barrels or similar containers, the cost of which is from 3½ to 3¾ cents a gallon above the cost of transportation in tank cars, and this makes such method of transportation practically prohibitive, and the refusal of the railroad to furnish an adequate supply of tank cars would tend to drive out of business refiners who are unable to supply themselves with enough cars to move their own products; and witnesses for the railroad admitted that tank cars are an economic necessity for the transportation of refined products.

(4) In 1887 the railroad acquired 1,308 tank cars, some of which have since been sold to independent refiners, but it owned at the time of the hearing 499 cars, of which 482 are furnished to shippers of oil located on its lines.

(5) At the time of the hearing the Paraffin Company owned 54 tank cars and the Crew-Levick Company 57; and it was testified that these companies for five or six years have daily made inquiry for the delivery of cars to them, and that formal orders for cars have been constantly on file in the railroad's offices.

(6) On November 11, 1912, shortly before the filing of the complaints before the Commission, complainants served notice upon the railroad company, requesting it to furnish a sufficient number of tank cars to ship respectively 450,000 gallons of oil per month from the Paraffin Company's refinery at Titusville, and 600,000 gallons per month from the Glade (Crew-Levick Co.) Oil Works at Warren.

To the request of complainants, the railroad company replied:

"We beg to say that the railroad company is not prepared to increase its present tank-car equipment, but is prepared to transport the commodities in question when properly contained in barrels or other similar retainers at rates that are fair, reasonable, and nondiscriminatory."

Solicitor General Davis and Mr. Robert Szold for the United States.

Mr. Joseph W. Folk for the Interstate Commerce Commission.

Messrs. John G. Johnson, Thomas Patterson, Frederic D. McKenney, and Henry Wolf Bickel for the Pennsylvania Railroad Company.

Messrs. Charles D. Chamberlin and David Wallerstein for the Crew-Levick Company.

Messrs. Samuel B. Clarke and Charles W. Atwater as amici curiæ.

* Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The question in the case is, Has the Commission the jurisdiction exercised by the order? It is not denied that the Commission has power over the general equipment of a carrier, but it is denied that it has power to require "vehicles of a special type having no reference to the safety of transportation," and to this distinction the argument of counsel for the railroad company is addressed.

The judgment of the district court had somewhat broader basis. The court said: "The act to regulate commerce does not confer upon the Interstate Commerce Commission all power over cars and other instrumentalities of shipment." And that, aside from special enactments, "Federal legislation regulating commerce, in so far, at least, as it is contained in the act of 1887 [24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, 37 S. C.—7

§ 8563] and its amendments, has thus far left carriers free to exercise their own judgment in the purchase, construction, and equipment of their roads and in the selection of their rolling stock." Indicating that the law conferred upon the Commission the power to prevent and redress unfair practices and discriminations, the court further said: "We find nothing in the law which confers upon the Commission power to compel a carrier to acquire facilities it does not possess, or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and perhaps more economical facilities."

And coming to consider the question of power conferred by the Interstate Commerce Act of 1887, as amended in 1906 [34 Stat. at L. 534, chap. 3591, Comp. Stat. 1913, § 8563], the court decided that the amendment "added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the Commission, and vested in the Commission no increase of power over cars as instrumentalities of shipment."

To this proposition the United States and the Commission oppose the contentions that "it is the duty of every interstate carrier to provide and furnish upon reasonable request such cars as are reasonably necessary for handling the normal traffic of which it is a common carrier," and that the Commission is given jurisdiction to enforce the duty.

The power of the Commission has been given precedence and dominance in the argument, the extent of the duty of carriers coming in secondarily, though important to be considered. In other words, the main question presented is, whatever be the duty of carriers as to the equipment they must have or furnish, whether the Interstate Commerce Commission is the tribunal to enforce the duty.

A comparison of the act as passed in 1887 with the amendment of 1906 becomes necessary, and a consideration of the rulings under the former as an interpreter of the latter.

The Act of 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563) provided that—

"The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage."

The word "transportation" is the crucial

word, and its definition in the amendment of 1906 is as follows:

" . . . and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor. . . ." And this, it is contended, must be read in connection with § 12 as amended March 2, 1889, as follows:

" . . . and the Commission is hereby authorized and required to execute and enforce the provisions of this act." (25 Stat. at L. 855, 858, chap. 382, Comp. Stat. 1913, §§ 8569, 8576.)

Section 1 of the Act of 1887 came before the Commission for consideration, and the duty thereunder of carriers to furnish tank cars for the transportation of petroleum, in *Scofield v. Lake Shore & M. S. R. Co.* 2 I. C. C. Rep. 90, 2 Inters. Com. Rep. 67. The opinion is too long to review. It is enough to say of it that it considered the conditions of the oil trade, the different methods of shipping oil in barrels and in tank cars, and stated that the latter method had become established, though very few of the railroads of the country owned tank cars; compared the cost and advantages of the methods, and from this declared that it was obvious that where the carriers did not furnish tank cars, one shipper could not compete in all respects upon equal terms with another shipper who furnished tank cars for the transportation of his oil, unless he also furnished tanks; and, following a former decision, declared that it was properly the business of the carrier to supply the rolling stock for the freight he offers or proposes to carry, and that if the diversities of the traffic are such that this is "not always practicable, and consignors are allowed to supply it themselves, the carrier must not allow his own deficiencies in this particular to be made the means of putting at an unreasonable disadvantage those who make use in the same traffic of the facilities he supplies." To prevent such disadvantages or preferences the Commission decided it had power; to enforce the duty of supplying cars it decided it had not the power.

Section 3 of the act was asserted against the conclusion, and the Commission replied that that section applied only to facilities between connecting lines, and did not em-

brace car equipment for the origination of freight; and, referring to § 1, it was said:

"The term 'instrumentalities of shipment or carriage,' as found in the first section of the statute, of course includes cars, but they are such cars as are provided by the carrier or used by it in interstate commerce, and the statute nowhere clothes the Commission with power to determine what kind of cars the carrier should use for this purpose and require the carrier to place upon its line for use in this business such kind and number of cars as the Commission may decide will constitute a proper and necessary equipment of car service. The duty of every such carrier is none the less obligatory at common law, and by its charter to furnish an adequate and proper car equipment for all the business of this character it undertakes and advertises in its tariffs it will do. The statute does not undertake to clothe the Interstate Commerce Commission with the power by summary proceeding of compelling a railroad company to perform all his common-law duties, but leaves many of these to be enforced in the courts by suits for damages and by other proceedings. . . ."

"The power, if it should be held to exist at all, on the part of the Interstate Commerce Commission, to require a carrier to furnish tank cars when that carrier is furnishing none whatever in its business, would apply equally to sleeping cars, parlor cars, fruit cars, refrigerator cars, and all manner of cars as occasion might require, and would be limited only by the necessities of interstate commerce and the discretion of the Interstate Commerce Commission. A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute."

And it was declared that the lawmaking power had not itself undertaken the responsibility or clothed the Commission with the responsibility of directing a carrier to supply itself with any particular kind of equipment or cars, or, in fact, any equipment or cars at all for the transportation of freight over its line. It will be observed, therefore, that all of the elements that entered into the problem of the power of the Commission and the reasons which seemed to impel its exercise were considered.

There was a repetition of the elements and decision in *Re Transportation & Refrigeration of Fruit*, 10 Inters. Com. Rep. 360, 373 (1904). It was there said that the Commission was of opinion*that it was* the duty of railroad companies to furnish refrigerator cars for the transportation of fruit; that at one time carriers might have declined to provide this special kind

of equipment, but that the trade had so grown that the carriers "might as well decline to provide stock cars for the transportation of live stock as refrigerator cars for the carriage of perishable commodities." It was, however, added: "But this duty does not spring from the act to regulate commerce, nor has this Commission any jurisdiction of that matter. It arises out of the common-law liability of the defendant railway companies as common carriers, and redress for failure to fulfil it must be sought in the courts."

Certain abuses were pointed out in that case and the tendency of the ownership of cars by private car lines to monopoly, and as a consequence it was urged upon the Commission that carriers should not be permitted to make exclusive contracts with private car lines like those then under consideration, but should be compelled to provide their own equipment. The Commission replied, at page 377: "The facts before us call for no expression of opinion on that subject, and none is attempted."

This, then, was the view of the Interstate Commerce Commission of the duty of carriers and of its power over them; that is, that it was the duty of carriers to provide and furnish equipment for transportation of commodities, and that this duty might expand with time and conditions, the special car becoming the common car, and the shipper's right to demand it receiving the sanction of law. But the Commission decided it was the sanction of the common law, not of the statute, and that the remedy was in the courts, not in the Commission. With this view we start as the first element of our decision.

But a change in the statute and remedy is asserted,—a change, it is further asserted, consequent upon a demand for a greater administrative power and remedy. To sustain the assertions the reports of the Commission are adduced, the legislation it recommended, and the comments of the legislators.

It is especially to be noted that the amendment of 1906 is in the exact language of the recommendation of the Commission, as far as concerns that part which defines "railroad" and "transportation."

The Senate committee on interstate commerce had instituted an extended inquiry and members of the Commission appeared before the special committee which had been appointed and presented a bill which the Commissioners said embodied their recommendations, and which the Commission subsequently made part of its 19th annual report. Significant explanations accompanied the bill. It was stated: "The form of the proposed measure, as will appear upon

inspection, is an amendment of certain sections of the present statute. . . . Aside from the main question—the grant of power to the Commission, after hearing, to fix the future rate—several other amendments are proposed with the view of improving the law as a remedial measure, and these amendments will now be referred to under appropriate headings, one of which was as follows:

"Enlargement of Jurisdiction.

"It will be seen that the changes proposed in the first section are designated (a) to somewhat increase the jurisdiction of the law as to the carriers subject to its provisions and (b) to bring within the scope of the law certain charges and practices which are not now subject to regulation, or respecting which there is dispute as to the power of the Commission. The first purpose is accomplished by leaving out of the first paragraph the phrase 'under a common control, management, or arrangement,' in order to reach certain classes of carriers which are now exempt from the obligations and requirements of the act. The second purpose is sought to be accomplished by enlarging the definition of the term 'transportation,' so as to include the charges for various services, such as refrigeration and the like, which are now claimed to be beyond our authority. The obligation to furnish and provide the services here referred to is also imposed, which is likewise a point now in dispute. No other changes are proposed in the first five sections of the act, which are commonly spoken of as containing its principal or substantive provisions. In other words, the only amendment suggested in this regard is an enlargement of jurisdiction. In this connection, and as illustrative of the matters here referred to, the subject of refrigeration charges may be properly considered."

Then follows a consideration of refrigeration charges, the dispute that existed as to whether the shipper or the carrier should bear the expense of refrigeration, and the controversy over the jurisdiction of the Commission. It was said that "the Congress ought to make that service, by express provision in the law, a part of the transportation itself. We do not at this time recommend that carriers should be prohibited from using private cars or from employing the owners of such cars to perform the icing service if they find that course to their advantage, but we do recommend that these charges should be put on the same basis as all other freight charges. They should be published and maintained the same as the transportation charge, and be subject to the same supervision and control."

Under the heading, "Terminal Roads, Elevator Charges, and Private Cars," the following was said:

"It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We should hesitate to recommend at this time so drastic a measure as that.* Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the service can be rendered or the facility furnished more advantageously both to the shipper and railway, and without injury to the public, if provided by the shipper himself."

After commenting on the amendment to § 16 and the added § 16a, the Commission explained that—

"It will thus be seen that the substantial amendments proposed are few in number and easily understood, the remaining changes being merely such as are needful to harmonize other parts of the act with the main amendments . . . In brief, the proposed measure amends certain sections of the act to regulate commerce and is confined to such recommendations as are deemed necessary to effect its intended purpose, and thereby furnish adequate protection against excessive and discriminating charges."

It will be observed that there is not one word in the report that indicates that there was a necessity or desire for the power exercised in the order under review. Indeed, there was directly expressed an approval of private cars, and the opinion declared that they were a facility which could be furnished more advantageously both to the shipper and the railroad, without injury to the public, if provided by the shipper himself, and the recommendation was that they be brought under the jurisdiction of the Commission and thereby prevent oppressive and discriminatory practices; the principle being, to borrow from another, that all services incident to transportation, whether primary (carrying the goods) or accessorial (caring for the goods in transit whenever such care calls for special facilities or special equipment), should be subject to the same supervision and regulation.

* But is there anything in the words of the amendment which exhibits on the part of Congress a larger knowledge of conditions than the Commission had, and that Congress, in a broader comprehension and judgment of the conditions and their remedy, gave the Commission a greater

jurisdiction than that which in any way occurred to it was necessary?

The act as it was enacted in 1887 defined the term "railroad" and the term "transportation," the latter as follows: "And the term 'transportation' shall include all instrumentalities of shipment or carriage." The definition was very comprehensive, and needed not the mobilization of its denotation; but this subsequently was attempted. Words, indeed, were multiplied—was meaning changed?

In 1906 the term "transportation" was defined to "include cars and other vehicles and all instrumentalities and facilities of shipment or carriage. . . ." The words are not much less general than the words of the Act of 1887. There is no advance made by them or enlargement of meaning. There was simply a useless tautology. But granting it was not and that Congress deemed a special declaration of things to be necessary, such declaration did not alter the relation of the companies to them. The duty which attached to "instrumentalities" of the Act of 1887 attached to the things covered by its comprehensive generality,—to the things declared in the amendment of 1906, that is, to "cars," "vehicles," "facilities." And this duty under the Act of 1887, we have seen, had, in the opinion of the Commission, the sanction only of the common law. Under the amendment the most that can be said is that the duty is particularized. Its sanction is not enlarged.

But other words occur which, it is contended, have such effect. These words are: "And it shall be the duty of every carrier . . . to provide and furnish such transportation upon reasonable request therefor . . ."

* This, however, is but the expression of a necessary implication. It was useless to declare that whatever a carrier must do, he must do "upon reasonable request." The duty having been imposed, it necessarily could be demanded. But the expression of the right, if it needed expression, adds nothing of indication to the previous words of the tribunal by which the demand was to be enforced.

But it is said the duty having explicit declaration, the power to enforce it was found in § 12 as amended March 2, 1899, as follows: "And the Commission is hereby authorized and required to execute and enforce the provisions of this act." (25 Stat. at L. 855, 858, chap. 382, Comp. Stat. 1913, §§ 8569, 8576.)

But this casts us back to our general considerations, to which we may only add that there was no question of the duty of carriers either under the Act of 1887 or

under the amendment of 1906. It was their duty under both to furnish the instrumentalities of transportation. The question is whether, under the latter, as under the former, jurisdiction to enforce the duty was at common law in the courts, or under the statute and in the Commission; and we have seen that it was the view of the Commission that the remedy was in the courts, and that the amendment of 1906 was not intended to and did not change the remedy. In other words, that Congress in effect accepted the explanation of the Commission and approved its decisions. We repeat, the amendment of 1906 was drawn by and recommended by the Commission, and it may be assumed was not intended to have nor given larger import in the law than it had in the recommendation. *United States v. Louisville & N. R. Co.* 236 U. S. 318, 333, et seq., 59 L. ed. 598, 605, 35 Sup. Ct. Rep. 363.

There was amendment in 1910 [36 Stat. at L. 550, 551, chap. 309, Comp. Stat. 1913, §§ 8581, 8583], not of § 1 in any particular relevant to our discussion, but of §§ 13 and 15. It was said by the committee which reported them for consideration that under § 15, as it then stood, the authority of the Commission to enter an order was "confined to the subject of rates for transportation and regulations or practices 'affecting such rates,' and the establishment of through routes where 'no reasonable or satisfactory through route exists.'" And the committee added that as recommended to be amended § 15 "will have its scope largely increased and the jurisdiction of the Commission will be much enlarged;" and that "by the amendment the Commission is given jurisdiction to enter orders not only regarding rates, but regarding classifications, regulations, or practices, whether they affect rates or not, and make orders requiring conformity thereto."

"Practices" were not otherwise or precisely defined either in the report or in the amendment recommended and as finally passed. Regarding only its broad generality anything may be asserted of it; regarding its context and the conditions which existed, an immediate limitation of it is indicated, made necessary, as we shall presently show.

Section 15 provides that whenever, after full hearing, as provided by § 13, the Commission should be of opinion that any individual or joint rates collected by a common carrier or "that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions" of the act are "unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial

or otherwise in violation of any of the provisions of" the act, the Commission is authorized and empowered to determine and prescribe what shall be the just and reasonable rate or rates and "what individual or joint classification, regulation, or practice is just, fair, and reasonable," and make an order that the carrier shall cease and desist from the charging of excessive rates, and shall adopt the classification and conform to and observe the regulation or practice prescribed; the order to continue such time, not exceeding two years, as shall be prescribed by the Commission.

* Applying the section, it is contended that the neglect to provide or certainly the refusal to furnish tank cars is a "practice," and became especially so by the reply made by the railroad to the request to furnish them.

Let us test the contention and see where it takes us. The request was for a special facility, a combination of package and car, and the question, then, is whether the neglect to provide it or to furnish it was a "practice" within the meaning of § 15. The far-reaching effect of an affirmative answer is instantly apparent, and there must be hesitation to declare it from the use of so inapt a word as "practice." Following a well-known rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates. And there were many such acts for which the word could provide,—practices which confused the relation of shippers and carriers, burdened transportation, favored the large shipper, and oppressed the small one. These have illustrations in decisions of the Commission. And this was purpose enough, remedied all that was deemed evil in privately owned cars of any type. Beyond that it was not necessary to go; beyond that there were serious impediments to going; and we cannot but believe that if beyond that it was intended to go, there would have been explicit declaration of the intent, with such provision as to notice and time and preparation as its consequences would demand; not ambushed in obscurity and suddenly disclosed by construction to turn accepted custom into delinquency,—a construction that could be disputed and was disputed.

Three commissioners out of seven dissented, they declaring that if the act conferred power upon the Commission to order a carrier to enlarge its complement of cars it would follow that the Commission had also the power to order enlargement of terminal facilities, increase in the number of locomotives, and extension of tracks or branches. In fact, it was said that no facility of trans-

portation would be exempt. The purpose of the provision reviewed was declared to be the regulation of facilities possessed by the carrier, that there should be no unjust discrimination, and the plain intent to be that the shipper should not be required to deal with any other than the carrier. And this, as far as we can glean from the extensive congressional literature, was the end sought. In other words, it was on account of the abuses of the private car system, not in its uses, that legislation was urged.

There was some sentiment outside of the Commission for the abolition of the private car system, but abolition was not attempted. It would have been a short cut to the solution of the problems and could easily have been accomplished by requiring the railroads to furnish all of the equipment necessary for taking care of all kinds of traffic. But neither the government nor the Commission contends for such an extreme, and to forestall the charge that the order has such tendency represents that the duty of the carrier to furnish special equipment is not absolute, but relative to the conditions of trade and the business of the shipper. This weakens the principle upon which the duty is based. If there be a duty, it would seem necessarily to be universal. And such contention is growing.

A friend of the court appears in the form of a salt company and presents an argument in support of the order of the Commission and asserts the right to a special equipment for the transportation of salt in bulk.

Little more need be said. Private cars came into existence as conveniences or necessities to particular businesses, developing by degrees and differentiating according to conditions. It was said in argument that there are different kinds of tank cars for different oils and liquids, and there are cars for live stock, fruit, live poultry, milk, and, as we have seen, salt in bulk. ¹²³What others there are neither the record nor the argument has given us ¹²⁴information, nor the extent of their specialization. However, the information is not needed. The facts of the present case illustrate the condition of the carriers of the country. Describing it, the Commission says:

"The bulk of the movement of refined oil is in tank cars owned by the shippers. In 1887 the Pennsylvania Railroad acquired 1,308 tank cars, some of which have subsequently been sold to independent refineries. Defendant now owns 499 tank cars, all that remain of those purchased in 1887, and 482 of which are furnished to shippers of oil located on its lines. The other railroads east of the Mississippi river own, in the

aggregate, only 303 tank cars. The privately owned tank cars east of the Mississippi aggregate about 27,700, and the total number of tank cars owned in the United States was given as approximately 40,000."

This, then, was the situation of the railroad, not dissimilar to that of other railroads, not therefore created in deliberate fault, but in accommodation to conditions useful to shippers, advantageous to the railroad, beneficial to the public, as the Commission had declared; and yet a change is suddenly required. The burden of the requirement we shall presently notice.

Of course, if there is a duty upon a carrier to furnish tank or other special cars upon request, its enforcement cannot be arrested by the burden it imposes; but here again the thought obtrudes, which we have already expressed—it may be to tiresome extent—that if Congress had intended such consequence with all that it implies of expense, directly and indirectly, it would not have left its intention to be evolved from obscure language, but would have put it in explicit declaration and with notice and time for accommodation to it.

It is to be remembered that the tank car is both package and car, must have special mechanical means of loading and unloading. May these, too, be ordered? ¹²⁵Are they not a "method and manner of presenting, marking, packing, and delivering property for transportation," to use the language of § 1, as amended?

It is difficult to particularize all that the ruling of the Commission implies of power. What of omission or commission in the carrier's relation to the public may not be said to be a practice or practices in the broad sense attempted to be given to those words? A railroad's powers are its duties, bearing, of course, obligations; and all of them by the asserted construction are swept under the jurisdiction of the Commission, —so swept by a single word, not of itself apposite, and determined besides by its association against the contention. This was apparent to the dissenting Commissioners and repelled their concurrence. Well might they have recoiled from going to such extreme upon doubtful implication, and have been impelled to declare, as they did declare, that if such power was given, it logically and necessarily extended to every facility of transportation.

As to whether this is desirable, we express no opinion, and we only mean now to say that it was not expressed as desirable in the statutes which we have considered, nor was there a word or a line from the Interstate Commerce Commission, so far as the record shows or intimates, of recommendation of such result. Indeed,

there is intimation that such result would be radical, and, as said by the railroad company, "the Safety Appliance Acts indicate that when Congress contemplates the imposition of obligations with respect to the equipment of carriers, it covers the subject by careful, specific rules." And we may further say with the company that "it is pertinent to inquire why committees of Congress should consider, as they continue to do from time to time, the wisdom of devolving on carriers the duty to furnish steel coaches for passenger traffic, if already the provisions of the act to regulate commerce are broad enough to cover matters of this kind?" And there is strength in the observation of the railroad company that if the argument based upon the word "practice" or "practices" were sound, "it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the act; why should the Commission ask that it be empowered to require the use of the block signal system? (Report of 1913, page 82.) Why should the Commission make this request if, because of its jurisdiction with respect to practices, it is already endowed with power to regulate the details of operation of carriers?"

The United States and the Commission insist that they have authority of cases for their two fundamental propositions, to wit: (1) That it is the duty of the railroad to furnish equipment for the transportation of products; and (2) that the Commission has the jurisdiction to enforce that duty.

The authorities upon the first proposition we are not concerned to review. The duty, as far as this question is concerned, may be admitted,—certainly admitted in its general sense. But we need not pause to distinguish its application in the cases to special equipment as distinguished from common equipment, or how much the decisions were based upon the belief of the shipper, justified or encouraged by the railroads, that the equipment required would be furnished.

With the second proposition we are concerned, and a consideration of the cases becomes necessary, as they are cases in this court and are cited to sustain the power of the Commission. They are as follows: Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A. (N.S.) 203, 33 Sup. Ct. Rep. 174; Ellis v. Interstate Commerce Commission, 237 U. S. 434, 59 L. ed. 1036, 35 Sup. Ct. Rep. 645; Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213; Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 58 L. ed. 1377, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790; Menasha Paper Co. v. Chicago &

N. W. R. Co. 241 U. S. 55, 60 L. ed. 385, 36 Sup. Ct. Rep. 501.

* The Hardwick Elevator Case passed upon a law of Minnesota, known as the Minnesota Reciprocal Demurrage Law, which made it the duty of a railroad company on demand from a shipper to furnish cars for transportation at terminal points within forty-eight hours and at intermediate points within seventy-two hours after such demand, Sundays and legal holidays excepted. A penalty was imposed for each day's delay. This court held that by § 1 of the Hepburn Act Congress had legislated concerning the delivery of cars in interstate commerce by carriers subject to the act. This was based upon the definitions of § 1 of the provisions of §§ 8 and 9. The questions in the case were not those in the present case. The kinds of equipment were not involved nor the questions dependent upon them. The only question was as to whether Congress had entered the field of regulation.

In Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. there was also involved a statute which penalized delays in delivering cars. It was held to be within the decision of the Hardwick Elevator Case, as it undoubtedly was.

In the Harris Case, the Carmack Amendment [34 Stat. at L. 593, chap. 3591, Comp. Stat. 1913, § 8592] was decided as not excluding a state statute allowing an attorney's fee in certain actions based on claims for small amounts against railway companies. It has no relevancy to the present case.

The Ellis Case grew out of a right asserted by the Interstate Commerce Commission to inquire whether Armour & Company, shipping packing-house products in commerce among the states, was controlling the Armour Car Lines and using them as a device to obtain concessions from the published rates for transportation. A series of questions were put to a witness in regard thereto which he refused to answer, and proceedings to compel his testimony were instituted. A question of the power of the Commission was presented and that was made to depend upon whether the Armour Car Lines was a common carrier subject to the Interstate Commerce Act. It was replied that the Car Lines Company had no control over the motive power and movement of the cars and was not a common carrier subject to the act. And this was said: "It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon rea-

sonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth." The language was perfectly apposite to the question under consideration, the relation of the Armour Car Lines to the Armour Company and to the railroad. The cars the latter obtained from the Car Lines Company constituted the equipment of the railroad company and were, of course, subject to the provisions of the Interstate Commerce Act.

The question with which the present case is concerned was not presented to the court nor intended to be decided. The testimony sought by the Commission was to expose and prevent what were supposed to be discriminatory practices, and the right to require the testimony depended, it was the effect of the decision, upon the relation of the Armour Company to the Armour Car Lines through the railroad, and whether what was paid to the Armour Car Lines was in effect paid to the Armour Company and made a means of discrimination. This view was rejected and it was said: "It does not matter to the responsibility of the roads whether they own or simply control the facilities, or whether they pay a greater or a less price to their lessor,"—the lessor of that case being the Armour Car Lines; and, as it was not shown that it was merely the tool of the Armour Company, it had immunity from the investigation. The case, therefore, is not authority for the proposition which it is urged to support.

²²⁶ Menasha Paper Co. v. Chicago & N. W. R. Co. needs no comment. It quotes but attempts no explanation of the words of the statute that is relevant to our present inquiry. Indeed, in all of the cases the points of inquiry and decision were different from the case at bar. They declared or enforced or recognized the general duty of carriers under the particular facts and the law to which the carriers were subject.

It is next contended by the United States that the railroad has held itself out specifically to carry oil in tank cars, and the fact, it is said, has been found by the Commission and is not reviewable, citing *United States v. Louisville & N. R. Co.* 235 U. S. 314, 320, 59 L. ed. 245, 250, 35 Sup. Ct. Rep. 113. We are unable to assent.

The railroad company in its answer to the petition before the Interstate Commerce Commission alleged that rule 29 of the official classification No. 39, providing rates for articles in tank cars, stated that the carriers whose tariffs were covered by such classification did not assume any obligation to furnish tank cars. There is a concession in the brief of the Interstate Commerce Commission that such was the published tariff, though contesting its efficacy to de-

vest the company of its duty as a carrier. This might be if there was a duty; but the United States seeks to establish the duty from the offer of the company, and must take the offer as made, and cannot, nor can the Commission, ignore its explicit qualification that the company assumed no obligation to furnish tank cars. The finding of the Commission, therefore, was one of law, and not of fact, and is reviewable.

The railroad company, besides the contentions of want of power in the Commission to make the order under review, object to it (1) in that it is defective because it requires the company to supply cars for movement over the lines of other carriers; and (2) that it is not administrative in character, but is uncertain, indefinite, and unlawful.

* In support of the first contention the railroad company points out that the company owns more tank cars than all of the other carriers east of the Mississippi river, amounting at the time of the hearing to 499 cars. The total ownership of other cars east of the Mississippi river amounted to 303, and the privately owned tank cars to 27,700. It therefore appears, it is said, that the railroad ownership is less than 3 per cent of the total ownership, and that of this 3 per cent the company is furnishing more than half. The company, therefore, asserts that if it be compelled to furnish all of the tank cars required for the transportation of oil on its line, irrespective of their destination, it is obvious that a burden out of all proportion is placed upon it. It further complains that although the New York Central Railroad serves the oil companies equally with it, no order is made against that company, but, on the contrary, the entire burden is devolved upon it.

In support of the second contention, the company asserts that the order of the Commission is not administrative is indicated by decisions of this court in actions for failure to furnish cars. The cases are: *Louisville & N. R. Co. v. F. W. Cook Brewing Co.* 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189 (1912); *Eastern R. Co. v. Littlefield*, 237 U. S. 140, 59 L. ed. 878, 35 Sup. Ct. Rep. 489 (1915); *Pennsylvania R. Co. v. Puritan Coal Min. Co.* 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484 (1915); *Illinois C. R. Co. v. Mulberry Hill Coal Co.* 238 U. S. 275, 59 L. ed. 1306, 35 Sup. Ct. Rep. 760 (1915).

Again, it is charged that the order expressed by a legislative principle has the generality of such principle without any criterion of application. The order requires the company to "provide . . . upon reasonable request and reasonable notice,

at complainants' respective refineries, tank cars in sufficient number to transport complainants' normal shipments in interstate commerce." What is a reasonable request or reasonable notice, and what are normal shipments? The order affords no answer, and if the railroad company ventures, however honestly,* any resistance to a request or notice not deemed reasonable, or to shipments not deemed normal, it must exercise this right at the risk of a penalty of \$5,000 a day against all of its responsible officers and agents. These considerations are very serious (International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853; Collins v. Kentucky, 234 U. S. 634, 58 L. ed. 1510, 34 Sup. Ct. Rep. 924), but the view we have taken of the power of the Commission to make the order, however definite and circumscribed it might have been made, renders it unnecessary to pass upon the contentions.

Decree affirmed.

(242 U. S. 202)

GOSHEN MANUFACTURING COMPANY,
Petitioner,

v.

HUBERT A. MYERS MANUFACTURING
COMPANY and Hubert A. Myers.

PATENTS  280—EQUITY—JURISDICTION—
PATENT SUIT—REMEDY AT LAW.

A suit against a corporation for the latter's alleged infringement of a patent for a hoisting device is justiciable in equity, although the corporation had sold its entire plant and property before the suit was commenced, where it still retained the ownership of a subsequent patent under which it asserted the right to infringe, and denied complainant's rights, and asserted in such suit a countervailing right, submitted for legal judgment, and had, besides, shortly before such suit was begun, sued complainant's assignor in a state court for injury to its business because of an advertisement charging infringement, published a year before, and in that action had alleged that it "is a corporation duly organized and existing under the laws of the state of Indiana, and is now and has been for more than five years last past engaged in the business of manufacturing hay cars," since such conduct must be regarded as a continuing menace, the execution of which complainant had a right to arrest and to recover as well any lost profits.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 439; Dec. Dig.  280.]

[No. 60.]

Argued and submitted November 1 and 2,
1916. Decided December 11, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the District Court for the District of Indiana, dismissing the bill in a suit for the infringement of a patent. Reversed and remanded for further proceedings.

See same case below, 131 C. C. A. 662, 215 Fed. 594.

The facts are stated in the opinion.

Messrs. Fred L. Chappell and Otis A. Earl for petitioner.

Mr. V. H. Lockwood for respondents.

* Mr. Justice McKenna delivered the opinion.²⁰³
ion of the court:

Suit for infringement of a patent, brought by petitioner, whom we shall call complainant, against the respondents, whom we shall call defendants, in the circuit court for the district of Indiana, October 3, 1910.

The device of the controversy is a new and useful improvement in hoisting pulleys. It is alleged to have been invented by Hubert A. Myers, one of the defendants, who, after his application for a patent, but before the issue thereof, assigned all of his right and title to one Allen P. Boyer, to whom a patent was issued January 21, 1908. Boyer, on the 28th of September, 1910, sold and assigned his right and title to the patent to complainant, "together with all rights and choses in action which had accrued to him, as well as those which might accrue for infringement thereof, and all rights to sue for and recover damages or profits for the same."

It is alleged that after the issue of the patent and before the commencement of the suit defendants infringed the invention by* constructing and selling a large number of the pulleys, the exact number not known, and discovery is therefore prayed; and it is alleged that defendants have a large number on hand which they are offering for sale.

It is further alleged that large profits have been realized by defendants which might have been obtained by complainant; how much exactly, however, is unknown, and discovery is prayed. An accounting is also prayed and preliminary and final injunctions.

It is alleged that Myers took part in promoting and organizing the defendant corporation, that he is a large stockholder, and is actively engaged in directing and managing the affairs of the company, being its general manager.

It is also alleged that the trade and public have recognized the value and validity of the patent.

The defendants answered separately. Myers's answer is not in the record. The de-

fendant company's is, and denies that the company had in any manner infringed the rights of the complainant under the patent, or that any great loss or injury had accrued or will accrue to complainant by reason of anything theretofore done by defendant, or that complainant had been or is being deprived of any gains or profits to which it is lawfully entitled, by reason of any act or any manufacture, use, or sale of hoisting devices by defendant.

And defendant alleges that it has not manufactured any hoisting device of any kind since October, 1909, or sold or had for sale any hoisting device since March, 1910, and that complainant had knowledge of such facts before bringing this suit; and denies that it was receiving or enjoying great gains or profits, or had avowed its determination to continue manufacturing and selling any such devices.

*202 It admits that Myers took part in organizing the defendant corporation, but denies that he is a stockholder or in management of its affairs; alleges that he ceased to be a stockholder on November 19, 1909, and that he has not been a director or other officer since December 17th of that year, or connected with the company or interested therein.

The answer denies the other allegations of the bill, including the novelty of the device, specifically alleging that it was not the result of invention, but merely of mechanical skill in bringing together parts of hoisting devices long previously well known and described and published in prior patents, a list of which is given, and that hoisting devices of all substantial and patentable respects similar to the alleged invention were known and publicly sold and used in the United States, the instances of which are related.

Abandonment of the alleged invention by Myers is alleged, that complainant is stopped by reason of actions had in the patent office from claiming a device other than in the specific form shown and described in the patent, that Myers was not the first inventor or discoverer of a material and substantial part of the device of the patent, and that neither he nor the complainant has ever made or filed a disclaimer thereof, to the great injury of defendants.

There was a replication filed to the answer.

Upon the issues thus formed by the pleadings proofs were taken and a decree was entered that the suit be dismissed for want of equity. The decree gives no information upon which it was based.

The complainant took the case to the circuit court of appeals and that court affirmed the decree. Stating the question presented,

the court said: "The first and decisive question raised in this appeal from a decree dismissing a bill in equity after a full hearing is whether a court of equity or a court of law is the proper forum in which to determine complainant's rights." [131 C. C. A. 662, 215 Fed. 594.]

It will be observed that defendant puts in issue the title of complainant, the novelty of the device described in the patent, alleges anticipation, and precludes or narrows it by the condition of the prior art. It denies infringement and also irreparable loss or injury to complainant by anything theretofore done by defendant, or that complainant was deprived or is being deprived of any great gains or profits to which it is lawfully entitled by reason of any act or any manufacture, use, or sale of hoisting devices by defendant.

It appears from the facts found that Myers was the inventor of complainant's device and that he subsequently claimed to have invented another different from and superior to that of complainant, which he assigned to Boyer, and that the defendant company which Myers had helped to organize began to manufacture the device of the alleged second invention of Myers and made 25 in the spring of 1908, and the following fall prepared to make 500 more, 300 of which were sold and the rest not completed. In August, 1909, it (the defendant company) contracted to manufacture and sell to one Diedrich 500 additional carriers for the season of 1910. It was in testimony that the 300 carriers sold by defendant were sold through Diedrich as its agent.

In October, 1909, complainant published a newspaper advertisement declaring defendant company to be an infringer of complainant's device, and also sent a direct notice to defendant to the same effect. In consequence of this it is testified that the defendant company was unable to proceed and it fulfilled its contract with Diedrich by giving him permission to use its shop and materials to finish the 200 uncompleted carriers and to manufacture the 300 more called for by his contract.

In December, 1909, Myers sold his stock to the other stockholders and thereafter had no connection with the company, and it is testified that the company neither manufactured nor sold carriers after the notice of infringement, except as stated above, and that its president and general manager notified complainants in February, 1911,* that the company was practically dead. In March, 1910, it is further testified, it sold its entire plant and all of its property except only the letters patent No. 942,735, that is, the patent for the second invention of Myers, since which time it has

been out of business and without factory or office. It is also testified that in the latter part of 1909, after notice of infringement, it had decided not to manufacture any more carriers.

From this testimony the circuit court of appeals deduced that clearly as to Myers, after December, 1909, and as to the defendant company, after March, 1910, at the latest, no infringement of complainant's rights had been committed or threatened.

We are unable to concur in the conclusion as to the company. It sold its plant in March, 1910, but it retained the patent under which prior alleged infringements had been practised and justified, and the right to proceed under it is neither given up nor the intention to do so denied. Besides, in September, 1910, the company sued Boyer in the state court for the injury to its business by the advertisement of infringement published a year before, and in that suit the company made the following allegation: That it "is a corporation duly organized under the laws of the state of Indiana and is now and has been for more than five years last past engaged in the business of manufacturing hay cars." We cannot ascribe this to the inadvertence or improvidence of counsel, for which the company was not responsible, as an expression of its intention. It had infringed (we assume this for the sake of argument only); it retained the patent under which it asserted the right to infringe; there was injury inflicted, therefore, and the means retained of further infringement; a denial of complainant's right, and the assertion of a countervailing right submitted for legal judgment in the case under review and besides in an independent action. We must regard this conduct as a continuing menace, and we think complainant had a right to arrest its execution and recover as well the profits of which it had been deprived, if any. The case, therefore, does not fall within the rules of the cases cited by the circuit court of appeals and those cited by defendants. In other words, further infringement was in effect threatened and could be reasonably apprehended.

We have assumed that there was infringing done and threatened, and, of course, both assumptions are based on the validity and novelty of the device and that the defendant company's device—that is, the device of patent No. 942,735—is an unsubstantial variation of it. Whether the assumption is justified is yet to be decided, and, in the first instance, should be decided by the Circuit Court of Appeals.

Its decree dismissing the case is reversed and the case is remanded for further proceedings in accordance with this opinion.

Reversed.

BENITO LOVATO, Plff. in Err.,
v.

STATE OF NEW MEXICO.

COURTS $\hookrightarrow$ 387(2)—ERROR TO STATE COURT
—CASE TRIED IN TERRITORIAL COURT—
EFFECT OF ADMISSION OF STATE.

1. The denial of asserted rights based on U. S. Const., 5th and 6th Amendments, presents questions within the appellate jurisdiction of the Federal Supreme Court over the supreme court of the state of New Mexico in a case tried in a territorial court and appealed to the territorial supreme court before New Mexico was admitted to the Union.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1032; Dec. Dig. $\hookrightarrow$ 387(2).]

CRIMINAL LAW $\hookrightarrow$ 182—FORMER JEOPARDY
—"TWICE IN JEOPARDY."

2. The accused was not placed twice in jeopardy, contrary to U. S. Const. 5th Amend., because, after a demurrer to the indictment which had been entertained after a plea of not guilty had been entered and not withdrawn was overruled, the jury, which had been impaneled and sworn, was dismissed, and the accused was forthwith arraigned and required to plead, and this having been done, and both sides again announcing themselves ready for trial, the same jury previously impaneled was sworn and the trial proceeded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 330-332; Dec. Dig. $\hookrightarrow$ 182.
For other definitions, see Words and Phrases, First and Second Series, Jeopardy.]

CONSTITUTIONAL LAW $\hookrightarrow$ 268—JURY $\hookrightarrow$
31(11)—DUE PROCESS OF LAW—RIGHT TO
JURY TRIAL.

3. Neither due process of law nor the right to jury trial was denied, contrary to U. S. Const., 5th and 6th Amendments, because, after a demurrer to the indictment which had been entertained after a plea of not guilty had been entered and not withdrawn was overruled, the jury, which had been impaneled and sworn, was dismissed, and the accused was forthwith arraigned and required to plead, and this having been done, and both sides again announcing themselves ready for trial, the same jury previously impaneled was sworn and the trial proceeded.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 756, 757; Dec. Dig. $\hookrightarrow$ 268; Jury, Cent. Dig. §§ 216, 219; Dec. Dig. $\hookrightarrow$ 31(11).]

[No. 123.]

Submitted November 16, 1916. Decided December 11, 1916.

IN ERROR to the Supreme Court of the State of New Mexico to review a judgment which affirmed a conviction of manslaughter in the District Court for the County of Taos in the territory of New Mexico. Affirmed.

See same case below, 17 N. M. 666, L.R.A. 1917A, 1226, 134 Pac. 222.

The facts are stated in the opinion.

Mr. T. B. Catron for plaintiff in error.

Mr. Frank W. Clancy, Attorney General of New Mexico, for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

In the district court of the territory of New Mexico the accused, on May 9th, 1910, pleaded not guilty to an indictment for murder. On May 24, 1911, without withdrawing his plea, he demurred to the indictment on the ground that it charged no offense. The demurrer was overruled, and, both parties announcing themselves ready for trial, a jury was impaneled and sworn and the witnesses for both sides were called and sworn. The record then states: "That thereupon it appearing to E. C. Abbott, Esq., district attorney, that defendant had not been arraigned and had not plead since the overruling of defendant's demurrer, upon motion the court dismissed the jury and directed that the defendant be arraigned and plead." The accused was accordingly again at once arraigned and pleaded not guilty, and, both sides again announcing themselves ready for trial, the same jury previously impaneled was sworn and the trial proceeded. At the close of the evidence for the prosecution the defendant moved for a directed verdict on the ground, among others, that the record showed that he had been formerly placed in jeopardy for the same offense, since it appeared that in the same case a jury had been impaneled and sworn and thereafter had been dismissed from a consideration of the case. The motion was denied and a conviction of manslaughter followed. The same ground was relied upon in a motion in arrest of judgment which was denied, and from the judgment and sentence subsequently entered an appeal was prosecuted to the supreme court of the territory.

Pending the appeal New Mexico was admitted to the Union and the case was heard by the supreme court of the state. In that court, in addition to the contention as to former jeopardy, the accused urged that he had been denied due process of law and had been deprived of the right to a trial by jury because from the record it appeared that although a jury was impaneled before he was arraigned and pleaded not guilty, that jury was dismissed and it did not appear that any jury was impaneled after his arraignment and plea. The court held this contention to be without merit and concluded from a consideration of the common-law doctrine of former jeopardy, in the light of which it deemed the constitutional provision on the subject was to be construed, that the question concerning it was raised too late, since it was first presented to the trial court after the conclusion of the state's case. To the judgment of affirmance giving effect to these conclusions this

writ of error was prosecuted. 17 N. M. 666, L.R.A. 1917A, 1226, 134 Pac. 222.

As the case was tried in a territorial court, the denial of asserted rights based upon the 5th and 6th Amendments presents questions within our jurisdiction.

Without expressing any opinion as to the correctness of the ruling of the court below concerning the failure to promptly raise the question of former jeopardy, although on this record it may be conceded it presents a Federal question, we pass from its consideration, since we think the contention that the accused was twice put in jeopardy is wholly without merit. Under the circumstances there was, in the best possible view for the accused, a mere irregularity of procedure which deprived him of no right. Indeed, when it is borne in mind that the situation upon which the court acted resulted from entertaining a demurrer to the indictment after a plea of not guilty had been entered and not withdrawn, it is apparent that the confusion was brought about by an over-cautious purpose on the part of the court to protect the rights of the accused. Whether or not, under the circumstances, it was a necessary formality to dismiss the jury in order to enable the accused to be again arraigned and plead, the action taken was clearly within the bounds of sound judicial discretion.* United States v. Perez, 9 Wheat. 579, 580, 6 L. ed. 165, 166; Dreyer v. Illinois, 187 U. S. 71, 85, 86, 47 L. ed. 79, 86, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253. See United States v. Riley, 5 Blatchf. 204, Fed. Cas. No. 16,164, in which the facts were in substance identical with those here presented.

As to the contention concerning the denial of due process and the right to jury trial, it is not disputed that in the first instance a jury was legally impaneled. The argument is, however, that constitutional rights of the accused were violated because, after the order of dismissal and the plea of not guilty, there was a failure to impanel a jury, although the same jury previously drawn was at once sworn and tried the case. But we think the absolute want of merit in the proposition is manifest from its mere statement, and is additionally demonstrated by what we have previously said.

Affirmed.

(242 U. S. 195)

W. A. CISSNA, Plff. in Err.,

v.

STATE OF TENNESSEE.

COURTS — 380 — ERROR TO STATE COURT — RESUBMISSION — PENDENCY OF ORIGINAL SUIT INVOLVING SAME QUESTION.

A case in the Federal Supreme Court on writ of error to a state court, which

cannot be decided on the merits without involving a decision of the question involved in a boundary suit between two states, pending on the original calendar of the Supreme Court, should not be considered or passed upon either as to the jurisdiction or merits without at the same time considering and passing upon the pending controversy concerning the boundary between the two states, where an affirmance of the money judgment below will, in substance, be an award for virtually the entire avails of the lands in suit, as well as of the greater part, if not all, of the lands to be affected in the boundary suit, and such case will therefore be restored to the docket and reasigned for hearing at the same time and immediately after the coming on for hearing of the original boundary suit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 996-1018, 1026; Dec. Dig. § 380.]

[No. 89.]

Argued November 10, 1916. Decided December 11, 1916.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment which reversed a judgment of the Chancery Court of Shelby County, in that state, dismissing a suit by the state to recover certain lands, to restrain cutting timber thereon, and for an accounting for timber already cut. Case restored to docket and assigned for hearing at the same time with a pending original boundary suit involving the same question.

See same case below, 119 Tenn. 47, 104 S. W. 437.

The facts are stated in the opinion.

Mr. Caruthers Ewing for plaintiff in error.

Mr. John P. Bullington for defendant in error.

* Mr. Chief Justice White delivered the opinion of the court:

As owner in trust for the people of the state of certain described lands, the state of Tennessee in a state court commenced this action in 1903 against Cissna and others to recover the lands, and to restrain cutting timber thereon, and for an accounting for timber already cut. A temporary injunction was granted against removing and cutting timber, which was modified by permitting, on the giving of a bond, the removal of timber already cut, and was subsequently again modified by allowing all the timber on the land to be cut and removed on the giving of an additional bond. By pleas in abatement and answers the jurisdiction of the court was denied on the ground that the lands were not in Tennessee, but in Arkansas, and this was sustained and the suit dismissed for want of jurisdiction. The

supreme court of the state, however, reversed this action and remanded the case for trial on the merits. 119 Tenn. 47, 104 S. W. 437.

The pleadings were amended in the trial court, and while the case was there undetermined, the state of Arkansas filed in this court its complaint against Tennessee to settle* the boundary line between the two.* The bill made reference to the suit pending in Tennessee and alleged that the lands embraced by that suit were in Arkansas, subject to its sovereignty, and denied the power of the state of Tennessee in its own courts to interfere with the lawful authority of the state of Arkansas. Thereafter the existence of the suit in this court was alleged in the state court, and that court was asked to suspend proceedings until the decision in the boundary case. This was denied and a judgment was entered in favor of the state of Tennessee, holding that the lands were in Tennessee and belonged to that state, and this judgment was subsequently affirmed by the supreme court of the state. In that court also the pendency of the original suit between the two states in this court was specially set up and an application for suspension of proceedings, based on the fact, was prayed, but was refused. The judgment of the supreme court of the state not only decreed the lands to belong to the state of Tennessee in its sovereign capacity, on the ground that they were situated within that state, but gave a recovery for the amount of the timber cut before the bringing of the suit, and also for the money value of the balance of the timber on the lands which had been cut and removed as the result of the modification of the injunction, permitting that to be done.

At the threshold jurisdiction to review the judgment thus rendered is denied on the ground that no Federal question arises for decision.

It is conceded in argument by both parties that the decision of the merits of this case will necessarily be the equivalent of a decision of the boundary suit pending on our original calendar between the two states, and that an affirmance of the money judgment below will in substance be an award for virtually the entire avails of the lands in suit in this case, as well as of the greater part, if not all, of the lands to be affected in the boundary suit.* Moreover, in substance it is not disputed that the facts here presented are identical with those upon which the solution of the boundary suit must depend. Under these conditions we think, without intimating an opinion on the question of jurisdiction raised in this case, or on the merits, that we ought not to consider and pass upon this case without at

the same time considering and passing up on the controversy concerning the boundary between the two states, now pending on our docket. The identity of the two issues, the possible influence which the decision of the one would have on the rights pending in the other, and the fact that the actor, the state of Tennessee, in this suit, is the defendant in the original suit, we think render that conclusion necessary.

For these reasons we direct that this case be restored to the docket and that it be hereafter assigned for hearing at the same time and immediately after the coming on for hearing of the original boundary suit

between the two states. And to the end that that hearing may be expedited, we say in addition, first, that if the facts in the boundary case be stipulated by the parties either by reference to the facts shown in this case or otherwise, both the cases will be taken on submission on printed briefs, if the parties are so advised; or second, if they are not so advised, upon an agreement and stipulation as to the facts in the boundary case, that case and this will be ordered advanced and assigned for oral argument at an early day.

And it is so ordered.

FOLLOWING ARE MEMORANDA
OF
CASES DISPOSED OF AT OCTOBER TERM, 1916,

WITHOUT OPINIONS AND NOT ELSEWHERE OR OTHERWISE DISPOSED OF IN THIS EDITION.

HENRY F. MARSHALL, Petitioner, v. SAMUEL W. BACKUS, Commissioner of Immigration, etc. [No. 603.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Henry Ach for petitioner.

No counsel appeared for respondent.

November 6, 1916. Granted.

THOMAS EWING, Commissioner of Patents, Petitioner, v. UNITED STATES EX REL. FOWLER CAR COMPANY. [No. 721.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Warren for petitioner.

Messrs. Melville Church and Charles C. Linthicum for respondent.

November 6, 1916. Granted.

L. A. WESTERMANN COMPANY, Petitioner, v. DISPATCH PRINTING COMPANY. [No. 742.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Curtis C. Williams for petitioner.

No counsel appeared for respondent.

November 6, 1916. Granted.

EDGAR F. LUCKENBACH et al., Petitioners, v. W. J. McCAHAN SUGAR REFINING COMPANY et al. [No. 743.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Peter S. Carter and Charles C. Burlingham for petitioners.

Messrs. J. Parker Kirlin and Mark W. Maclay, Jr., for respondents.

November 3, 1916. Granted.

YEE SUEY, Petitioner, v. F. W. BERKSHIRE, Supervising Inspector of Immigration, etc. [No. 575.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Waters Davis for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

November 6, 1916. Denied.

BEN FRANKFURT, Petitioner, v. UNITED STATES. [No. 533.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. James M. Edwards for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Warren for respondent.

November 6, 1916. Denied.

WILLIAM R. STAATS COMPANY et al., Petitioners, v. SECURITY TRUST & SAVINGS BANK, as Trustee, etc. [No. 598.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. H. W. O'Melveny for petitioners.

Mr. Jefferson P. Chandler for respondent.

November 6, 1916. Denied.

COMMERCIAL SECURITY COMPANY et al., Petitioners, v. STEWART N. DUNNING, Trustee, etc. [No. 611.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Henry A. Heiser for petitioners.

Mr. Lucius F. Robinson for respondent.

November 6, 1916. Denied.

NATHAN A. HUGHES et al., Petitioners, v. UNITED STATES. [No. 677.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Theodore Mack and John Winfred Pope for petitioners.

Mr. Solicitor General Davis for respondent.

November 6, 1916. Denied.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, Petitioner, v. WAGNER ELECTRIC MANUFACTURING COMPANY. [No. 749.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Paul Bakewell and Thomas B. Kerr for petitioner.

Messrs. Melville Church and Edwin E. Huffman for respondent.

November 6, 1916. Denied.

CLARA P. BOBB, Plaintiff in Error, v. ALFRED C. F. MEYER. [No. 473.]

In Error to the Supreme Court of the State of Missouri.

Mr. Thomas J. Rowe for plaintiff in error.

No counsel appeared for defendant in error.

November 6, 1916. Dismissed with costs, on motion of counsel for plaintiff in error.

ARTHUR J. McDONALD, as Executor, et al., Plaintiffs in Error, v. J. T. McDONALD et al. [No. 80.]

In Error to the Supreme Court of the State of Arizona.

Mr. Roy D. Keehn for plaintiffs in error.

Mr. Selim M. Franklin for defendants in error.

November 6, 1916. Dismissed with costs, pursuant to the Tenth Rule.

CENTRAL TRUST COMPANY OF NEW YORK, as Trustees, etc., Appellant, v. UNITED STATES. [No. 768.]

Appeal from the District Court of the United States for the Southern District of Ohio.

Mr. Arthur H. Van Brunt for appellant. The Attorney General for appellee.

November 8, 1916. Dismissed with costs, on motion of counsel for the appellant, and mandate granted.

FRANCIS J. TORRANCE, Trustee, etc., et al., Plaintiffs in Error, v. FIRST-SECOND NATIONAL BANK OF PITTSBURGH. [No. 83.]

In Error to the District Court of the United States for the Western District of Pennsylvania.

Alvin A. Morris for plaintiffs in error.

No counsel appeared for defendant in error.

November 9, 1916. Dismissed with costs and mandate granted, on motion of counsel for the plaintiffs in error.

P. P. DABNEY et al., Plaintiffs in Error, v. CITY LAND COMPANY. [No. 96.]

In Error to the Supreme Court of the State of Oregon.

Messrs. Charles W. Fulton and Guy C. H. Corliss for plaintiffs in error.

Mr. Alfred E. Clark for defendant in error.

November 10, 1916. Dismissed with costs, pursuant to the Tenth Rule.

P. P. DABNEY et al., Plaintiffs in Error, v. JOHN H. MIDDLETON et al., as Executors, etc. [No. 97.]

In Error to the Supreme Court of the State of Oregon.

Messrs. Charles W. Fulton and Guy C. H. Corliss for plaintiffs in error.

Mr. Alfred E. Clark for defendants in error.

November 10, 1916. Dismissed with costs, pursuant to the Tenth Rule.

ILLINOIS SURETY COMPANY, Appellant, v. FRANK MILLER et al. [No. 82.]

Appeal from the District Court of the United States for the Eastern District of New York.

Messrs. L. Laflin Kellogg and Nelson L. Keach for appellant.

Messrs. Frederick P. King and George W. Bristol for appellees.

November 13, 1916. Per Curiam: Dismissed for want of jurisdiction, with 5 per cent damages, upon the authority of *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; *Brown v. Alton Water Co.* 222 U. S. 325, 56 L. ed. 221, 32 Sup. Ct. Rep. 156; *Metropolitan Water Co. v. Kaw Valley Drainage Dist.* 223 U. S. 519, 56 L. ed. 533, 32 Sup. Ct. Rep. 246; *Union Trust Co. v. Westhus*, 223 U. S. 519, 57 L. ed. 947, 33 Sup. Ct. Rep. 593; *Shapiro v. United States*, 235 U. S. 412, 59 L. ed. 291, 35 Sup. Ct. Rep. 122.

VANDALIA RAILROAD COMPANY, Plaintiff in Error, v. NATHANIEL G. STRINGER. [No. 86.]

In Error to the Supreme Court of the State of Indiana.

Mr. Charles W. Moores for plaintiff in error.

Messrs. Wymond J. Beckett and Martin M. Hugg for defendant in error.

November 13, 1916. Per Curiam: Dismissed for want of jurisdiction, with 5 per cent damages, upon the authority of *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Texas & N. O. R. Co. v. Miller*, 221 U. S. 408, 416, 55 L. ed. 789, 796, 31 Sup. Ct. Rep. 534; *Washington v. Miller*, 235 U. S. 422, 429, 59 L. ed. 295, 299, 35 Sup. Ct. Rep. 119; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224.

E. G. STEELE et al., Petitioners, v. HIGHLAND PARK MANUFACTURING COMPANY. [No. 729.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Joseph A. McCullough and John A. Marion for petitioners.

Messrs. Charles W. Tillett and Thomas C. Guthrie for respondent.

November 13, 1916. Denied.

HELOISE MCCENEY WILLS, Petitioner, v. SAMUEL MADDOX et al. [No. 740.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. R. B. Dickey, D. W. Baker, and Martin Conboy for petitioner.

Messrs. A. S. Worthington and H. Prescott Gatley for respondents.

November 13, 1916. Denied.

HIRAM CHASE, Appellant, v. PETER HANSEN. [No. 102.]

Appeal from the District Court of the United States for the District of Nebraska.

Mr. Hiram Chase, appellant, pro se.

Mr. Charles J. Kappler for appellee.

November 14, 1916. Dismissed with costs, pursuant to the Sixteenth Rule, on motion of counsel for the appellee.

37 S. C.—8.

AMERICAN BONDING COMPANY OF BALTIMORE, Plaintiff in Error, v. UNITED STATES OF AMERICA TO THE USE OF CAESAR FRANCINI et al. [No. 589.]

In Error to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Francis B. Bracken for plaintiff in error.

Mr. William M. Hargest for defendants in error.

November 14, 1916. Dismissed per stipulation.

G. S. NICHOLS & COMPANY et al., Petitioners, v. UNITED STATES. [No. 757.]

Petition for a Writ of Certiorari to the United States Court of Customs Appeals.

Mr. Albert H. Washburn for petitioners.

No counsel appeared for respondent.

November 20, 1916. Granted.

ALEX D. SHAW & COMPANY et al., Petitioners, v. UNITED STATES. [No. 758.]

Petition for a Writ of Certiorari to the United States Court of Customs Appeals.

Mr. W. P. Preble for petitioners.

No counsel appeared for respondent.

November 20, 1916. Granted.

F. VITELLI & SONS, Petitioners, v. UNITED STATES. [No. 769.]

Petition for a Writ of Certiorari to the United States Court of Customs Appeals.

Mr. Albert M. Guzzolino for petitioners.

No counsel appeared for respondent.

November 20, 1916. Granted.

F. VITELLI & SON, Petitioners, v. UNITED STATES. [No. 770.]

Petition for a Writ of Certiorari to the United States Court of Customs Appeals.

Mr. Albert M. Guzzolino for petitioners.

No counsel appeared for respondent.

November 20, 1916. Granted.

LAM FUNG YEN, Petitioner, v. G. OLIVER FRICK, United States Immigration Inspector, etc. [No. 663.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. E. J. Henning for petitioner.

No appearance for respondent.

November 20, 1916. Denied.

CHAUTAUQUA INSTITUTION, Petitioner, v. JOHN L. ZIMMERMAN et al. [No. 731.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Thornton M. Hinkee for petitioner.

Mr. J. Warren Keifer for respondents.

November 20, 1916. Denied.

JAMES W. CAMPBELL, Petitioner, v. CHARLES M. CAMPBELL et al. [No. 763.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. William Henry White for petitioner.

Mr. John Ridout for respondents.

November 20, 1916. Denied.

COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, Petitioner, v. TERESA M. BUMP. [No. 773.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Joseph P. Nolan and John M. Nolan for petitioner.

Mr. Frederic E. Mygatt for respondent.

November 20, 1916. Denied.

UNITED STATES, Appellant, v. E. DOWDEN et al. [No. 354.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

The Attorney General for appellant.

Mr. Repra Bond for appellees.

November 20, 1916. Dismissed, on motion of counsel for the appellant.

WELLS FARGO & COMPANY EXPRESS, Plaintiff in Error, v. STATE OF OKLAHOMA. [No. 91]; AMERICAN EXPRESS COMPANY, Plaintiff in Error, v. STATE OF OKLAHOMA [No. 92]; and UNITED STATES EXPRESS COMPANY, Plaintiff in Error, v. STATE OF OKLAHOMA [No. 93].

In Error to the Supreme Court of the State of Oklahoma.

Mr. S. T. Bledsoe for plaintiffs in error.

No counsel appeared for defendant in error.

November 20, 1916. Dismissed on motion of counsel for the plaintiffs in error.

(242 U. S. 307)

CHRISTOPHER L. WILLIAMS, as Receiver
of First National Bank of Mineral Point,
Wisconsin,

v.

JOHN P. COBB.

BANKS AND BANKING ⚡249(3)—**NATIONAL BANKS—LIABILITY OF STOCKHOLDER—EFFECT OF TRANSFER BY EXECUTORS.**

1. A transfer of decedent's national bank stock by executors to themselves as trustees, in the bona fide discharge of their duty under the will to invest a specified sum in "interest-bearing securities," and pay the income thereof to a designated person, is not void, but only voidable, and so long as the transfer is permitted to stand without direct attack the title must be deemed to have passed, so as to relieve both the estate and a legatee, made liable by statute, after distribution, for debts of the estate, from any liability for a subsequent assessment upon the stock for the benefit of creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 918; Dec. Dig. ⚡249(3).]

TRUSTS ⚡197—**IN PERSONAL PROPERTY—ILLEGAL TRANSFER BY TRUSTEE—VOID OR VOIDABLE.**

2. Trusts in personal property cannot be deemed to be controlled by the provision of Wis. Stat. § 2091, that "when a trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustee in contravention of the trust shall be absolutely void," in view of the facts that this section is found in a chapter devoted to "uses and trusts," under the title, "Real Property and the Nature and Quality of Estates Therein," and that the highest state court has refused to make applicable to personal property other sections of this same chapter, and that in the statute dealing with "trust investments" (Wis. Stat. Sup. § 2100b) no such provision is found.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 252-257; Dec. Dig. ⚡197.]

[No. 125.]

Submitted November 17, 1916. Decided
December 18, 1916.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York, dismissing the bill in a suit to enforce an assessment on national bank stock. Affirmed.

See same case below, 134 C. C. A. 217, 219 Fed. 663.

The facts are stated in the opinion.

Messrs. John B. Sanborn and Chauncey E. Blake for appellant.

Mr. Kurnee R. Babbitt for appellee.

* Mr. Justice Clarke delivered the opinion of the court:

In 1904 Laura A. Cobb died testate at

Mineral Point, Wisconsin, and by her will directed her executors to invest the sum of \$2,000 of her estate in "interest-bearing securities," to pay the income thereof to Catherine Monohan during her life, and on her death to distribute the trust fund to certain persons designated in the will. The defendant, John P. Cobb, and one Calvert Spensley, were appointed executors of Mrs. Cobb's will, and so administered her estate that in July, 1908, they filed their final account as executors, reciting that the estate was wholly distributed, with the exception of twenty shares of the capital stock of the First National Bank of Mineral Point, which the account stated the executors had caused to be transferred to themselves and registered in their names as trustees for Catherine Monohan.

The bank became insolvent, and the Comptroller of the Currency on the 3d day of November, 1909, made an assessment of \$100 upon each share of the capital stock of the bank for the payment of creditors.

The defendant was a son of the deceased, and, as legatee and distributee, received a sum of money greater than the amount of the assessment on the twenty bank shares.

The foregoing facts are all derived from the bill filed in this case, to which the defendant demurred. The district court sustained the demurrer and entered an order dismissing the bill. The circuit court of appeals affirmed this decree, and the case is here upon appeal.

The theory upon which this suit was commenced is that the transfer of the twenty shares of bank stock by Cobb and Spensley, as executors, to themselves, as trustees for Catherine Monohan, is void; that the stock is as if it had never been transferred at all, and is therefore an undistributed asset of the estate of Mrs. Cobb, and that the defendant, having received as legatee and distributee much more than the amount of the assessment, is liable under the Wisconsin statute to the receiver for the assessment, a debt of the estate, all the other assets having been distributed before the failure of the bank.

Obviously the question as to the liability of the defendant turns upon whether the transfer of the stock to Cobb and Spensley, as trustees for Catherine Monohan, is void or voidable; for if it is voidable only, this suit was improvidently commenced. At common law, and no Wisconsin statute is cited to modify the rule, an executor has full power, without any special provision of the will that he is administering or order of court, to sell or dispose of the personal assets of the estate, and thereby to pass good title to them. *Munteith v. Rahn*, 14 Wis. 210; *Ex parte Gay*, 5 Mass. 419;

Leitch v. Wells, 48 N. Y. 585. *Perry, Tr.* §§ 225, 809. A sale by an executor, even to himself, is not void, but only voidable, at the option of interested persons. *Grim's Appeal*, 105 Pa. 375; *Tate v. Dalton*, 41 N. C. (6 Ired. L.) 562. And if, after such purchase from himself, an executor sells to another, the purchaser from him acquires a good title. *Cannon v. Jenkins*, 16 N. C. (1 Dev. Eq.) 426.

No suggestion is made that the transfer of the stock by the executors to themselves as trustees was not made in good faith, and it was obviously made under the conviction that it was, if not "an interest-bearing security," at least the equivalent of such a security. Very certainly this was the basis for the approval of the transaction by the appropriate Wisconsin court more than a year before the bank failed, and, for anything that appears in the record, prior to the time when the bank became insolvent.

The claim that the lower court failed to give proper effect to § 2091 of the Wisconsin statute cannot be allowed. The part of this section which is claimed to be applicable reads:

"When a trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee in contravention of the trust shall be absolutely void."

This section is found in a chapter devoted to "Uses and Trusts," of the title, "Real Property and the Nature and Quality of Estates Therein," and the claim is made that its drastic provision should be extended to trusts in personal property. No Wisconsin court has so applied it, but, on the contrary, the supreme court of the state, in *Lamberton v. Pereles*, 87 Wis. 449, 23 L.R.A. 824, 58 N. W. 776, refused to make other sections of this same chapter respecting real estate applicable to personal property, saying: "In this state we have no statute making the statute of uses and trusts, or any part of it, applicable to personal property." It is significant also that, in the statute dealing with "Trust Investments," no such provision is found. Wis. Stat. Supp. § 2100b.

It results that, since the executors had lawful authority to dispose of the bank shares, assets as they were of the estate, so long as the transfer is permitted to stand unassailed directly the title to them is in the defendant and Spensley, as trustees for Catherine Monohan, and that the estate of Mrs. Cobb is not liable to the receiver for the assessment claimed. If the estate is not liable, the defendant, as legatee and distributee, is not liable, and the claim in suit, obviously without natural equity, is therefore without technical merit, and

the decree of the Circuit Court of Appeals must be affirmed.

(242 U. S. 303)

ERIE RAILROAD COMPANY, Plff. in Err.,
v.

JAMES T. WELSH.

COMMERCE — 27(5)—EMPLOYERS' LIABILITY—WHEN SERVANT IS ENGAGED IN INTERSTATE COMMERCE.

1. The true test as to whether an injured railway employee was engaged in interstate commerce at the time he received his injuries, so as to make applicable the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), is the nature of the work he was doing at the time of the injury, and the mere expectation that he would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act.

[Ed. Note.—For other cases, see *Commerce*, Dec. Dig. — 27(5).]

COMMERCE — 27(6)—EMPLOYERS' LIABILITY—WHEN SERVANT IS ENGAGED IN "INTERSTATE COMMERCE."

2. A yard conductor on an interstate railway, injured while alighting from a slowly moving freight engine for the purpose of reporting to the yardmaster's office for further orders, having executed all previous orders, was not employed in interstate commerce so as to render applicable the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), although the orders which he would have received had he not been injured would have required him immediately to make up an interstate train.

[Ed. Note.—For other cases, see *Commerce*, Dec. Dig. — 27(6).]

For other definitions, see *Words and Phrases*, First and Second Series, *Interstate Commerce*.]

COURTS — 399(2)—ERROR TO STATE COURT—FOLLOWING DECISION BELOW—QUESTION FOR JURY.

3. A decision of a state court that the evidence did not require the submission to the jury of the question whether a yard conductor on an interstate railway was, at the time of his injury, employed in interstate commerce, should not be disturbed by the Federal Supreme Court, where the testimony shows that such employee having, under orders, taken from one yard to another an interstate freight car and a caboose which, so far as appears, was not to go outside the state, and having placed the freight car on a siding, to be made up into a train by another crew, and having taken the caboose a short distance further and placed it on another siding, next took the engine to a water plug and took on water, and then returned to the first yard, and was injured while attempting to alight from the locomotive for the purpose of reporting to the yardmaster's office for further orders.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1090; Dec. Dig. — 399(2); *Appeal and Error*, Cent. Dig. §§ 3384, 3385, 3396.]

[No. 29.]

Argued October 25, 1916. Decided December 18, 1916.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Mahoning County in that state, in favor of plaintiff in an action brought under the Federal Employers' Liability Act. Affirmed.

See same case below, 89 Ohio St. 81, 105 N. E. 189.

The facts are stated in the opinion.

Messrs. Leroy A. Manchester, C. D. Hine, James B. Kennedy, and John W. Ford for plaintiff in error.

Mr. William R. Stewart for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

The supreme court of Ohio (89 Ohio St. 81, 105 N. E. 189) affirmed a circuit court judgment which sustained a judgment*recovered in a court of common pleas by Welsh against the Erie Railroad Company for damages on account of personal injuries suffered by him while in its employ as a yard conductor in the Brier Hill yard, near Youngstown, Ohio; overruling the contention of the defendant (now plaintiff in error) that by certain rulings of the trial court defendant had been deprived of rights secured to it by the Federal Employers' Liability Act of April 22, 1908 (chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657).

Plaintiff's case was that, on March 7, 1911, about 11 o'clock p. m., while in the performance of his duties, he attempted to alight from the footboard of a slowly moving locomotive; that in so doing he stepped upon a pulley wheel of an interlocking mechanism situate between the tracks, and then covered with snow, and the turning of the wheel under his weight caused his foot to become entangled in the interlocking wires, as a result of which he fell partly under the locomotive and sustained serious injuries. The negligence attributed to defendant was the failure properly to guard or cover the wires and the pulley wheel. There was evidence tending to show such a knowledge on plaintiff's part of the nature and character of the interlocking apparatus and its location between the tracks, and such a knowledge and appreciation of the dangers incident thereto, as to bring into play the defense of assumption of risk (Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 503, 58 L. ed. 1062, 1069, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Jacobs v. Southern R. Co. 241 U. S. 229, 234, 30 L. ed. 970,

976, 36 Sup. Ct. Rep. 588), if the case came within the Federal act; and this depended upon whether plaintiff was employed by defendant in interstate commerce at the time he received his injuries. Defendant's fourth request was for the submission to the jury of the question whether plaintiff was employed in such commerce, with an appropriate instruction embodying the rule as to assumption of risk in case they should find him to have been so employed. This request, which in terms invoked the protection of the act of Congress, was refused,²³⁰⁵ and the trial court, in the*instructions²³⁰⁶ given, declined to follow that act or the common law, and, on the contrary, instructed the jury that, under a state statute held to be applicable, the assumption of risk was not a defense.

The rulings of the trial court were sustained by the supreme court (and presumably by the circuit court) upon the ground that, upon the undisputed evidence, plaintiff was not at the time employed in interstate commerce. As to this question, there was testimony tending to show that defendant was a common carrier by rail engaged in commerce between the states, and that plaintiff was and for some time had been a yard conductor engaged in night duty at its Brier Hill yard, a mile or more west of Youngstown; that he performed miscellaneous services in the way of shifting cars and breaking up and making up trains, under orders of the yardmaster, and had to apply frequently to the latter for such orders; that when any orders thus given had been performed, or had "run out," he usually reported at the yardmaster's office for further orders; that on the night in question plaintiff, with a yard crew, took a freight car loaded with merchandise destined to a point without the state, and a caboose which, so far as appears, was not to go beyond the limits of the state, from the Brier Hill yard eastwardly to the "F. D. yard" in Youngstown, where the freight car was placed upon a siding, so that it might be made up into a train by another crew; that they then took the caboose a short distance farther and placed it upon another siding; that they next took the engine to a water plug and took on water, and then returned with it to the Brier Hill yard; that on this return journey the engine was slowed down near the yardmaster's office, which is at the easterly end of that yard, so as to enable Welsh to report for further orders, all previous orders having been executed; and that the injury was received while he was attempting to alight for that purpose,²³⁰⁶ * It was in evidence, also, that the orders* plaintiff would have received had he not

been injured on his way to the yardmaster's office would have required him immediately to make up an interstate train. Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion, this view is untenable. By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, 478, 58 L. ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, 10 N. C. C. A. 153.

There remains the contention that plaintiff's act in stepping from the yard engine was in completion of his trip to the "F. D. yard" with the interstate car, and hence was itself an act in furtherance of interstate commerce. This cannot be answered by saying, in the words used *arguendo* by the state supreme court (89 Ohio St. 88), that "he was not then and there employed in moving or handling cars engaged in interstate commerce." The question remains whether he was performing an act so directly and immediately connected with his previous act of placing the interstate car in the "F. D. yard" as to be a part of it or a necessary incident thereto. *New York C. & H. R. R. Co. v. Carr*, 238 U. S. 260, 264, 59 L. ed. 1298, 1300, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; *Shanks v. Delaware, L. & W. R. Co.* 239 U. S. 556, 559, 60 L. ed. 436, 438, L.R.A.1916C, 797, 36 Sup. Ct. Rep. 188. And this depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a single and indivisible task. It turns upon no interpretation of the act of Congress, but involves simply an appreciation of the testimony and admissible inferences therefrom in order to determine whether there was a question to be submitted to the jury as to the fact of employment* in interstate commerce. The state courts held there was no such question, and we cannot say that in so concluding they committed manifest error. It results that, in the proper exercise of the jurisdiction of this court in cases of this character, the decision ought not to be disturbed. *Great Northern R. Co. v. Knapp*, 240 U. S. 464, 466, 60 L. ed. 745, 751, 36 Sup. Ct. Rep. 399.

Judgment affirmed.

(242 U. S. 298)

PENNSYLVANIA RAILROAD COMPANY,
Plff. in Err..

v.

STINEMAN COAL MINING COMPANY.

COURTS ⇨489(9) — JURISDICTION — SUIT AGAINST INTERSTATE CARRIERS—CAR DISTRIBUTION — ADMINISTRATIVE QUESTION.

1. A state court has jurisdiction without previous action by the Interstate Commerce Commission of a suit by a coal mining company against an interstate carrier to recover the damages arising in interstate commerce out of the latter's failure to furnish such company with the number of coal cars to which it claims to be entitled under the carrier's own rule for car distribution, since, the rule itself not being attacked, there was no administrative question involved.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1326; Dec. Dig. ⇨489(9).]

COURTS ⇨489(9) — JURISDICTION—SUIT AGAINST INTERSTATE CARRIERS—CAR DISTRIBUTION—ADMINISTRATIVE QUESTIONS.

2. The carrier's defense at the trial of a suit brought by a shipper to recover the damages arising in interstate commerce out of the carrier's failure to furnish such shipper with the cars to which it claimed to be entitled under the carrier's own rule for car distribution, that the rule invoked by the shipper was discriminatory, and therefore not an appropriate test of the shipper's right or the carrier's duty, did not oust the state court of jurisdiction, where the administrative question thus presented was not then an open one, such rule having theretofore been found by the Interstate Commerce Commission, upon complaint of other shippers, to be unjustly discriminatory.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1326; Dec. Dig. ⇨489(9).]

COMMERCE ⇨88 — INTERSTATE COMMERCE COMMISSION — JUDICIAL RESPECT FOR FINDINGS—DISCRIMINATION — CARRIER'S RULE FOR CAR DISTRIBUTION.

3. No recovery may be had in a suit brought in a state court by a shipper to recover damages arising in interstate commerce out of the carrier's failure to furnish a shipper with the cars to which it claimed to be entitled under the carrier's own rule for car distribution, where, before the trial, though after the period covered by the suit, the Interstate Commerce Commission, upon complaint of other shippers and after a full hearing, had found that such rule was unjustly discriminatory, and had directed the carrier to give no further effect to it, and, recognizing that shippers who had been injured through its operation in the past were entitled to reparation, had proceeded to award reparation to such shippers as appeared and adequately proved their injury and the amount of damages sustained, the Commission's report making it plain that the finding was not based upon any temporary condition, but upon what inhered in the

rule, and therefore was true from the time of its adoption.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141; Dec. Dig. 88.]

[No. 11.]

Argued May 14, 1915. Restored to docket for reargument June 14, 1915. Reargued October 25, 1915. Decided December 18, 1916.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Clearfield County, in that state, in favor of a shipper in an action against an interstate carrier to recover damages arising in interstate commerce from the carrier's failure to furnish the shipper with the cars to which it claimed to be entitled under the carrier's own rule for car distribution. Reversed.

See same case below, 241 Pa. 509, 88 Atl. 761.

The facts are stated in the opinion.

Messrs. Francis I. Gowen, John G. Johnson, and F. D. McKenney for plaintiff in error.

Messrs. A. M. Liveright and A. L. Cole for defendant in error.

* Mr. Justice Van Devanter delivered the opinion of the court:

In a state court in Pennsylvania the coal company recovered a judgment against the railroad company for damages resulting, as was claimed, from unjust discrimination practised in the distribution of coal cars in times of car shortage; and the supreme court of the state affirmed the judgment. 241 Pa. 509, 88 Atl. 761.

The suit related to both intrastate and interstate commerce, and whether, in respect of the latter, it could be brought in a state court consistently with the Interstate Commerce Act is the first question presented.

The coal company was engaged in coal mining on the carrier's line in Pennsylvania, and was shipping the coal to points in that and other states. Other coal companies were engaged in like operations in the same district. A rule of the carrier provided for a pro rata distribution of the available supply of coal cars in times of car shortage, but did not require or contemplate that individual cars, owned or controlled by the shipper, should be charged against his distributive share. Without questioning the reasonableness of this rule, but, on the contrary, assuming that it was unobjectionable and became the true measure of the shipper's right and the carrier's duty, the coal company claimed that the carrier had unjustly discriminated

against it to its damage by furnishing it a smaller number of cars, and some of its competitors a greater number, than the rule contemplated or permitted. In other words, the claim was not that the rule was discriminatory, but that it was violated or unequally enforced by the carrier. Of such a suit we said in *Pennsylvania R. Co. v. Puritan Coal Min. Co.* 237 U. S. 121, 131, 132, 59 L. ed. 867, 873, 35 Sup. Ct. Rep. 484, where the provisions of the Interstate Commerce Act were extensively considered: "There is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts." Adhering to this view, we think the suit was properly brought in a state court. See *Pennsylvania R. Co. v. Sonman Shaft Coal Co.* 242 U. S. 120, 61 L. ed. 188, 37 Sup. Ct. Rep. 46.

But it is suggested that, in the course of the trial, an administrative question—one which the act intends the Interstate Commerce Commission shall solve—was brought into the suit, and that this disabled the court from proceeding to a decision upon the merits. The suggestion is grounded upon the fact that one of the carrier's defenses at the trial was to the effect that the rule invoked by the coal company as fixing its quota of the cars was unjustly discriminatory, and therefore not an appropriate test of the shipper's right or the carrier's duty. We think the suggestion is not well taken. The administrative question, which was whether the rule was reasonable or otherwise, was not then an open one. It had been theretofore determined in the mode contemplated by the act. Upon the complaint of other shippers, and after a full hearing, the Commission had found that the rule was unjustly discriminatory, and had directed the carrier to give no further effect to it. See *Hillsdale Coal & Coke Co. v. Pennsylvania R. Co.* 19 Inters. Com. Rep. 356; *Jacoby v. Pennsylvania R. Co.* 19 Inters. Com. Rep. 392, 23 Inters. Com. Rep. 186. This was shown by the reports and orders of the Commission, which were produced in evidence. Thus there was no jurisdictional obstacle at this point.

The Commission deemed it essential to a fair distribution in times of car shortage that individual cars, owned or controlled by the shipper, should be charged against his distributive share, and because the rule here took no account of such cars the Commission found that it was unjustly discriminatory. This occurred two years before the trial, but after the period covered by the suit. As

part of its defense the carrier claimed that the cars distributed to the coal company during that period included many individual cars controlled by the latter, and that these were not charged against its distributive share. Evidently intending to recognize that this was so, and desiring to shorten the trial, the parties agreed that a verdict should be taken for the coal company in a designated sum, subject to the condition, among others, that "if, under the practice, the law, and the rules," the court should conclude that "the plaintiff company should have been charged with individual cars," then judgment should be entered for the carrier non obstante veredicto. The verdict was taken and judgment entered thereon, the court concluding that the rule should be respected notwithstanding the Commission's finding. Complaint is made of this decision, and we think it was wrong. That this shipper was not a party to the proceeding before the Commission hardly needs notice, no point being made of it in the briefs. And it is not a valid objection that the finding came after the period to which the suit relates. The act contemplated that the proceeding should be conducted in the interest of all the shippers who had been, or were likely to be, affected by the rule, and not merely in the interest of those who filed the complaint. The purpose was to determine the character of the rule for the equal benefit of all, to the end not only that discrimination thereunder in the future might be prevented, but also that such discrimination in the past might be redressed. So understanding the act, the Commission, upon finding the rule unjustly discriminatory, ordered the carrier to cease giving effect to it, and also recognized that shippers who had been injured through its operation in the past were entitled to reparation. And the Commission proceeded to award reparation to such shippers as appeared and adequately proved their injury and the amount of damages sustained. Not only so, but the Commission's report makes it plain that the finding was not based upon any temporary or changeable condition existing at the time, but upon what inhered in the rule, and therefore was true from the time of its adoption. The legal propriety of the Commission's finding is not questioned, but only that it operates to discredit the carrier's rule as respects earlier transactions.

In the circumstances stated we are of opinion that effect must be given to the Commission's finding, even though it came after the transactions in question, and that a recovery by the coal company cannot be permitted without departing from the uniformity and equality of treatment which the act is intended to secure. Only through an

enforcement of the discriminatory rule, and of the particular feature which made it discriminatory, can a recovery be had. A right to recover independently of that is neither shown nor claimed. In short, the coal company concedes that it received all the cars to which it would have been entitled under a reasonable rule, and yet seeks to recover upon the ground that more cars were not delivered to it under a rule which was unreasonable, because unduly discriminatory in its favor. Consistently with the act this cannot be done.

Judgment reversed.

(242 U. S. 288)

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,

v.

OHIO VALLEY TIE COMPANY.

COURTS — 394(15) — ERROR TO STATE COURT — FEDERAL QUESTION — RIGHTS ASSERTED UNDER INTERSTATE COMMERCE ACT.

1. A case in which the defeated party insisted at the trial court and on appeal in the highest state court upon its asserted rights under the Interstate Commerce Act of February 4, 1887 (24 Stat. at L. 382, chap. 104, § 8, Comp. Stat. 1913, § 8572), and in which those rights were passed upon adversely by the latter court, is within the appellate jurisdiction of the Federal Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1064; Dec. Dig. — 394(15).]

COMMERCE — 88 — INTERSTATE COMMERCE COMMISSION — REPARATION ORDER — WHAT DAMAGES INCLUDED — SUBSEQUENT RECOVERY IN STATE COURT.

2. All the damages that properly can be attributed to a carrier's overcharge, whether it be the keeping of the shipper out of its money, or the damage to its business following as a remoter result of the same cause, must be deemed to have been included in an award by the Interstate Commerce Commission of a sum of money to a shipper as reparation for unreasonable rates, pursuant to the provisions of the Act of February 4, 1887 (24 Stat. at L. 382, chap. 304, Comp. Stat. 1913, §§ 8572, 8573, 8581) §§ 8, 9, 13, which contemplate the recovery of all damages sustained through violations of the act, either before the Commission or in the courts, requiring, however, an election between the two methods of procedure; and a satisfaction of the Commission's award precludes any recovery in a subsequent action in a state court for any damages arising out of such overcharge.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141; Dec. Dig. — 88.]

[No. 66.]

Argued November 3 and 6, 1916. Decided December 18, 1916.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Jefferson County, in that state, in favor of plaintiff in a suit by a shipper against an interstate carrier to recover damages for wilful and malicious injury to the former's business. Reversed.

See same case below, 161 Ky. 212, 170 S. W. 633.

The facts are stated in the opinion.

Messrs. Helm Bruce and Henry L. Stone for plaintiff in error.

Messrs. Edward W. Hines, John Bryce Baskin, and J. V. Norman for defendant in error.

*Mr. Justice Holmes delivered the opinion of the court:

This is a suit brought by the defendant in error in 1911 against the railroad company to recover for injury to business and other damages alleged to have been caused by the railroad's acts. The most important feature at this stage is that the railroad maintained and collected a higher rate for crossties than it did for lumber when they were carried between states, although the State Commission required the same rate upon both for carriage within the state, and although, as the railroad knew, the Interstate Commerce Commission repeatedly had decided that the rates for crossties and lumber should be the same. It is alleged that these and the other acts complained of were done for the purpose of getting rid of the plaintiff as a competitive buyer, and, in that sense, maliciously. The plaintiff tried to meet the higher rate by directing delivery within the state of ties intended to go beyond, which attempt the defendant encountered by refusal to carry them except on its interstate tariff, and hampered the plaintiff by declining to let its cars leave its road, by deliveries at points requiring a haul by wagon, and so forth; and, in short, it may be assumed that the railroad did other acts to further the alleged end, not necessary to be stated here.

Shortly before bringing this suit the plaintiff complained to the Interstate Commerce Commission in respect of charges collected upon ninety-one carloads of ties, and in 1912 obtained an order that the railroad pay to it \$6,198 as reparation for unreasonable rates, and establish a rate for ties not to exceed its contemporaneous one for lumber of the same kind of wood. This order was pleaded by an amendment to the petition, and it appeared at the trial that the sum awarded had been paid. As the damage alleged was attributed mainly to the publication and exaction of excessive charges, the defendant insisted at the trial

and before the court of appeals upon its rights under the Act to Regulate Commerce, and those rights were passed upon by the court, so that there is no doubt of the jurisdiction here, although some questions were raised that we think it unnecessary to discuss.

The defendant contended and asked for a ruling that in this action no damages could be allowed "on account of defendant's having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of crossties" and other rulings to similar effect. It also asked an instruction that, under the Act to Regulate Commerce, it was required to collect the rates fixed by its tariff on file and in effect. These requests were refused, and the jury were told that if they believed that the rates found by the Interstate Commerce Commission to be unreasonable were wilfully and maliciously maintained with intent to injure the plaintiff's business, and that the defendant knew them to be unreasonable, and that by its acts it tied up a part of the plaintiff's capital, and so damaged the plaintiff's business, then upon this, as well as on several other possible findings stated, they would find for the plaintiff. The jury found a verdict for the plaintiff for certain itemized expenses and for \$50,000 damage to plaintiff's business and credit, as mentioned in the above instruction. Judgment on the verdict was affirmed by the court of appeals. 161 Ky. 212, 170 S. W. 633.

The court of appeals decided that the Act to Regulate Commerce committed to the Interstate Commerce Commission only the granting of special relief against the making of an overcharge, and that the satisfaction of the Commission's award still left open an action in the state courts to recover what are termed general damages,—such as are supposed to have been recovered in this case. In this we are of opinion that the court was wrong.

By § 8 a common carrier violating the commands of the act is made liable to the person injured thereby "for the full amount of damages sustained in consequence" of the violation. [24 Stat. at L. 382, chap. 104, Comp. Stat. 1913, § 8572.] By § 9 any person so injured may make complaint to the Commission or may sue in a court of the United States to recover the damages for which the carrier is liable under the act, but must elect in each case which of the two methods of procedure he will adopt. The rule of damages in one hardly can be different from that proper for the other. An award directing the carrier to pay to the complainant the sum to which he is entitled is provided for by § 16. By the same section, if the carrier does not comply in

due time with the order, the complainant may sue in a state court,—which implies that if the order has been complied with and the money paid no suit can be maintained. It is to be noticed further that reparation before answer is contemplated as possible by § 13, and in that case the carrier shall be relieved of liability to the complainant, though only, of course, for the particular violation of law. The decisions say that whatever the damages were, they could be recovered (*Pennsylvania R. Co. v. International Coal Min. Co.* 230 U. S. 184, 202, 203, 57 L. ed. 1446, 1453, 1454, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; *Meeker v. Lehigh Valley R. Co.* 236 U. S. 412, 429, 59 L. ed. 644, 657, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691); and that the statute determines the extent of damages (*Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.* 238 U. S. 456, 472, 59 L. ed. 1406, 1413, 35 Sup. Ct. Rep. 896). We are of opinion that all damage that properly can be attributed to an overcharge, whether it be the keeping of the plaintiff out of its money, dwelt upon by the trial court, or the damage to its business following as a remoter result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid.

If, at a new trial, the plaintiff can prove that the defendant unjustifiably refused cars or caused it other damage not attributable to the overcharge of freight, our decision does not prevent a recovery; but it is evident that the present judgment embraces elements that cannot be allowed.

Judgment reversed.

(242 U. S. 292)

ILLINOIS CENTRAL RAILROAD COMPANY, Plff. in Err.,

v.

ROBERT H. PEERY.

COMMERCE — 27(6)—EMPLOYERS' LIABILITY — WHEN SERVANT ENGAGED IN "INTERSTATE COMMERCE."

A freight conductor employed on a round-trip run between two points in the same state cannot be said still to be engaged in interstate commerce, within the meaning of the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), while making his return trip with a train devoted solely to domestic commerce, because his train on the trip out carried interstate freight.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. — 27(6).]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

[No. 77.]

Argued and submitted November 7 and 8, 1916. Decided December 18, 1916.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which, on a second appeal, affirmed a judgment of the District Court of Ramsey County, in that state, in favor of plaintiff in an action based upon the Federal Employers' Liability Act. Reversed.

See same case below, on first appeal, 123 Minn. 264, 143 N. W. 724; on second appeal, 128 Minn. 119, 150 N. W. 382.

The facts are stated in the opinion.

Messrs. Blewett Lee and W. S. Horton for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an action brought under the Federal Employers' Liability Act to recover for personal injuries caused by a rear end collision in Kentucky. The railroad company denied that the case was governed by the Federal act, contending that the train upon which the plaintiff was moving was engaged in local business only, between two points* within the state. The issue was important as affecting the rules of law to be applied. At a second trial the judge, intending to follow the previous decision of the supreme court of the state (123 Minn. 264, 143 N. W. 724), ruled that the accident happened in interstate commerce, and that the act of Congress governed the case. The defendant excepted and assigned as error that the court determined the matter of fact instead of leaving it to the jury, in accordance with the intimation of the former decision (123 Minn. 266), but the judgment was affirmed by the supreme court of the state (128 Minn. 119, 150 N. W. 382).

We are of opinion that the ruling was wrong, as, we think, will be seen from a short statement of the facts. The plaintiff was a freight conductor on the defendant's road, having his principal run from Paducah, south, to Fulton, both in Kentucky, and the same day back from Fulton, north, to Paducah. According to his testimony he took back the engine, caboose, and crew with which he started, and was allowed 100 miles of mileage in compensation for the trip out and back. The train out generally and on this occasion had freight destined to beyond the limits of the state. That on the return depended on what could be picked up, the engine and caboose sometimes coming back alone. The accident happened when the engine was returning to Paducah, after having taken up a switch engine from the Fulton yards seemingly in need of repairs at the Paducah shops, and a pile driver and outfit on three flat cars, and having in the rear, behind the last, the

plaintiff's caboose. The pile driver was dropped on the way, at Mayfield, and the train thereafter consisted of the two engines and the caboose. The plaintiff was sitting in the caboose, making up a report of his trip out and back, when the collision occurred.

Of course the plaintiff treats the round trip as one, and the return as merely the necessary complement of the trip out. The conclusion is drawn that the plaintiff still was engaged in interstate commerce because the train out had cars destined to Tennessee. But, on the other hand, the trips out and back were distinct, in opposite directions, with different trains. The plaintiff's journey was confined wholly to Kentucky. Only the circumstance that the south-bound train from Paducah carried freight destined to beyond Fulton caused him to be engaged in interstate commerce while on that trip. On the return, when he was injured, all the freight had domestic destinations. It is true that the greater certainty of getting traffic going south probably was the chief reason for the establishment of the circuit; but they got what they could coming back; generally a train or a part of a train. It seems to us extravagant to subordinate the northerly to the southerly journey so completely that if, on the latter, there happened to be a parcel destined beyond the state, the conductor should be regarded as still engaged in commerce among the states when going from Fulton to Paducah, even though he had a full train devoted solely to domestic commerce. For it must be remembered that if the northerly movement is regarded as the incident of the southerly, that subordination is independent of the character of the commerce, and depends solely on the fact that southerly moving business, no matter what, induced establishing the route. Therefore it does not matter that the interstate traffic moving south was greater than, for purposes of illustration, we have supposed.

Judgment reversed.

(242 U. S. 295)

BALTIMORE & OHIO RAILROAD COMPANY, Plff. in Err.,
v.

JAMES B. WILSON.

MASTER AND SERVANT — 204(2), 228(2) —
HOURS OF SERVICE—EMPLOYERS' LIABILITY—CONTRIBUTORY NEGLIGENCE — ASSUMPTION OF RISK.

A violation of the Hours of Service Act of March 4, 1907 (34 Stat. at L. 1415, chap. 2939, Comp. Stat. 1913, § 8677), by keeping a railway employee on duty for more than sixteen consecutive hours, excludes, by virtue of the provisions of the

Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, §§ 8659, 8660) §§ 3, 4, the defenses of contributory negligence and assumption of risk in an action by such employee under the latter act to recover for injuries received after a rest of fourteen hours, if the breach of the Hours of Service Act was a cause contributing to the injury, since no reason can be given for limiting liability to injuries happening while the violation of law is going on, and the ten-hour rest period fixed by the Hours of Service Act is a minimum for rest after work no longer than allowed, and has nothing to do with the question of the varying rest necessary after work has extended beyond the lawful time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 545, 671; Dec. Dig. 204(2), 228(2).]

[No. 375.]

Argued December 5, 1916. Decided December 18, 1916.

IN ERROR to the Appellate Court for the First District of the State of Illinois to review a judgment which affirmed a judgment of the Circuit Court of Cook County, in that state, in favor of plaintiff in an action brought under the Federal Hours of Service and Employers' Liability Acts. Affirmed.

See same case below, 194 Ill. App. 491.

The facts are stated in the opinion.

Messrs. James B. Sheean, William J. Calhoun, Will H. Lyford, and George E. Hamilton for plaintiff in error.

Mr. Morse Ives for defendant in error.

* Mr. Justice Holmes delivered the opinion* of the court:

This is an action for personal injuries, brought under the Hours of Service Act, March 4, 1907, chap. 2939, § 2, 34 Stat. at L. 1415, 1416, Comp. Stat. 1913, §§ 8677, 8678, and the Employers' Liability Act, April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657. There is a count alleging an improper construction of tracks, and there are others, which alone are of importance here, alleging that the plaintiff was kept on duty for more than sixteen hours, and subsequently (we may take it, in fact to have been fourteen hours later) put on duty again and injured* because he was so exhausted as to be unable to protect himself in the work that he was attempting to perform. At the trial the judge instructed the jury that if they found that the defendant had been guilty of the breach of duty alleged, and that the breach proximately contributed to the plaintiff's injury, then they should not consider negligence, if any, on the part of the plaintiff, in determining the amount of the plaintiff's damages, if any. In other words, under § 3 of the Em-

ployers' Liability Act, he allowed a violation of a statute enacted for the safety of employees to be found to exclude contributory negligence, although at the time of the accident the violation was fourteen hours old.

It is not important to give the particulars of the accident. The plaintiff was a freight conductor, and was intending to cut a car with a hot box out of a train. He stood on the running board at the rear of an engine on a side track until it drifted abreast of the car standing on the main track, when he stepped off and was very badly hurt.

The first step in the railroad's real defense was that the plaintiff was not kept on duty more than sixteen hours,—a proposition that there was substantial evidence to maintain. But that having been overthrown by the verdict, it contends that the injury must happen during the violation of law, or at least that the Hours of Service Law fixes the limit of possible connection between the overwork and the injury at ten hours by the provision that an employee, after being continuously on duty for sixteen hours, shall have at least ten consecutive hours off. It also objects that the plaintiff, if feeling incompetent to work, should have notified the defendant. But no reason can be given for limiting liability to injuries happening while the violation of law is going on, and as to the ten hours, the statute fixes only a minimum, and a minimum for rest after work no longer than allowed. It has nothing to do with the question of the varying rest needed after work extended beyond the lawful time. In this case there was evidence that whether technically on duty or not, the plaintiff had been greatly overtaxed before the final strain of more than sixteen hours, and that, as a physical fact, it was far from impossible that the fatigue should have been a cause proximately contributing to all that happened. If so, then by the Employers' Liability Act, §§ 3 and 4, questions of negligence and assumption of risk disappear.

Judgment affirmed.

(242 U. S. 283)

CHICAGO, TERRE HAUTE, & SOUTH-EASTERN RAILWAY COMPANY, Plff.
in Err.,

v.

CHAMPION S. ANDERSON.

AGRICULTURE —S— CONSTITUTIONAL LAW
—241, 297— EQUAL PROTECTION OF THE
LAWS—DUE PROCESS OF LAW—REQUIRING
RAILWAY COMPANY TO REMOVE
NOXIOUS WEEDS—PENALTY.

The requirement of Indiana Act of March 6, 1889,¹ that railway companies cut down and destroy noxious weeds "on lands

occupied by them," under penalty of \$25, recoverable by "any person feeling himself aggrieved" by the company's neglect or refusal, will not be held to offend against the equal protection of the laws or the due process of law clauses of U. S. Const. 14th Amend., where the statute has as yet been given no broader construction by the state courts than one which permits a single recovery by a contiguous landowner because of a railway company's failure to cut and destroy weeds on its right of way.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. —8; Constitutional Law, Cent. Dig. §§ 700, 701, 832-834; Dec. Dig. —241, 297.]

[No. 34.]

Argued October 25, 1916. Decided December 18, 1916.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the Circuit Court of Sullivan County, in that state, in favor of plaintiff in an action to recover a penalty from a railway company for its failure to cut down and destroy noxious weeds on its right of way. Affirmed.

See same case below, 182 Ind. 140, 105 N. E. 49.

The facts are stated in the opinion.

Messrs. William F. Peter and James C. Hutchins for plaintiff in error.

No appearance for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

A statute of Indiana provides as follows:

"Sec. 1. . . . That all railroad corporations doing business in this state shall, between the 1st day of July and the 20th day of August, in each year, cause all thistles, burs, docks, and other noxious weeds growing on lands occupied by them in any city, village or township of this state, to be cut down and destroyed.

"Sec. 2. In case any railroad company shall refuse or neglect to comply with the requirements specified in the first section of this act, such company shall be liable in a penalty of \$25 to be prosecuted for in an action of debt by any person feeling himself aggrieved. Said suit may be brought before any justice of the peace in the county, who shall require of the complainant surety to pay costs in case he fails to maintain his action. Summons may be served on any agent or officer of the company." [Burns's Anno. Stat. 1914, §§ 5524, 5525.]

The company was proceeded against under this statute by defendant in error, who alleged that the railroad company is a corporation doing business in the state, and that one of the branches of its railway lines intersects and runs through his land for a distance of $\frac{1}{4}$ of a mile in the township of

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

¹ Burns' Ann. St. 1914, §§ 5524, 5525.

Curry, Sullivan county, Indiana, and that the company, between July 1, 1911, and August 20, 1911, refused and neglected to cause all noxious weeds (following the words of the statute) growing on lands occupied by it in the township and county designated above to be cut down and destroyed, and especially on its lands running through the lands of defendant in error. He also alleged that he felt himself aggrieved thereby and had been damaged in the sum of \$25, and should receive the statutory penalty of \$25.

The company demurred to the complaint for insufficiency to constitute a cause of action, filing therewith a memorandum alleging, among other things, that the act was unconstitutional.

The demurrer was overruled and the company filed a general denial of the allegations of the complaint.

* * * After hearing a penalty was imposed upon the company in the sum of \$25. It filed a motion in arrest of judgment in which it repeated that the law was unconstitutional. The motion was overruled and judgment entered against the company. It was affirmed by the supreme court. In that court the ground was specifically urged that the statute offended the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States. The court considered both contentions and rejected both, and to review its decision this writ of error is prosecuted.

As offending against the equal protection assured by the 14th Amendment the company complains that occupiers of land are separated into two classes—"(1) railway corporations, and (2) all others." This, it is insisted, is an unnatural and unjustifiable classification with respect to the obligation imposed of cutting down weeds growing on lands occupied, as there is no relation between the line of division of the classes and the subject matter. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, and *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, are cited. We need not pause to review them or the many cases decided since them, explaining the wide discretion a legislature has in the classification of the objects of legislation, for immediately repellent to plaintiff in error's contention is *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638. In that case a statute of Texas imposed a penalty on railroad companies for permitting Johnson grass and Russian thistle to go to seed upon their rights of way. A right of action for the penalty was given to contiguous owners. The act was sustained, but certain distinc-

tions between that statute and the Indiana statute are pointed out. These distinctions are: (1) The Texas statute gave the penalty to contiguous landowners; the Indiana statute gives it to "any person feeling himself aggrieved." (2) The Texas statute required the contiguous landowner to be free from the same neglect; the Indiana statute does not impose this limitation. (3) The Texas statute is limited to the railroad's rights of way; the Indiana statute applies to all lands occupied by a railroad "in any city, village or township."

How discriminating and arbitrary these distinctions make the Indiana statute as compared with the Texas statute, and remove the latter from authority, is variously illustrated by plaintiff in error.

The supreme court of Indiana is not specific as to these contentions. On the authority of *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. 937, and *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679, the court decided that it was neither necessary to aver in the complaint nor prove that the person bringing the action had suffered actual damages. The court said: "The penalty imposed is for violation of a duty required of appellant [the railway company] and it is not in a position to complain that the penalty when collected shall be paid to the complaining party, and this is not available in defense of an action for the recovery of the penalty prescribed." [182 Ind. 144, 105 N. E. 49.]

In *Pennsylvania Co. v. State* the penalty was imposed for failure of railroads to provide blackboards in their passenger stations showing the time of arrival and departure of trains, the act providing that one half of the recovery should go to the prosecuting attorney. It was held that this was a method of compensating that officer and to encourage the actual enforcement of the law against its violators, and not intended to require him to become a party litigant.

In the second case a statute was considered that required telegrams to be transmitted with impartiality and in the order of time in which they were received, and without discrimination as to rates. It was provided that any person or company violating the act should be liable to "any party aggrieved in a penalty of \$100 for each offense, to be recovered in a civil action in any court of competent jurisdiction." It was held that the "party aggrieved is the person whose message the telegraph company has refused to receive or failed to transmit on the terms or in the manner prescribed by the statute," and that it was not necessary for him to show that he had sustained any actual damages; that he might recover compensation for damages in-

dependently of the statute, which furnished a cumulative remedy.

Both cases illustrate the principle that a penalty imposed by a statute may be given to an informer or prosecutor as a means of enforcing the statute,—as a means of its public vindication,—and necessarily there could be but one recovery in the designated territory. But we cannot say whom, under the statute under review in this case, the court would consider a “party aggrieved,” or who could be considered as a “person feeling himself aggrieved,” to use the language of the statute, whether a contiguous landowner, or other landowner, or whether any person could be aggrieved within the meaning of the statute if he himself was guilty of the same neglect as the railroad company. Nor can we say how the supreme court would decide as to what was meant by “lands occupied by” railroad corporations; whether this would mean only their rights of way, the designation of “in any city, village or township” being only for the purpose of venue, or mean, which is difficult to suppose, the corporation’s “roundhouses, shops, yards, repair tracks, turntables, and other buildings used in connection” with the business of a railroad, which seems to be the alarm of plaintiff in error. At any rate, such construction has not yet been given and may never be given, and we cannot anticipate that it ever will be given, and on that anticipation hold the statute invalid. We have heretofore expressed the propriety of waiting, when a state statute is attacked for unconstitutionality, until the state court has given it a construction which may justify the attack. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546, 58 L. ed. 713, 720, 34 Sup. Ct. Rep. 359. The statute has only been applied in favor of a contiguous landholder, and only one recovery has been permitted. So limited, we think its validity must be admitted under the doctrine of the *May Case*. But we express no opinion concerning the consequences if a broader construction should be accepted by the state court.

Judgment affirmed.

(242 U. S. 281)

IN THE MATTER OF THE PETITION OF
THE INDIANA TRANSPORTATION
COMPANY FOR WRIT OF PROHIBITION.

PROHIBITION — 26 — PARTIES — RETURN —
WHO MUST MAKE.

Parties permitted to become colibellants in an admiralty cause pending in a Federal district court by an order which

is asserted to have been beyond the jurisdiction of the judge to make may not, upon the failure of the judge to make a return to a rule to show cause why a writ of prohibition should not issue to prevent the carrying out of such order, be treated as respondents to the rule, and as such be permitted to file a return.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. § 75; Dec. Dig. — 26.]

[No. 25, Original.]

Submitted December 4, 1916. Decided December 18, 1916.

PETITION for leave to intervene and make return to rule to show cause why a writ of prohibition should not issue to prevent the carrying out of an order permitting petitioners to become colibellants in an admiralty cause pending in the District Court of the United States for the Northern District of Illinois. Denied, and time extended for filing return.

Mr. Harry W. Standidge for the petitioner.

Memorandum opinion by Mr. Chief Justice White, by direction of the court:

Speaking in a general sense, on the ground that in an admiralty cause pending in the district court of the United States for the northern district of Illinois, one of the judges of that court had, by an order which he was absolutely devoid of jurisdiction to make, permitted more than 270 persons to become colibellants, an application by the defendant in the cause was made on the 16th day of October, 1916, for leave to file a petition for prohibition directed to the judge in question, to prevent the carrying out of the order. On the 23d of October, permission to file the petition for prohibition was granted and a rule to show cause was directed to be issued to the Honorable Kenesaw M. Landis, the judge by whom the order complained of was made. On the day upon which this rule was returnable, December 4, there was no response to the rule made on behalf of the respondent judge, but by oral motion a request was made on behalf of the parties who, it was asserted, had been mistakenly permitted to become colibellants, that they be treated as the respondents to the rule, and be permitted in that capacity to file a return to the rule, a copy of which return was prepared to be filed and presented for filing in case the permission asked was granted, and that request is the matter now before us for consideration.

We are of opinion, however, that the substitution of respondents asked for cannot be granted, since it is apparent that the judge

who rendered the order and against whom the writ prayed for, if allowed, is to be directed, is the essential party respondent, however much, when his return to the rule is made, either by his authority, or because of their interest in the result, or as friends of the court, the persons to be adversely affected by the granting of the relief prayed may be heard to sustain the sufficiency of the re-

turn when that subject arises for consideration. We therefore transfer the date fixed for the return in the original rule to show cause from the 4th day of December, 1916, to the 15th day of January, 1917, in order to afford ample opportunity for the making by the respondent judge of the return which the original order calls for.

And it is so ordered.

(242 U. S. 462)

ILLINOIS CENTRAL RAILROAD COMPANY et al.

v.

GEORGE R. WILLIAMS.

COMMERCE — 85—SAFETY APPLIANCES — HANDHOLDS — SUSPENSION OF DUTY BY INTERSTATE COMMERCE COMMISSION.

The requirement of the Safety Appliance Act of April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8618), § 2, that cars having ladders shall also be equipped with secure handholds or grab irons on the roofs at the tops of such ladders, was not, and could not be, suspended by an order of the Interstate Commerce Commission, made pursuant to § 3 of that act,¹ which, after directing the Commission to standardize the safety appliances called for by § 2, provided that the Commission, upon full hearing and for good cause, might extend the period within which any common carrier should comply with the provisions of § 3 with respect to the equipment of cars actually in service upon the date of the passage of the act. The sole function of such proviso is to give the Commission the discretionary power and duty of determining the length of time which the carrier shall be allowed to make the safety appliances called for by § 2 conform to the uniform standards which the Commission, under § 3, was to prescribe.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. — 85.]

[No. 637.]

Argued December 6, 1916. Decided January 8, 1917.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment which affirmed a judgment of the Circuit Court of Hinds County, in that state, in favor of plaintiff in a personal-injury action. Affirmed.

See same case below, — Miss. —, 72 So. 158.

The facts are stated in the opinion.

Messrs. Charles C. Le Forgee, Blewett Lee, Charles N. Burch, and Robert B. Mayes for plaintiffs in error.

Messrs. William H. Watkins and M. F. Harrington for defendant in error.

^{*463} *Mr. Justice Clarke delivered the opinion of the court:

It will contribute to brevity in this opinion to designate the parties as they were in the state circuit court, the defendant in error as plaintiff and the railroad companies as defendants.

The plaintiff, a switchman in the employ of the defendants, was in the act of mounting, by means of a ladder, to the top of a box car to set the brake, when the hand-

hold or grab iron placed at the top of the ladder, and intended to be fastened securely to the roof of the car, gave way, causing him to fall to the ground and sustain injuries, for which he instituted suit in a circuit court of Mississippi, and recovered a judgment, which was affirmed by the supreme court of the state. This judgment is now here for review on writ of error.

Counsel for the defendants concede that the plaintiff pleaded and proved a case which entitles him to recover under the provisions of the Supplement to the Federal Safety Appliance Act, approved April 14, 1910 [36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8618], if § 2 of that act was in effect at the time the accident to the plaintiff occurred on the night of March 15th, 1913; but they claim that this section of the act^{*464} was not in effect at that time, because it had been suspended until July 1st, 1916, by an order of the Interstate Commerce Commission, issued on March 13, 1911, under the authority contained in the proviso of § 3 of the act.

Thus the sole question presented for decision is, Does the order issued by the Interstate Commerce Commission on March 13, 1911, suspend the provisions of § 2 of the act under discussion until July 1st, 1916?

To answer this question requires an examination of §§ 2 and 3 of the Act of April 14, 1910, and of the order of the Interstate Commerce Commission of March 13, 1911.

Section 2 of the act provides that on and after July 1st, 1911, "all cars" used by any common carrier subject to the act, "requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders," and it makes it unlawful to use cars not so equipped.

A box car could not properly be used without a secure ladder, and since, by its terms, all cars having ladders must be equipped with secure handholds, the application of this section (if it was not suspended) to the case at bar, the neglect of its requirements, and the liability of the defendants to the plaintiff for the result to him of such neglect, are too clear for discussion. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. ed. 874, 36 Sup. Ct. Rep. 482.

Section 3 of the act provides that within six months from the passage of the act the Interstate Commerce Commission "shall designate the number, dimensions, location and manner of application of the appliances provided for by § 2 of this act" . . . and shall give notice of such designation to all common carriers subject to the provi-

— For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

¹ Comp. St. 1913, § 8619.

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sions of the act by such means as the Commission* may deem proper, and "thereafter said number, location, dimensions, and manner of application, as designated by said Commission, shall remain as the standards of equipment to be used on all cars subject to the provisions of this act;" and failure to conform its equipment to such standards shall subject the neglecting carrier to like penalty as failure to comply with any requirements of the act. Then follows this proviso, upon which the defendants rely, viz.:

"Provided, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier *shall comply with the provisions of this section* with respect to the equipment of cars actually in service upon the date of the passage of this act."

Pursuant to the command of this 3d section, the Interstate Commerce Commission, on March 13, 1911, issued an order designating "the number, dimensions, sizes and manner of application of the appliances provided for by § 2 of the act," and specifically describing the size, character, and location of ladders on "freight-train cars" and of handholds to be maintained at the tops of such ladders. By the terms of this order carriers were granted an extension of five years from July 1st, 1911, in which to bring such safety appliances into compliance with the standards by it prescribed.

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The claim of the defendant railway companies with respect to these two sections is built up wholly upon the assertion, it cannot properly be called argument, that because, in the part of § 3 just quoted, reference is made to § 2 for a description of the safety appliances to be standardized, therefore the whole of § 2 must be treated as so incorporated into § 3 as to be comprehended within the expression of the proviso giving power to the Interstate Commerce Commission to extend the period within which any common carrier "*shall comply with the provisions of this (the 3d) section,*" etc., and that § 2 was therefore suspended until July 1st, 1916, by the Commission's order of March 13, 1911.

That this strained and artificial construction of the section cannot be allowed may be made clear by a brief consideration of the terms and purposes of the two sections of the act.

The congressional purpose in enacting § 2 of the act is very plain. At the time the act was passed railroad carriers had in service many box cars, requiring for their proper use secure ladders and secure handholds or grab irons on their roofs at the tops of such ladders, and the purpose of this section clearly is to convert the general legal duty

of exercising ordinary care to provide such safety appliances and to keep them in repair into a statutory, an absolute and imperative, duty, of making them "secure," and to enforce this duty by appropriately severe penalties. *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612.

It is equally clear that the purpose of the 3d section is to require that the safety appliances "provided for by § 2 of the act" shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission; that is, that they shall be standardized, shall be of uniform size and character, and, so far as ladders and handholds are concerned, shall be placed as nearly as possible at a corresponding place on every car so that employees who work always in haste, and often in darkness and storm, may not be betrayed, to their injury or death, when they instinctively reach for the only protection which can avail them when confronted by such a crisis as often arises in their dangerous service. It is for such emergencies that these safety appliances are provided,—for service in those instant decisions upon which the safety of life or limb of a man so often depends in this, perilous employment,—and therefore this law requires* that ultimately the location of these ladders and handholds shall be absolutely fixed, so that the employee will know certainly that night or day he will find them in like place and of like size and usefulness on all cars, from whatever line of railway or section of the country they may come. This highly important and humane purpose must not be defeated by finesse of construction such as is pressed upon our attention in the argument of this case.

To this primary purpose of protecting the life and limb of employees is added the purpose of protecting the lives of passengers and of securing the safety of property by requiring uniform standards as to other equipment of cars, such as coupling appliances, brakes, and the like.

To change these safety appliances on all the cars in the country from what they were as contemplated by § 2,—"*secure,*" but differing "*in number, dimensions, location and manner of application,*"—to what they must be when standardized to meet the requirements provided for in § 3, was regarded by Congress as a work so great and so expensive that it wisely committed to the informed discretion of the Interstate Commerce Commission the power and duty of determining the length of time which the carriers should be allowed in which to accomplish it. To give this discretion to the Commission is the function,

and the only function, of the proviso of § 3, and the claim that, by construction, power may be found in it to suspend § 2, is too forced and unnatural to be seriously considered.

This reading of the two sections makes them stand together as an expression of a consistent congressional purpose "to promote the safety of employees and travelers on railroads" on and after July 1st, 1911, by requiring that the safety appliances described in § 2 of the act shall be secure and efficient from that date, and by requiring, as § 3 provides, that these appliances shall be brought as speedily as may be to a uniform standard of location, size,* and usefulness, to be prescribed by the Interstate Commerce Commission.

While the question we have considered has not been presented to this court before in precisely the form in which we have it here, yet § 2 of the act was treated by this court as in full force as of September 4, 1912, in *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. ed. 874, 36 Sup. Ct. Rep. 482, and the supreme court of the state of Minnesota in *Coleman v. Illinois C. R. Co.* 132 Minn. 22, 155 N. W. 763, and the supreme court of Iowa in *Cook v. Union P. R. Co.* — Iowa, —, 158 N. W. 521, while arriving at their conclusions by somewhat different analyses of the sections of the Act of April 14, 1910, have given to them precisely the meaning and effect which we are giving to them in this decision. It results that the judgment of the Supreme Court of Mississippi is affirmed.

(242 U. S. 433)

CLAUDE M. DEAN, Appt.,

v.

R. BEALE DAVIS, Jr., Trustee, etc.

BANKRUPTCY — 165(3) — PREFERENCES—TRANSFER TO THIRD PERSON.

1. No preferential transfer forbidden by the Bankrupt Act of July 1, 1898 (30 Stat. at L. 562, chap. 541) § 60b, as amended by the Act of Feb. 5, 1903 (32 Stat. at L. 800, chap. 487, § 13, and Act June 25, 1910, 36 Stat. 842, c. 412, § 11, Comp. Stat. 1913, § 9644), when made within four months of the bankruptcy proceedings, results from the giving of a mortgage by the bankrupt to secure notes representing moneys contemporaneously advanced by the mortgagee to take up other notes given by the bankrupt, which the bank discounting and holding them claimed bore forged indorsements, although the mortgagee knew that the mortgagor was insolvent. If anyone was preferred, it was the bank, not the mortgagee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260; Dec. Dig. —165(3).]

BANKRUPTCY — 175—FRAUDULENT TRANSFER—KNOWLEDGE OF TRANSFEREE—"HINDER, DELAY OR DEFRAUD."

2. A mortgage of all the mortgagor's property, given to secure notes, overdue when the mortgage was recorded, which represent moneys advanced to take up other notes given by the mortgagor, bearing indorsements that the bank discounting and holding them claimed to be forgeries, must be deemed to be one to hinder, delay, or defraud the creditors of the mortgagor, within the meaning of the Bankrupt Act of July 1, 1898 (30 Stat. at L. 564, chap. 541, Comp. Stat. 1913, § 9651), § 67e, avoiding, "except as to purchasers in good faith and for a present fair consideration," every transfer made by the bankrupt "within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them," where the mortgagee knew that the mortgagor was insolvent and was making a preferential payment to avoid a threatened criminal prosecution, and must have known that suspension of his business and bankruptcy would result from giving and recording such mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. —175.

For other definitions, see Words and Phrases, Second Series, Hinder, Delay or Defraud.]

BANKRUPTCY — 306—APPEAL — REVERSIBLE ERROR — ISSUES — OBJECTION NOT RAISED BELOW.

3. A decree granting relief under the provisions of the Bankrupt Act of July 1, 1898 (30 Stat. at L. 564, chap. 541, Comp. Stat. 1913, § 9651), § 67e, avoiding fraudulent transfers by a bankrupt, will not be disturbed by the Federal Supreme Court on the ground that the bill was framed under § 60b of that act, as amended by the Act of Feb. 5, 1903 (32 Stat. at L. 800, chap. 487, § 13, and Act June 25, 1910, 36 Stat. 842, c. 412, § 11, Comp. Stat. 1913, § 9644), avoiding preferential transfers, where this objection was not raised in either of the two lower courts, and the issue of fraudulent transfer was presented by the pleadings, was fully tried, and was found against the appellant.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. —306.]

[No. 70.]

Argued and submitted November 6 and 7, 1916. Decided January 8, 1917.

APPEAL from the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Virginia, setting aside a mortgage given by a bankrupt within four months of the bankruptcy proceedings. Affirmed.

See same case below, 128 C. C. A. 658, 212 Fed. 88.

The facts are stated in the opinion.

Messrs. Wyndham R. Meredith and C. V. Meredith for appellant.

Messrs. Richard B. Davis and Bartlett Roper, Jr., for appellee.

* Mr. Justice Brandeis delivered the opinion of the court:

The Bankruptcy Act (as amended Feb. 5, 1903 [32 Stat. at L. 800, chap. 487, § 13, and Act June 25, 1910, 36 Stat. 842, c. 412, § 11, Comp. Stat. 1913, § 9644]) provides in § 60b that if a debtor has, within four months before the filing of the petition in bankruptcy, made a transfer which the person receiving the same has reason to believe was intended to give a preference, the transfer shall be voidable, and the trustee in bankruptcy may recover the property or its value. The act also provides in § 67e, 30 Stat. at L. 564, chap. 541, Comp. Stat. 1913, § 9651, that if a debtor, within four months before the filing of the petition in bankruptcy, makes any transfer "with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them," it shall be null and void except as to purchasers in good faith and for a present fair consideration; and that it shall be the duty of the trustee to recover the same.

R. Crawley Jones was a farmer and owner of a country store. A bank, having discounted his notes bearing indorsements which it later concluded had been forged, demanded that Jones take up the notes. Fearing arrest, he appealed through his father to his brother-in-law, Dean, for a loan of \$1,600, promising to secure it by a mortgage of all his property, which he represented was worth more than five times that amount. Dean provided the money, and on September 3, 1909, acting in conjunction with Jones's father, "took up" the notes. Most of them were not yet due. A mortgage deed of trust dated September 3 was executed September 10, and recorded September 11. It covered practically all of Jones's property, including the stock in trade and accounts, store furnishings and fixtures, household furniture and goods, live stock, crops standing and cut, and the farm itself, the last subject to a prior deed of trust. Four mortgage notes were given, payable respectively in seven, thirty, sixty, and ninety days; with a proviso that upon default on any one all should become payable. The first note—and hence all—was overdue when the mortgage was recorded. On that day Dean directed that possession of the property be taken, which was done on September 13 (the 12th being Sunday). Jones was at the time deeply insolvent and had many unsecured creditors. Some of these immediately challenged the validity of the mortgage. Within a few days an involuntary petition in bankruptcy was filed and Jones was adjudicated a bankrupt. The mortgaged property was converted into cash under an agreement with general creditors that it should be deposited

to await the ultimate determination of the rights of the parties. It yielded only \$1,634,—leaving nothing for the general creditors if the mortgage is held valid.

Davis, the trustee in bankruptcy, brought a bill in equity to set aside the mortgage. The district court granted the relief prayed for; and its decree was affirmed by the circuit court of appeals. Both courts found the facts to be in substance as above stated and held the mortgage void under § 67e as having been made by Jones "with the intent and purpose on his part to hinder, delay or defraud his creditors," to one not a "purchaser in good faith" within the meaning of the act. The circuit court of appeals held the mortgage void also as a preference under § 60b (128 C. C. A. 658, 212 Fed. 88). The case comes to this court upon appeal; Dean contending that the mortgage is not invalid under either § 60b or § 67e.

The mortgage was not voidable as a preference under § 60b. Preference implies paying or securing a pre-existing debt of the person preferred. The mortgage was given to secure Dean for a substantially contemporary advance. The bank, not Dean, was preferred. The use of Dean's money to accomplish this purpose could not convert the transaction into a preferring of Dean, although he knew of the debtor's insolvency. Mere circuitry of arrangement will not save a transfer which effects a preference from being invalid as such. *National Bank v. National Herkimer County Bank*, 225 U. S. 178, 184, 56 L. ed. 1042, 1046, 32 Sup. Ct. Rep. 633. But a transfer to a third person is invalid under this section as a preference only where that person was acting on behalf of the creditor, as in *Re Beerman*, 112 Fed. 663, and *Walters v. Zimmerman*, 208 Fed. 62, 136 C. C. A. 409, 220 Fed. 805. Here Dean acted on the debtor's behalf in providing the money and taking up the notes.

* But under § 67e the basis of invalidity is much broader. It covers every transfer made by the bankrupt "within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them" "except as to purchasers in good faith and for a present fair consideration." As provided in § 67d, only "liens given or accepted in good faith and not in contemplation of or in fraud upon this act" are unassailable. A transfer, the intent (or obviously necessary effect) of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act, "hinders, delays or defrauds creditors" within the meaning of § 67e. *Van Iderstine v. National Discount Co.* 227 U. S. 575, 582, 57 L. ed. 652, 654, 33

Sup. Ct. Rep. 343, points out the distinction between the intent to prefer and the intent to defraud. A transaction may be invalid both as a preference and as a fraudulent transfer. It may be invalid only as a preference or only as a fraudulent transfer. Making a mortgage to secure an advance with which the insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay, or defraud creditors. The mortgage may be made in the expectation that thereby the debtor will extricate himself from a particular difficulty and be enabled to promote the interest of all other creditors by continuing his business. The lender who makes an advance for that purpose with full knowledge of the facts may be acting in perfect "good faith." But where the advance is made to enable the debtor to make a preferential payment with bankruptcy in contemplation, the transaction presents an element upon which fraud may be predicated. The fact that the money advance is actually used to pay a debt does not necessarily establish good faith. It is a question of fact in each case what the intent was with which the loan was sought and made.

⁴⁴⁵ We cannot say that the facts found by the district court and affirmed by the circuit court of appeals were not supported by the evidence, nor that these courts erred in concluding upon this evidence that the mortgage was made with the purpose and intent to hinder, delay, or defraud Jones's creditors, and that Dean was not, as against general creditors, "a purchaser in good faith." Jones knew that he was insolvent. He knew that he was making a preferential payment. He must have known that suspension of his business and bankruptcy would result from giving and recording a mortgage of all his property to secure a note which had matured before the mortgage was executed. The lower courts were justified in concluding that he intended the necessary consequences of his act; that he willingly sacrificed his property and his other creditors to avert a threatened criminal prosecution; and that Dean, who, knowing the facts, cooperated in the bankrupt's fraudulent purpose, lacked the saving good faith.

The conclusion reached by the lower courts is supported by many decisions of the several district courts and circuit courts of appeal, which are referred to in the margin.¹ It is in harmony with both the Van

Iderstine*Case, and Coder v. Arts, 213 U. S. 223, 244, 53 L. ed. 772, 781, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008, upon which appellant particularly relies. In each of these cases this court refused to hold fraudulent in law a transfer which the circuit court of appeals had found to be innocent in fact. In the Van Iderstine Case, where a pledge was held valid, the circuit court of appeals had expressly found that the pledgee was without knowledge of the debtor's fraudulent intent, if such there was. In Coder v. Arts, where a mortgage was held valid, the circuit court of appeals had found that, in making the mortgage, the debtor had no intent to hinder, delay, or defraud creditors, and this court said that, "in view of the finding of the circuit court of appeals, it may be that [he] though including in the conveyance a large amount of his property, acted in good faith, with a view to preserving his estate and enabling him to meet his indebtedness." This court, while declaring itself bound by the facts so found, was careful to express its dissent from the view, "that the giving of the mortgage and its effect upon other creditors could not be considered as an item of evidence in determining the question of fraud."

Dean contends also that relief should not have been granted under § 67e because the bill was framed under § 60b. The objection was not taken in the district court, although the question of invalidity under § 67e was elaborately discussed on demurrer to the bill as well as upon final hearing. Twenty-five other errors were assigned on the appeal to the circuit court of appeals. This objection was not raised then. It was insisted only that the evidence did not warrant the finding of fraudulent intent. Section 60b seems to have been mainly in the mind of the pleader when the bill of complaint was drafted, but not exclusively, for it alleges that the plaintiff as trustee was entitled "to recover property transferred by said bankrupt in fraud of his creditors." The answer expressly alleges that the mortgage was accepted "without any intent or purpose of aiding said Jones to defraud, delay, or hinder his creditors, and not in contemplation of or in fraud of the Bankruptcy Act, or any of its provisions, believing him to be solvent, and that he would continue his business." The issue of fraudulent transfer was presented by the pleadings,

¹ Cases holding that a mortgage is a fraudulent conveyance where taken as security for a loan which the lender knows is to be used to prefer favored creditors, in fraud of the act: *Parker v. Sherman*, 129 C. C. A. 437, 212 Fed. 917 (C. C. A. 2d C.); *Re Soforenko*, 210 Fed. 562 (D. C. Mass.);

Johnson v. Dismukes, 122 C. C. A. 552, 204 Fed. 382 (C. C. A. 5th C.); *Lumpkin v. Foley*, 122 C. C. A. 542, 204 Fed. 372 (C. C. A. 5th C.); *Re Lynden Mercantile Co.* 156 Fed. 713 (D. C. Wash.); *Roberts v. Johnson*, 81 C. C. A. 47, 151 Fed. 567 (C. C. A. 4th C.); *Re Pease*, 129 Fed. 446 (D.

was fully tried, and was found against the appellant. No error was committed.

Decree affirmed.

(242 U. S. 443)

WESTERN TRANSIT COMPANY, Plff. in
Err.,
v.

A. C. LESLIE & COMPANY, Limited.

CARRIERS —158(1)—LIMITING LIABILITY
—AGREED VALUE—LIABILITY AS WARE-
HOUSEMAN.

1. A released-valuation clause in an interstate bill of lading, based upon a difference in the carrier's tariffs on file with the Interstate Commerce Commission, is valid and controlling, although the loss occurs while the freight is in the carrier's warehouse at an intermediate point, conformably to the provisions of one of such tariffs, which confers the right in transit of free storage and diversion at that point, the bill of lading reciting that the shipment is to be held at that point for orders, and providing that every service to be performed thereunder is subject to all the conditions therein contained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 663; Dec. Dig. —158(1).]

CARRIERS —141 — LIABILITY AS WARE-
HOUSEMAN—BILL OF LADING—NEW CON-
TRACT.

2. No new contract of warehousing, wholly independent of the contract of carriage, was created by a letter from the carrier to an interstate shipper, who had then enjoyed nearly two months' storage at an intermediate point, which stated that the goods were held there in storage subject to a circular therein inclosed, which was a copy of the carrier's tariff on file with the Interstate Commerce Commission, giving the right in transit to free storage and diversion at that point.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 611, 611½; Dec. Dig. —141.]

C. Mich.). See also *Walters v. Zimmerman*, s. c. on appeal, 208 Fed. 62 (D. C. Ohio), 136 C. C. A. 409, 220 Fed. 805 (C. C. A. 6th C.).

Cases upholding the mortgage security because the lender did not know that the insolvent borrower intended to make improper payments to favored creditors—thus indicating that the mortgage would be fraudulent if such additional fact were shown: *Grinstead v. Union Sav. & T. Co.* 111 C. C. A. 398, 190 Fed. 546 (C. C. A. 9th C.); *Powell v. Gate City Bank*, 102 C. C. A. 55, 178 Fed. 609 (C. C. A. 8th C.); *Re Kullberg*, 176 Fed. 585 (D. C. Minn.); *Ohio Valley Bank Co. v. Mack*, 24 L.R.A. (N.S.) 184, 89 C. C. A. 605, 163 Fed. 155 (C. C. A. 6th C.); *Stedman v. Bank of Monroe*, 54 C. C. A. 269, 117 Fed. 237 (C. C. A. 8th C.); *Re Soudan Mfg. Co.* 51 C. C. A. 476, 113 Fed. 804 (C. C. A. 7th C.).

In accord with this view are also the decisions which hold that a general assignment for the benefit of creditors, though without

CARRIERS —158(1)—LIMITING LIABILITY
—AGREED VALUATION—RATIO OF RECOV-
ERY.

3. A recovery at the ratio of \$100 per ton for the lost freight is the limit of the damages recoverable for the loss of a part of an interstate shipment of 25 tons of copper, under a bill of lading which contains a released-valuation clause of \$100 per net ton, based upon a difference in the carrier's freight rates on file with the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 708; Dec. Dig. —158(1).]

[No. 104.]

Argued and submitted December 19 and 20,
1916. Decided January 8, 1917.

IN ERROR to the Supreme Court, Appel-
late Division, Fourth Department, of the
State of New York, to review a judgment
which affirmed a judgment of a Special
Term of the Supreme Court in and for the
County of Erie, in that state, affirming a
judgment of the City Court of Buffalo in
favor of an interstate shipper, for the full
value of a freight loss, notwithstanding a
released-valuation clause in the bill of lad-
ing. Reversed and remanded for further
proceedings.

See same case below in appellate division,
165 App. Div. 947, 150 N. Y. Supp. 1073.

The facts are stated in the opinion.

Mr. Lester F. Gilbert for plaintiff in
error.

Messrs. Daniel J. Kenefick and Charles
B. Sears for defendant in error.

* Mr. Justice Brandeis delivered the opin-
ion of the court:

The Western Transit Company, operating
steamers between Buffalo and other points
on the Great Lakes, formed, with the New

preferences, is void under § 67e because its
necessary effect is to hinder, delay, or de-
fraud creditors in their rights and remedies
under the Bankruptcy Act. *Re Gutwillig*,
90 Fed. 475, 34 C. C. A. 377, 63 U. S. App.
191, 92 Fed. 337; *Davis v. Bohle*, 34 C. C.
A. 372, 92 Fed. 325; *Rumsey & S. Co. v.*
Novelty & Mach. Mfg. Co. 99 Fed. 699. See
Randolph v. Scruggs, 190 U. S. 533, 536,
47 L. ed. 1165, 1169, 23 Sup. Ct. Rep. 710;
George M. West Co. v. Lea Bros. 174 U. S.
590, 596, 43 L. ed. 1098, 1100, 19 Sup. Ct.
Rep. 836.

It is difficult to reconcile the following
cases or dicta in them with the great weight
of authority and the decisions of this court:
Re Baar, 130 C. C. A. 292, 213 Fed. 628
(C. C. A. 2d C.); *Re Hersey*, 171 Fed. 1004
(D. C. Iowa); *Sargent v. Blake*, 17 L.R.A.
(N.S.) 1040, 87 C. C. A. 213, 160 Fed. 57,
15 Ann. Cas. 58 (C. C. A. 8th C.); *Re Bloch*,
74 C. C. A. 250, 142 Fed. 674 (C. C. A. 2d
C.); *Githens v. Shiffer*, 112 Fed. 505 (D. C.
Pa.).

York Central Railroad, a "lake and rail" line between Michigan and New York city. Among the privileges and facilities offered by this line was the right "in transit of free storage and diversion at Buffalo." That is, the shipper, instead of sending his goods from Michigan through to New York city, was entitled, without the payment of any extra charge, to have them stored at Buffalo for a period, to await further orders, and be forwarded later to New York. The shipper was also given the privilege of "diversion,"—that is, of changing the ultimate destination of the stored goods upon proper adjustment of the rate. On September 23, 1908, A. C. Leslie & Company, Limited, the plaintiff below, delivered to the Western Transit Company, the defendant below, at Houghton, Michigan, for shipment over this line to New York city, 25 tons of copper ingots, with direction to store the same upon arrival at Buffalo to await further shipping directions. The copper arrived there September 30, and was placed in the Transit Company's warehouse. Nearly four months later about one ton of it was stolen from the warehouse. An action was brought by the shipper in the city court of Buffalo to recover its value. The Transit Company denied all liability; but the court found that the loss was due to its negligence, and held the company liable for the full value of the copper lost. The judgment of the city court was affirmed by the supreme court of New York at special term, and also by the appellate division of that court. (165 App. Div. 947, 150 N. Y. Supp. 1073.) Applications for an appeal to the court of appeals of New York having been denied, both by the appellate division and by the chief judge of the court of appeals, a writ of error to this court was granted on the ground that the decision below involved a Federal question, namely: the construction and effect of the bill of lading and of tariffs filed under the Act to Regulate Commerce as amended. (Act June 29, 1906, chap. 3501, 34 Stat. at L. 584, Comp. Stat. 1913, § 8563.)

The question before this court relates solely to the measure of damages. The shipper contends that it is entitled to the full value of the copper lost, which was \$271.38. The carrier contends that the damages recoverable are limited to \$94.10; that is, the value *not to exceed \$100 a ton*. In support of this limitation it relies upon the fact that freight was paid at the rate of 18 cents per ton under a bill of lading and a tariff which names the following rates from Houghton, Michigan, to New York city:

"Copper ingots . . . value not to exceed \$100 a ton, 18¢ per ton.

Copper ingots . . . value not expressed . . . 30¢ per ton."

The shipper insists that it is enforcing the liability of the Transit Company not as carrier, but as warehouseman; and that the terms of its obligation as warehouseman are fixed, not by the bill of lading and the tariff provision quoted above, but wholly by the letter of November 26, 1908, and the circular therein referred to, which are copied in the margin.¹

* The Transit Company filed with the Interstate Commerce Commission, in addition to its general tariffs covering "lake and rail" rates, a separate tariff known as I. C. C. No. 236, covering specifically storage and diversion privileges at Buffalo, as set forth in the circular copied in the margin.*

The filing of this tariff was required by the act (see *Goldenberg v. Clyde S. S. Co.* 20 Inter. Com. Rep. 527), since the general tariff did not specify the detail of the storage and diversion privileges. The Act to Regulate Commerce, as amended, provides expressly (§ 1) that the term "transportation" includes storage. And § 6 (Comp. St. 1913, § 8569) provides that a carrier must file with the Interstate Commerce Commission tariffs "showing all the rates, fares, and charges for transportation," and "shall also state separately all . . . storage charges, . . . all privileges or facilities granted or al-

¹ The Western Transit Company, N. Y. C. & H. R. R. Line of Steamers.

Buffalo, N. Y., Nov. 26, 1908.
Messrs. A. C. Leslie & Company,
Montreal, Que.

Gentlemen:—

Replying to your letter of 24th, instant, would advise you that we have in store here, lot 1036 ingot bars of copper, marked M. M. 102, as well as lot of 979 ingot bars, marked M. M. 97.

This copper came forward in our steamer, Buffalo, which unloaded here September 30th, and will be held here subject to our storage circular I. C. C. No. 236, copy of which I inclose.

Yours truly,
(Signed) Edwin T. Douglass,
D. General Manager.

I. C. C. No. 236, Superseding I. C. C. No. 231.

The Western Transit Company, New York
Central & Hudson River R. R. Line. Gen-
eral Office.

Copper and Copper Matte, Pig Lead and
Spelter for Storage and Diversion at Buf-
falo.

The Western Transit Company will accept shipments of copper and copper matte, pig lead and spelter for storage and diversion at Buffalo, under the following rules:

1. The Western Transit Company, at request of owners, will furnish free storage

lowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates."

The bill of lading, in a form similar to that approved and recommended by the Interstate Commerce Commission (14 Inters. Com. Rep. 346), contains the following, among other provisions:

"It is mutually agreed in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, and which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable."

"To be held at Bflo. for orders.

"Value not to exceed \$100 per net ton. Limited by written agreement.

"The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would make the carrier liable, because of the lower rate thereby accorded for transportation."

Conditions.

"The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation."

The release valuation clause in an interstate bill of lading when based upon a difference in freight rates is valid. *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 509, 57 L. ed.

on shipments of copper and copper matte, pig lead and spelter in transit, at Buffalo, for a period not exceeding four months.

2. If held longer than four months, it will be subject to a charge of one-half ($\frac{1}{2}$) cent per 100 pounds for each thirty (30) or part thereof so held.

3. Shipments held under this arrangement will be at owner's risk, and will not be accepted for storage unless arrangements are made with the undersigned previous to forwarding from western lake ports.

4. Shipments ordered out of store will

314, 321, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148. The limitation of liability by means of such valuation contained in the bill of lading continues although the service of carrying has been completed and the goods are held by the carrier strictly as warehouseman. *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. ed. 453, 36 Sup. Ct. Rep. 177. The provisions of the bill of lading govern even where the goods are allowed to remain in the carrier's warehouse after giving receipt therefor and payment of freight. The carrier and the shipper can make no alteration of the terms upon which goods are held under a tariff, until there has been an actual delivery of the goods to the consignee. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. 836, 36 Sup. Ct. Rep. 469. The reasons are even more persuasive for holding that the terms of a bill of lading govern storage in transit, like that at Buffalo. The contention of the shipper that the letter of November 26, inclosing the circular, created a contract of warehousing wholly independent of the contract of carriage, is contrary to fact. The Transit Company's circular states "that free storage is furnished on shipments in transit," and that shipments "will not be accepted for storage unless arrangements are made with the undersigned previous to forwarding from western lake ports." Obviously, free storage in transit was granted only to those who shipped over this "lake and rail" line. The shipper had enjoyed nearly two months' storage when the circular was received in answer to a letter of inquiry. It stated only what was contained in the tariff filed, which every shipper was bound to take notice of.

The contention was also made that the judgment below was correct, even if the bill of lading be held to govern the warehousing at Buffalo; because the agreed valuation clause, properly construed, fixes an amount far greater than the actual value for which judgment was rendered. The "released" or agreed valuation is "\$100 per net ton." There were 25 tons in this shipment. It is insisted that, as the 25 tons constituted a single lot, \$2,500 is recoverable for loss of or damage to the

be charged at the through rate in effect at time the shipment originated, to points to which through rates are published by the Western Transit Company.

5. Shipments ordered to points to which no through rates are in effect via the Western Transit Company will be charged at the local rate to and from Buffalo.

Issued May 15th, 1908.

Effective June 16th, 1908.

Edwin T. Douglass,
General Manager,
Buffalo, N. Y.

whole or to any part of the lot. This construction does violence to the language used and is unreasonable. The valuation clause fixes not an arbitrary limit of recovery, but a ratio. In *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 656, 57 L. ed. 683, 689, 33 Sup. Ct. Rep. 391, where the released valuation clause was applied to a shipment consisting of two boxes and a barrel, and one box was lost, this court said the consignor and carrier must have understood the agreed valuation to mean that the package contained "household goods of the average value per hundredweight of \$5." The ratio is more naturally applied where the whole shipment is homogeneous. Under this bill of lading the shipper is entitled to recover not more than \$100 a ton for each or any ton damaged or lost.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

(242 U. S. 455)

JOHN ARMSTRONG CHALONER, Plff. in Err.,
v.

THOMAS T. SHERMAN.

COURTS — 382(5) — ERROR TO CIRCUIT COURT OF APPEALS—JURISDICTION—FEDERAL QUESTION—SCOPE OF REVIEW.

1. The contention in a suit between citizens of different states, insisted upon in both of the lower courts, that certain orders of a state court upon which defendant relied as justifying his custody of plaintiff's property were void as having been entered without due process of law, contrary to the Federal Constitution, gives the Federal Supreme Court jurisdiction to review the whole case by writ of error to a circuit court of appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1020; Dec. Dig. — 382(5).]

CONSTITUTIONAL LAW — 255—"DUE PROCESS OF LAW"—NOTICE AND HEARING.

2. An order made conformably to N. Y. Code Civ. Proc. §§ 2320 et seq., adjudging a person incompetent, and appointing a committee of his person and estate, is not wanting in due process of law where, at each stage in the proceedings leading up to such order, the alleged incompetent, then under commitment to a private hospital, was personally served with notice and was given an opportunity to be heard.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 736-738, 740-745; Dec. Dig. — 255.]

For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

INSANE PERSONS — 26—JUDGMENT—COLLATERAL ATTACK—ADJUDICATION OF INCOMPETENCY.

3. An adjudication of incompetency, made conformably to N. Y. Code Civ. Proc. §§ 2320 et seq., after notice and an opportunity to be heard, is not open to collateral attack because the alleged incompetent was,

at the time, under commitment at a private hospital.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. — 26.]

CONSTITUTIONAL LAW — 255—DUE PROCESS OF LAW—NOTICE AND HEARING.

4. Due process of law does not require that notice and an opportunity to be heard be given before a court may accept the resignation of a committee of an adjudged incompetent and appoint another person as his successor.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 736-738, 740-745; Dec. Dig. — 255.]

INSANE PERSONS — 26—JUDGMENT—COLLATERAL ATTACK—ADJUDICATION OF INCOMPETENCY—APPOINTMENT OF COMMITTEE.

5. Orders made by a court of competent jurisdiction adjudging a person to be incompetent, appointing a committee, accepting the latter's resignation, and appointing his successor in proceedings in which the essentials of due process of law were met, may not be collaterally attacked on the ground that they were entered corruptly, irregularly, or inadvertently, or that, because of a change in the condition of the adjudged incompetent, a committee was no longer required,—especially in an action which merely seeks damages for the alleged wrongful withholding of his property.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. — 26.]

[No. 121.]

Argued November 16 and 17, 1916. Decided January 8, 1917.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the District Court for the Southern District of New York in favor of defendant in an action in which an adjudged incompetent seeks damages from his committee for withholding his securities and moneys. Affirmed.

See same case below, 132 C. C. A. 96, 215 Fed. 867.

The facts are stated in the opinion.

Messrs. Edward F. Colladay, Sidney J. Dudley, and Mr. John Armstrong Chaloner, in propria persona, for plaintiff in error.

Mr. Joseph H. Choate, Jr., for defendant in error.

*Mr. Justice Brandels delivered the opinion of the court:

This is an action in which the plaintiff seeks damages for withholding his securities and moneys. The defendant sets up as justification that he received and held the property by virtue of two orders of the supreme court of New York, appointing him

committee of the person and estate of the plaintiff as one "incompetent to manage himself and his affairs." The validity and alleged effect of these orders were denied by plaintiff. The action was brought in 1904 in the circuit court of the United States for the southern district of New York; was transferred to the district court January, 1912, by virtue of Judicial Code, § 290 [36 Stat. at L. 1167, chap. 231, Comp. Stat. 1913, § 1267], and was tried before a jury in that year. A verdict was directed for the defendant at the close of the plaintiff's case; and the judgment entered thereon was affirmed by the circuit court of appeals. The case comes here upon writ of error.

The complaint alleges that the plaintiff is a citizen and resident of Virginia and the defendant a citizen and resident of New York; but Federal jurisdiction was not rested solely on diversity of citizenship. The complaint alleged also that the orders of the supreme court of New York upon which defendant relies are void as having been entered without due process of law, in violation of the Federal Constitution. The contention was insisted upon in both the lower courts. This court has, therefore, jurisdiction to review the whole case. *Howard v. United States*, 184 U. S. 676, 681, 46 L. ed. 754, 757, 22 Sup. Ct. Rep. 543.

The orders under which defendant justifies were that of June 23, 1899, adjudging plaintiff incompetent, appointing a committee of his person and estate, and naming one Butler as such; and that of November 19, 1901, appointing defendant as his successor. These orders were made under statutes of New York, the material portions of which are set forth in the margin.¹ The

proceedings were held in New York city, where much of plaintiff's property was located. For over two years prior to the entry of the earlier order plaintiff had been an inmate of Bloomingdale, a private hospital near that city. At each stage in the proceeding leading up to the order of June 23, he was personally served there with notice and was given an opportunity to be heard. Thus he had notice of the motion, on May 19, to appoint the commission de lunatico inquirendo; of the inquisition on June 12; and of the motion to confirm the inquisition and for appointment of a committee on June 23. Such notice and opportunity to be heard at the inquisition was required by the law of New York, though not expressly recited in the statute; *Re Blewitt*, 131 N. Y. 541, 30 N. E. 587; *Gridley v. College of St. Francis Xavier*, 137 N. Y. 327, 33 N. E. 321; *Re Fox*, 138 App. Div. 43, 122 N. Y. Supp. 889. Plaintiff was physically able to be present at this hearing. But he did not appear, did not send anyone to represent him, nor ask for an adjournment. At the inquisition the commission and the jury, after hearing witnesses, concluded that his attendance was unnecessary, and did not require him to attend. There was evidence that his enforced attendance would be detrimental to his mental health.

As the plaintiff had notice and opportunity to be heard at each stage of these proceedings, the essential elements of due process of law were fully met, and the court had jurisdiction to enter that order. It is not open to collateral attack, although plaintiff was then under commitment at Bloomingdale. See *Simon v. Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836.

¹ Code Civ. Proc. "2320. Jurisdiction; concurrent jurisdiction.

"The jurisdiction of the supreme court extends to the custody of the person, and the care of the property, of a person incompetent to manage himself or his affairs, in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause. . . .

"2322. Committee may be appointed.

"The jurisdiction, specified in the last two sections, must be exercised by means of a committee of the person, or a committee of the property, or of a particular portion of the property, of the incompetent person, appointed as prescribed in this title. The committee of the person and the committee of the property may be the same individual, or different individuals, in the discretion of the court.

"2323. Application for committee; by whom made.

"An application for the appointment of such a committee must be made by petition,

which may be presented by any person. Except as provided in the next section, where the application is made to the supreme court, the petition must be presented at a special term held within the judicial district, or to a justice of said court within such judicial district at chambers, where the person alleged to be incompetent resides; or if he is not a resident of the state, or the place of his residence cannot be ascertained, where some of his property is situated, or the state institution is situated of which he is an inmate.

"2325. Contents, etc., of petition; proceedings upon presentation thereof.

"The petition must be in writing, and verified by the affidavit of the petitioner, or his attorney, to the effect that the matters of fact therein stated are true. It must be accompanied with proof, by affidavit, that the case is one of those specified in this title. It must set forth the names and residences of the husband or wife, if any, and of the next of kin and heirs, of the person

The order of November 19, 1901, accepting Butler's resignation as committee and appointing defendant in his place, was made by the court without notice either to the plaintiff or to the other parties to the original proceedings. But this was a mere substitution of one officer of the court for another. No substantial right of the plaintiff was affected. Due process does not require notice and opportunity to be heard in such a proceeding; and the irregularity, if any, was not such as to prevent the court from exercising jurisdiction to determine the matter.

The validity of the orders was assailed and their effect contested also on other grounds. It was contended that plaintiff had been corruptly lured from his home in Virginia to New York in March, 1897, and then illegally committed to Bloomingdale, and that he could not otherwise have been served in New York at all in the 1899 proceedings; that in 1899 plaintiff was a resident of Virginia; that the adjudication of incompetency in 1899 was made on perjured evidence; and that the plaintiff was then of sound mind and competent to manage his affairs. It was also contended that about November 6, 1901, the plaintiff, being a citizen and resident of Albemarle county, Virginia, was adjudged by its county court

to be of sound mind and capable of managing his person and estate; that he was such at the time of the commencement of this action and has been since. Much evidence was offered to support these contentions; but the facts, if established, could not overcome the defense presented by the orders* of the supreme court of New York. That court had jurisdiction because the plaintiff and his property were in New York; and the essentials of due process of law were met. The orders, consequently, are not void; and they are not subject to this collateral attack. If it be true that the orders ought to be set aside, either because they were, as alleged, entered corruptly, irregularly, or inadvertently (see *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Hilton v. Guyot*, 159 U. S. 113, 207, 40 L. ed. 95, 123, 16 Sup. Ct. Rep. 139), or because, owing to a change in plaintiff's condition, a committee is no longer required, the remedy must be sought by a direct proceeding to that end (*Re Curtiss*, 137 App. Div. 584, 122 N. Y. Supp. 468, 199 N. Y. 36, 92 N. E. 396). No evidence was introduced to prove that even an attempt was made to vacate or modify the orders. In this action of trover, which seeks merely damages for alleged wrongful withholding of plaintiff's property, the existing orders constitute a

alleged to be incompetent, as far as the same are known to the petitioner, or can, with reasonable diligence, be ascertained by him; and also the probable value of the property possessed and owned by the alleged incompetent person, and what property has been conveyed during said alleged incompetency and to whom, and its value and what consideration was paid for it, if any, or was agreed to be paid. The court must, unless sufficient reasons for dispensing therewith are set forth, in the petition or accompanying affidavit, require notice of the presentation of the petition to be given to the husband or wife, if any, or to one or more of the relatives of the person alleged to be incompetent, or to an officer specified in the last section. When notice is required, it may be given in any manner, which the court deems proper; and for that purpose, the hearing may be adjourned to a subsequent day, or to another term, at which the petition might have been presented.

"2327. Order for commission, or for trial by jury in courts.

"Unless an order is made, as prescribed in the last section, if it presumptively appears, to the satisfaction of the court, from the petition and the proofs accompanying it, that the case is one of those specified in this title; and that a committee ought, in the exercise of a sound discretion, to be appointed; the court must make an order, directing, either

"1. That a commission issue, as pre-

scribed in the next section, to one or more fit persons, designated in the order; or

"2. That the question of fact, arising upon the competency of the person, with respect to whom the petition prays for the appointment of a committee, be tried by a jury at a trial term of the court.

"2328. Contents of commission.

"The commission must direct the commissioners to cause the sheriff of a county, specified therein, to procure a jury; and that they inquire, by the jury, into the matters set forth in the petition; and also into the value of the real and personal property of the person alleged to be incompetent, and the amount of his income. It may contain such other directions, with respect to the subjects of inquiry, or the manner of executing the commission, as the court directs to be inserted therein.

"2330. Jury to be procured; proceedings thereupon.

"The commissioners, or a majority of them, must immediately issue a precept to the sheriff, designated in the commission, requiring him to notify, not less than twelve nor more than twenty-four indifferent persons, qualified to serve, and not exempt from serving, as trial jurors in the same court, to appear before the commissioners, at a specified time and place, within the county, to make inquiry, as commanded by the commission.

"2331. Proceedings upon the hearing.

complete defense. The evidence offered was properly excluded, and there was no error in directing a verdict for the defendant.

Judgment affirmed.

(242 U. S. 426)

KNAUTH, NACHOD, & KUHNE, Petitioners,
v.

LATHAM & COMPANY et al. (No. 98.)

MAX JAFFE et al., Surviving Members of the Firm of Knauth, Nachod, & Kuhne, Appts.,

v.

WILLIAM S. LOVELL, as Custodian, etc., and as Trustee in Bankruptcy of Knight, Yancey, & Company et al. (No. 259.)

MAX JAFFE et al., Surviving Members of the Firm of Knauth, Nachod, & Kuhne, Appts.,

v.

MAURICE E. A. WESTPHALEN et al. (No. 260.)

BANKRUPTCY $\hookrightarrow$ 292—CONFLICTING JURISDICTION—SUIT TO ESTABLISH PRIORITY.

The Federal district court may not entertain jurisdiction of a bill or cross bill which, by reason of the inadequacy of the

allegations seeking to impress a trust upon the property of bankrupts whose estate is in course of administration in another district, must be regarded as an attempt to secure priority of payment out of the bankrupts' estate on account of moneys fraudulently obtained by the bankrupts and put into their business.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 410, 413, 415, 416; Dec. Dig. $\hookrightarrow$ 292.]

[Nos. 98, 259, and 260.]

Submitted November 13, 1916. Decided January 8, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed, with a modification, a decree of the District Court of Alabama, dismissing a cross bill in a suit begun by a trustee in bankruptcy to set aside an alleged preferential transfer. Affirmed. Also

TWO APPEALS from the District Court of the United States for the Northern District of Florida to review decrees dismissing suits to impress a trust upon the property of a bankrupt. Affirmed.

See same case below, in No. 98, 135 C. C. A. 419, 219 Fed. 721.

The facts are stated in the opinion.

"All the commissioners must attend and preside at the hearing; and they, or a majority of them, have, with respect to the proceedings upon the hearing, all the power and authority of a judge of the court, holding a trial term, subject to the directions contained in the commission. Either of the commissioners may administer the usual oath to the jurors. At least twelve jurors must concur in a finding. If twelve do not concur, the jurors must report their disagreement to the commissioners, who must thereupon discharge them, and issue a new precept to the sheriff, to procure another jury.

"2332. Return of inquisition and commission.

"The inquisition must be signed by the jurors concurring therein, and by the commissioners, or a majority of them, and annexed to the commission. The commission and inquisition must be returned by the commissioners, and filed with the clerk.

"2334. Proceedings upon trial by jury in court.

"Where an order is made, directing the trial, by a jury, at a trial term, of the questions of fact, arising upon the competency of the person, with respect to whom the petition prays for the appointment of a committee, the order must state, distinctly and plainly, the questions of fact to be tried; which may be settled as where an order for a similar trial is made in an action. The court may, in that or in a subsequent order,

direct that notice of the trial be given to such persons, and in such a manner as is deemed proper. The trial must be reviewed in the same manner, with like effect, and, except as otherwise directed in the order, the proceedings thereupon are, in all respects, the same as where questions of fact are tried, pursuant to an order for that purpose. The court may make inquiry by means of a reference or otherwise, as it thinks proper, with respect to any matter, not involved in the questions tried by the jury, the determination of which is necessary in the course of the proceedings. The expenses of the trial, and of such an inquiry, must be paid by the petitioner.

Laws 1895, chap. 946.

"2339. Committee under control of court; limitation of powers.

"A committee, either of the person or of the property, is subject to the direction and control of the court by which he was appointed, with respect to the execution of his duties; and he may be suspended, removed, or allowed to resign, in the discretion of the court. A vacancy created by death, removal, or resignation may be filled by the court. But a committee of the property cannot alien, mortgage, or otherwise dispose of, real property, except to lease it for a term not exceeding five years, without the special direction of the court, obtained upon proceedings taken for that purpose, as prescribed in title seventh of this chapter.

Messrs. **Thomas M. Stevens, George T. Hogg, Julien T. Davies, and W. H. Watson** for petitioners and appellants.

Messrs. **Walker B. Spencer, Charles Payne Fenner, Augustus Benners, William A. Blount, Henry P. Dart, F. B. Carter, E. C. Maxwell, and Henry P. Dart, Jr.,** for respondents and appellees.

* Mr. Justice **McReynolds** delivered the opinion of the court:

Number 98.

Knight, Yancey, & Company were duly adjudged bankrupts in the district court, northern district of Alabama, April 21, 1910. A few days later, in conjunction with a firm creditor, the receivers brought suit in the United States circuit court, fifth circuit, southern district of Alabama, against **Latham & Company, a French partnership, Frederick Leyland Steamship Company, Limited, Louisville & Nashville Railroad Company, and others,** seeking to recover 4,200 bales of cotton about to be exported from Mobile, upon the ground that, while insolvent, the bankrupts had transferred it to **Latham & Company** in payment of prior indebtedness and with intent to prefer them. After being taken into possession by the United States marshal, by order of court, the cotton was released, May 14, 1910, to **Latham & Company**, who executed a bond conditioned: "Now, therefore, if the obligors herein shall have forthcoming and deliver within sixty days from date of any final decree of this court said cotton to the proper officer of the court, or shall pay and satisfy such decree as may be rendered in the premises, then this obligation shall be null and void, otherwise to remain in full force and effect." Later the trustee in bankruptcy was substituted as complainant.

July 1, 1910, **Knauth, Nachod, & Kuhne** filed in the cause a so-called cross bill, subsequently amended, which on motion was dismissed both for want of equity upon its face and because the court lacked jurisdiction to entertain it. The circuit court of appeals affirmed this action.

The amended cross bill is a mass of prolix and vagrant statements and allegations from which it is difficult to spell out any very definite theory. Apparently because \$98,000—approximate market value of 1,300 bales of cotton—had been fraudulently obtained from **Knauth, Nachod, & Kuhne** by the bankrupts and used by them in their business, the former sought to impress a trust upon what the latter thereafter acquired, including the 4,200 bales of cotton found at Mobile.

The allegations of the bill are wholly inadequate to trace the funds into any specific cotton (**Peters v. Bain**, 133 U. S. 670, 693, 33 L. ed. 696, 704, 10 Sup. Ct. Rep. 354), and the cross bill must be regarded as an attempt to secure from the estate priority of payment on account of money fraudulently obtained by the bankrupts and put into their business. Manifestly such a proceeding could not be entertained in the southern district of Alabama. The estate was being administered in another court. **Mueller v. Nugent**, 184 U. S. 8, 46 L. ed. 408, 22 Sup. Ct. Rep. 269; **Jones v. Springer**, 226 U. S. 153, 57 L. ed. 163, 33 Sup. Ct. Rep. 64; **Acme Harvester Co. v. Beekman Lumber Co.** 222 U. S. 300, 56 L. ed. 208, 32 Sup. Ct. Rep. 96; **Lazarus v. Prentice**, 234 U. S. 267, 58 L. ed. 1307, 34 Sup. Ct. Rep. 851; **Jaffe v. Weld**, 208 N. Y. 593, 102 N. E. 1104.

The judgment of the Circuit Court of Appeals is affirmed.

Number 259.

The record contains the amended bill of complaint; motions to dismiss, with objections thereto; final judgment of dismissal for want of jurisdiction; assignment of errors, etc.

* Shortly after **Knight, Yancey, & Company** were adjudged bankrupts, upon application of the receivers (May, 1910), the United States district court, northern district of Florida, enjoined the **Louisville & Nashville Railroad** from removing or disposing of 3,600 bales of cotton in its possession at Pensacola; and in June thereafter the duly selected trustee instituted suit seeking to recover possession of the cotton upon the ground that it had been transferred with intent to prefer. By the court's direction 2,635 bales were thereafter delivered to **Latham & Company**, who claimed them as owners, a forthcoming bond having been given. The remainder—965 bales—was sold and proceeds deposited in the **First National Bank of Pensacola** to await final orders.

Subsequently appellants instituted an original proceeding claiming that the bankrupts had fraudulently obtained from them \$98,000 and invested it in this or other cotton or otherwise, and that they were entitled to impress a trust upon the avails of such funds.

The involved and erratic allegations are wholly inadequate to show with sufficient definiteness that the funds were invested in the cotton at Pensacola; and the bill must be considered as an attempt to secure priority of payment out of the bankrupts' estate upon the theory that it was increased by appellants' money. There was no jurisdiction to entertain such

a proceeding in the District Court in Florida; and the judgment below is accordingly affirmed.

Number 260.

The record also consists of the amended bill, filed April 14, 1914; motions to dismiss, with objections thereto; final judgment of dismissal for want of jurisdiction; assignments of error, etc.

*430 At the instance of the receivers of Knight, Yancey, & *Company, May, 1910, the Louisville & Nashville Railroad was enjoined by the United States district court, northern district of Florida, from removing or disposing of 1,950 bales of cotton then in its possession at Pensacola, Florida, and claimed by Westphalen & Company. Afterwards that firm instituted an original suit to recover, pending which, under agreement, the cotton was sold and the proceeds deposited in two banks at Pensacola, subject to final judgment. The proceedings were substantially the same as in Number 259, and like action was taken by the court. The judgment below is affirmed.

(242 U. S. 430)

FURNESS, WITHY, & COMPANY, Limited, Petitioner,

v.

YANG-TSZE INSURANCE ASSOCIATION, Limited, et al.

COURTS ⇨383(1)—CERTIORARI—TO CIRCUIT COURT OF APPEALS—IMPROVIDENTLY GRANTED—DISMISSAL.

1. Petitions for certiorari to the Federal circuit courts of appeals are at the risk of the party making them, and whenever, in the progress of the case, facts develop which, if disclosed on the application, would have induced a refusal, the Supreme Court may, upon motion by a party, or ex mero motu, dismiss the writ.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⇨383(1).]

COURTS ⇨383(1)—CERTIORARI—TO CIRCUIT COURT OF APPEALS—IMPROVIDENTLY GRANTED—DISMISSAL.

2. Certiorari to a Federal circuit court of appeals, granted to review a judgment in a proceeding to recover damages consequent upon the sinking of a ship in a collision, will be dismissed where it subsequently transpires that a later final decree in proceedings for a limitation of the shipowner's liability was based upon an express compromise agreement.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⇨383(1).]

[No. 106.]

Argued December 18 and 19, 1916. Decided January 8, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree in favor of libellant in a suit to recover damages consequent upon the sinking of a ship in a collision. Dismissed as having been improvidently granted.

See same case below, 132 C. C. A. 201, 215 Fed. 859.

The facts are stated in the opinion.

Messrs. Norman B. Beecher, Charles C. Burlingham, and Roscoe H. Hupper for petitioner.

Messrs. D. Roger Englar, J. Parker Kirlin, Lawrence Kneeland, William H. McGrann, and John M. Woolsey for respondents.

* Mr. Justice McReynolds delivered the opinion of the court: *431

The writ of certiorari was improvidently granted and must be dismissed. We should have denied the petition therefor if the facts essential to an adequate appreciation of the situation had then been brought to our attention. Petitions of this character are at the risk of the party making them, and whenever, in the progress of the cause, facts develop which, if disclosed on the application, would have induced a refusal, the court may, upon motion by a party, or ex mero motu, dismiss the writ. *United States v. Rimer*, 220 U. S. 547, 55 L. ed. 578, 31 Sup. Ct. Rep. 596; *State, Malone, Prosecutor, v. Water Comrs.* 30 N. J. L. 247.

In February, 1912, the Yang-Tsze Insurance Association, Limited, filed its libel in the district court at New York against Furness, Withy, & Company, Limited, owner of the Pomaron, to recover damages consequent upon the sinking of the Alleghany. A judgment for libellant, rendered June 13, 1913, was affirmed by the circuit court of appeals in June, 1914; and on October 5, 1914, the Pomaron's owner instituted a proceeding in the same district court for limitation of liability, and the steps customary in such causes were regularly taken. April 12, 1915, the petitioner presented an original application here for a writ of certiorari to bring up the judgment of the circuit court of appeals in the damage cause, and this was denied April 19th.

* It now appears that, on April 22, 1915, a final decree containing the following recitals was entered by the district court in the limitation proceedings: "Whereas the petitioner and all the claimants herein have compromised and settled the issues between them, and in consideration of the said compromise and settlement it has been agreed between the petitioner and all the claimants:" (The terms follow.) "Where-

as, in consideration of the said compromise and settlement, the several claimants herein by agreement have fixed and adjusted the amounts of their several losses consequent on the said collision at the following sums, to wit:” (The amounts are specified.) “Now on the subjoined admissions of correctness of the foregoing recitals and the subjoined consents and waivers of settlement in respect of the entry of this decree, made by the proctors for all claimants herein . . . it is ordered, adjudged, and decreed, etc.”

The following, signed by all the proctors, is subjoined to the decree: “The undersigned proctors, for all the parties herein, hereby admit the truth of the recitals contained in the foregoing decree and consent to the entry thereof, without further notice.”

Petitioner’s second application for certiorari, which was presented June 15, 1915, and granted, contains these statements:

“On May 10, 1915, as your petitioner is informed, this court granted a writ of certiorari to the circuit court of appeals for the ninth circuit upon the petition of Olaf Lie, master of the Norwegian steamship Selja, in a suit between said Olaf Lie, master, etc., and the San Francisco & Portland Steamship Company, etc.”

“Your petitioner now renews its application for certiorari for the reason that the questions presented by its petition are identical with those presented by the petition of Olaf Lie. The principal question is whether, under this court’s decision in *The Pennsylvania*, 19 Wall. 125, 22 L. ed. 148, a privileged vessel, which, before a collision with a burdened vessel, ported her helm in violation (*prima facie*, at least) of article 21 of the International Regulations, may be held responsible for the collision, . . .”

“Subsequent to the decision of the circuit court of appeals your petitioner instituted proceedings for limitation of liability, which, after the denial by this court of the original petition, were prosecuted to a decree under which payments were made to the respondents by the clerk of the district court. As these payments were made under compulsion, they would be recoverable by your petitioner in the event that this court should reverse the decision of the circuit court of appeals.”

In their memorandum opposing the second petition for certiorari, counsel for the Insurance Association said: “The case is settled and closed.” And after referring to steps taken in the limitation proceeding, and quoting from the decree therein, dated April 22, 1915, they added: “All the claimants have been paid the respective pro-

portions of the fund ascertained to be due them, and have executed receipts of discharge in the terms provided by the decree. The case is, therefore, finally closed and settled as between all the parties, and such settlements have been made without any reservation of rights on the part of the petitioner.”

We were not advised by petition of June 15, 1915, or memorandum opposing it, that the final decree in the limitation proceedings was based upon an express compromise agreement; otherwise the writ would not have been allowed. At the hearing counsel expressed different views concerning the ultimate effect of that decree and the reasons for its form; and they made it quite plain that there was no purpose to mislead us. Nevertheless, in the circumstances, we think it was incumbent upon counsel for both sides to see that the petition and reply thereto disclosed the real situation. The oversight has resulted in unfortunate delay and needless consumption of time.

During the last term one hundred fifty-four petitions for certiorari were presented and acted upon. Because of recent legislation—Act of September 6, 1916, chap. 448, 39 Stat. at L. 726—their number hereafter may greatly increase. Such petitions go first to every member of the court for examination, and are then separately considered in conference. This duty must be promptly discharged. We are not aided by oral arguments, and necessarily rely in an especial way upon petitions, replies, and supporting briefs. Unless these are carefully prepared, contain appropriate references to the record, and present with *studied accuracy, brevity, and clearness* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket.

Dismissed.

(242 U. S. 434)

JOHN WILLIAMS, Chief; Michael Williams, Secretary, et al., Appts.,
v.

CITY OF CHICAGO, Illinois Central Railroad Company, et al.

INDIANS  10—RELATIVE TITLE OF INDIANS AND GOVERNMENT—OCCUPANCY OR FEE.

1. The only possible immemorial right which the Pottawatomie Nation had in the country claimed as their own at the time of the concluding of the Greeneville Treaty of Peace of August 3, 1795 (7 Stat. at L. 51), was that of occupancy.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 25, 29, 46; Dec. Dig.  10.]

INDIANS 11—TRIBAL LANDS — TREATY
STIPULATIONS—OCCUPANCY OR FEE.

2. Nothing more than a right of continued occupancy could be claimed by the Indians under the Greenville Treaty of Peace of August 3, 1795 (7 Stat. at L. 51), by which the United States stipulated with the Pottawatomies and other Indians that, generally, in respect of a large territory westward of a line passing through Ohio, "the Indian tribes who have a right to those lands are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States and against all other white persons who intrude upon the same." When this right of occupancy was abandoned, all legal right or interest which both tribe and its members had in the territory came to an end.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 26; Dec. Dig. .

[No. 128.]

Argued December 22, 1916. Decided January 8, 1917.

APPEAL from the District Court of the United States for the Northern District of Illinois to review a decree dismissing the bill in a suit by Pottawatomie Indians to establish title to lands reclaimed from Lake Michigan. Affirmed.

The facts are stated in the opinion.

Messrs. J. G. Grossberg, and W. W. De Armond for appellants.

Messrs. W. S. Horton, Chester E. Cleveland, Samuel A. Ettelson, Robert Redfield, W. D. McKenzie, and Francis O'Shaughnessy for appellees.

* Mr. Justice McReynolds delivered the opinion of the court:

The claim set up in this cause is without merit, and the amended bill was properly dismissed, upon motion, for want of equity.

Complainants are eight Pottawatomie Indians, members of the Pokagon Band, and residents of Michigan. They undertake to sue "on behalf of themselves and of all members of the Pokagon Band of Pottawatomie Indians, and of all other members of the Pottawatomie Nation of Indians, if any are entitled to join herein with them, and of all others, if any, who are entitled to join herein with them."

Defendants are the city of Chicago and certain corporations now occupying valuable lands within the geographical limits

of Illinois, which have been reclaimed from Lake Michigan.

The bill proceeds upon this theory:

That from time immemorial, on August 3, 1795, and *thereafter, the Pottawatomie Indians were the owners and in possession as a sovereign nation, as their country, of large tracts of land around and along the shores of Lake Michigan, south of a line running from Milwaukee river, Wisconsin, to Grand river, Michigan, and extending "east and west of said two points and including all of Lake Michigan which is south of said line,"—a stretch of a hundred miles.

That by the Treaty of Peace entered into at Greenville, Ohio, August 3, 1795, the United States relinquished to the Pottawatomie and other tribes their claims to Indian lands westward of a designated line passing through the state of Ohio, and lying "northward of the River Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them, according to the boundary line agreed on by the United States and the King of Great Britain in the Treaty of Peace made between them in the year of 1783 [8 Stat. at L. 80]."¹ [7 Stat. at L. 51.]

That by later treaties the Pottawatomie Nation ceded to the United States all such lands up to the shores of Lake Michigan, but those within the geographical limits of Illinois which were formerly beneath the waters of Lake Michigan, "whether reclaimed, artificially made, or now or formerly submerged . . . have remained and still are the property of these complainants . . . and any attempts on the part of any persons, firms, and corporations to appropriate same, or any part thereof, were and are in violation of said treaties and the rights of these complainants."

That in 1833, with the exception of the Pokagon Band, in pursuance of a treaty with the United States, the Pottawatomie Nation migrated west of the Mississippi river, leaving that band in possession, occupation, control, and sovereignty of so much of the Nation's original country as remained unceded.

That the United States has refused to purchase the *reclaimed lands and consequently complainants are at liberty to occupy, sell, lease, or dispose of the same as their own in fee simple.

The bill prays that defendants be enjoined from occupying or building upon the specified land, or from asserting any claim, title, or interest therein; that they be required to pay a reasonable compensation for its use; and that the complainants' title thereto be quieted, established, and confirmed.

The only possible immemorial right which the Pottawatomie Nation had in the country claimed as their own in 1795 was that of occupancy. *Johnson v. M'Intosh*, 8 Wheat. 543, 5 L. ed. 681. If, in any view, it ever held possession of the property here in question, we know historically that this was abandoned long ago, and that for more than a half century it has not even pretended to occupy either the shores or waters of Lake Michigan within the confines of Illinois.

By the Treaty of Greenville the United States stipulated with the Pottawatomies and other Indians that generally, in respect of a large territory westward of a line passing through Ohio, "the Indian tribes who have a right to those lands are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same." We think it entirely clear that this treaty did not convey a fee-simple title to the Indians; that under it no tribe could claim more than the right of continued occupancy; and that when this was abandoned, all legal right or interest which both tribe and its members had in the*territory came to an end. *Johnson v. M'Intosh*, 8 Wheat. 543, 584, 586, 588, 5 L. ed. 681, 691, 692; *Mitchel v. United States*, 9 Pet. 711, 745, 9 L. ed. 283, 295; *United States v. Cook*, 19 Wall. 591, 592, 22 L. ed. 210, 211; *Beecher v. Wetherby*, 95 U. S. 517, 525, 24 L. ed. 440, 441.

It is unnecessary to consider other reasons suggested by counsel in support of the decree below.

Affirmed.

(242 U. S. 375)

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Chicago, Indiana, & Southern Railroad Company, and Michigan Central Railroad Company, Plffs. in Err.,

v.

SUSAN CLOUGH, the Tolleston Club of Chicago, Charles G. Wicker, et al.

CONSTITUTIONAL LAW ¶291—DUE PROCESS OF LAW—IMPOSING SPECIAL BURDEN ON RAILWAY COMPANY.

1. The expense of bridging with their

tracks a drainage ditch to be constructed in the public interest under the Indiana Drainage Act of March 11, 1907, across a sandy ridge lying between Lake Michigan and the Little Calumet river, may be cast upon railway companies occupying such ridge with their rights of way, without denying the due process of law guaranteed by U. S. Const. 14th Amend., although their roads, being upon the top of the ridge, are not within the area to be drained, do not contribute to the formation of any overflow, and are not benefited by the proposed drainage, where their charters obligate them not to interfere with the free use, or unnecessarily impair the usefulness of any stream, watercourse, highway, or canal which their roads may cross,—a duty which the highest state court interprets as a continuing one, and as applicable to artificial as well as natural watercourses.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 870-876; Dec. Dig. ¶291.]

CONSTITUTIONAL LAW ¶291—DUE PROCESS OF LAW—IMPOSING SPECIAL BURDEN ON RAILWAY COMPANY.

2. The expense of taking out existing piers and abutments of a railway bridge and erecting new ones, made necessary by the deepening of a channel in the carrying out of a proposed drainage system to be constructed in the public interest under the sanction of the Indiana Drainage Act of March 11, 1907, may be cast upon the railway company without denying the due process of law guaranteed by U. S. Const. 14th Amend., although the present bridge and abutments form no obstruction to the natural flow of the stream, where the company's charter obligates it not to interfere with the free use, or unnecessarily impair the usefulness of any stream or watercourse which its road may cross,—a duty which the highest state court interprets as a continuing one, and as applicable to artificial as well as natural watercourses.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 870-876; Dec. Dig. ¶291.]

CONSTITUTIONAL LAW ¶234 — EQUAL PROTECTION OF THE LAWS—CLASSIFICATION —RAILWAY COMPANIES.

3. Awarding to a county the damages to bridges and highways to result from carrying out a proposed drainage system to be constructed in the public interest under the sanction of the Indiana Drainage Act of March 11, 1907, while casting upon railway companies the cost of bridging gaps to be made in their rights of way by the proposed drain, and of rebuilding existing abutments and piers of a railway bridge crossing a stream, the channel of which will be deepened as a result of the construction of the drainage system, does not deny the railway companies the equal protection of the laws guaranteed by U. S. Const. 14th Amend., where their charters obligate them not to interfere with the free use, or unnecessarily impair the usefulness of any stream, watercourse, highway, or canal which their roads may cross,—a duty which the highest state court interprets as

a continuing one, and as applicable to artificial as well as natural watercourses.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 636; Dec. Dig. 234.]

[No. 87.]

Argued November 9 and 10, 1916. Decided January 8, 1917.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the Circuit Court of Porter County, in that state, modifying, and confirming as modified, the report of drainage commissioners. Affirmed.

See same case below, 182 Ind. 178, 104 N. E. 975, 105 N. E. 905.

The facts are stated in the opinion.

Messrs. John B. Peterson, J. A. Gavit, Addison C. Harris, and Robert J. Cary for plaintiffs in error.

Messrs. John H. Gillett, Frank B. Patee, and Randall W. Burns for defendants in error.

* Mr. Justice Pitney delivered the opinion of the court:

The Little Calumet river rises in La Porte county, Indiana, flows westerly across that and the adjoining counties of Porter and Lake into the state of Illinois, and, after continuing its course for some distance in that state,* empties into the Big Grand Calumet, which in turn empties into Lake Michigan. In Indiana the river runs approximately parallel to the south shore of the Lake. Intervening is a ridge of sandy land about 1 mile in width, 30 feet higher than the water level of the lake, and 10 feet higher than the river. The Lake Shore & Michigan Southern and the Chicago, Indiana, & Southern Companies own parallel railroad lines running along this ridge. Neither of these roads crosses the river in Indiana. The Michigan Central Railroad crosses the river in that state upon a steel bridge resting on abutments and piers. The Calumet valley, in Porter and Lake counties, is a mile or more in width, lying between the ridge on the north and low hills on the south. The watershed drained by the river in Indiana is about 350 square miles. At times the river fails to carry within its banks all the water, and the overflows produce a marsh having an area of 14,000 acres. Under An Act Concerning Drainage, approved March 11, 1907 (Act 1907, p. 508; 3 Burns's Anno. Stat. [Ind.] 1914, § 6140), application was made by defendants in error, owners of lands affected by the overflows, to the Porter circuit court, for the establishment of a proposed plan of drainage, its essential features being the cutting of an artificial chan-

nel for a considerable distance along the course of the Little Calumet and at such a gradient as to reverse the direction of its flow, and the construction of an outlet for its waters in the form of an open ditch to run northwardly, cutting through the sandy ridge and emptying into the Lake. Pursuant to the provisions of the act, the petition was referred to the drainage commissioners. They made a report in favor of the proposed plan, and assessed substantial damages, in excess of benefits, in favor of the Chicago, Indiana, & Southern and the Lake Shore & Michigan Southern Companies with respect to their rights of way. No benefits or damages were appraised to the Michigan Central. Under § 4 of the act, certain* landowners assessed with benefits filed remonstrances against the awards of damages to the former two companies. Each of the three companies filed remonstrances: the Lake Shore & Michigan Southern and the Chicago, Indiana, & Southern upon the ground that the damages awarded to them were inadequate because the new ditch, where it was to cross their rights of way, would be 70 feet wide at the bottom, about 30 feet deep, and about 200 feet wide at the top, and the expense of bridging it, with the tracks, would in each instance be upwards of \$100,000; the Michigan Central, because no damages were assessed in its favor, although, by the deepening of the channel of the river at its crossing, it would be required to take out the present piers and abutments and erect new ones to support the bridge, at a cost of about \$60,000. Upon the commissioner's report and the remonstrances the matter came on for hearing before the circuit court, where findings were made setting forth the necessity for the drainage, stating the plan in detail, finding that it would be practicable to accomplish the proposed drainage without an expense exceeding the aggregate benefits; that the proposed work would benefit the public health, would improve the public highways in several townships specified, and would be of public utility. It was further found that the Chicago, Indiana, & Southern and Lake Shore & Michigan Southern Companies, whose roads were to be crossed by the main ditch, had no property other than their right of way that would be affected or interfered with or touched by the drainage proceeding, and these companies would not be damaged by the construction of the proposed drain; and that at the point where the ditch was to pass under the bridge of the Michigan Central the natural channel of the stream would have to be deepened, and this would necessitate the rebuilding of the abutments and piers upon which the bridge rested, but that this com-

pany would neither be damaged nor benefited by the proposed drain. A motion for a new trial having been overruled, a judgment was rendered confirming the report of the commissioners as modified by the court, and ordering that the proposed work of drainage be established. The three companies appealed to the supreme court of Indiana, where the judgment was affirmed (182 Ind. 178, 104 N. E. 975, 105 N. E. 905), and they bring the case here upon questions raised under the 14th Amendment to the Federal Constitution.

The principal contention of the Lake Shore & Michigan Southern and the Chicago, Indiana, & Southern Companies is that, since their railroads are not within the area to be drained, and neither contribute to the formation of the marsh nor are to be in any wise benefited by its drainage, their lands can be taken only through the exercise of the power of eminent domain, with appropriate compensation, and that a denial of such compensation is a taking of their property without due process of law. A right to compensation is asserted in behalf of the Michigan Central on the ground that its present bridge and abutments form no obstruction to the natural flow of the Little Calumet river.

It will be observed that none of the lands of any plaintiff in error is expropriated. The damage they suffer is confined to a temporary inconvenience in the use of their rights of way pending the construction of the drain, and the necessity for making substantial expenditures of money in order to pass their railroads over the new watercourse. But the record shows that each of the companies was organized and had its existence under the general laws of the state for the incorporation of railroad companies, that is to say, an act approved May 11, 1852, and amendments thereto (1 Ind. Rev. Stat. 1852, p. 409; 2 Burns's Anno. Stat. [Ind.] 1914, §§ 5176 et seq.). By § 13 of this act (as found in Burns, § 5195) it is declared: "Every such corporation shall possess the general powers, and be subject* to the liabilities and restrictions expressed in the special powers following: . . . Fifth: To construct its road upon or across any stream of water, watercourse, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises."

Concerning the duty thus imposed upon

railroad companies with respect to highway crossings, it has been held by the supreme court of Indiana in a long line of cases that the duty is applicable not only to the original construction of a railroad across highways then in existence, but also where highways are laid out and opened across a railroad after its construction; that it is a continuing duty, requiring the railroad to keep pace with the times, and the increase of public travel, the change of methods and improvements of highways, and the public desire for the increased ease and convenience of the traveling public. Louisville, N. A. & C. R. Co. v. Smith, 91 Ind. 119, 121; Evansville & T. H. R. Co. v. Crist, 116 Ind. 446, 454, 2 L.R.A. 450, 9 Am. St. Rep. 865, 19 N. E. 310; Chicago, I. & L. R. Co. v. State, 158 Ind. 189, 191, 63 N. E. 224; Chicago & S. E. R. Co. v. State, 159 Ind. 237, 240, 64 N. E. 860; Baltimore & O. S. W. R. Co. v. State, 159 Ind. 510, 519, 65 N. E. 508; Lake Erie & W. R. Co. v. Shelley, 163 Ind. 36, 41, 71 N. E. 151; Southern Indiana R. Co. v. McCarrell, 163 Ind. 469, 473, 71 N. E. 156; Vandalia R. Co. v. State, 166 Ind. 219, 223, 117 Am. St. Rep. 370, 76 N. E. 980; Cincinnati, I. & W. R. Co. v. Connersville, 170 Ind. 316, 323, 83 N. E. 503, affirmed by this court in 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; New York, C. & St. L. R. Co. v. Rhodes, 171 Ind. 521, 525, 24 L.R.A. (N.S.) 1225, 86 N. E. 840; Pittsburgh, C. C. & St. L. R. Co. v. Gregg, 181 Ind. 42, 53, 102 N. E. 961.

But in the Railroad Act streams, watercourses, and canals are mentioned along with roads and highways. The terms employed are broad enough to include artificial watercourses, whether employed for traffic, for irrigation, or for drainage. And accordingly it has been held by the supreme court of the state that, with respect to a public ditch constructed under the Drainage Act of 1907, railroad companies are under the same duty as with respect to highways, and that the company acquires its right of way subject to the right of the state to extend such ditches across it, without compensation to the company for the interruption and inconvenience, if any, or for increased expense or risk, or for the cost of accommodating the railroad line to the crossing. Chicago & E. R. Co. v. Luddington, 175 Ind. 35, 38-40, 91 N. E. 939, 93 N. E. 273; Wabash R. Co. v. Jackson, 176 Ind. 487, 490, 95 N. E. 311, 96 N. E. 466.

No question is made but that the settled law of the state is as we have stated it, and that the charter obligations of plaintiffs in error are such as we have defined. An attempt is made to distinguish the Luddington Case upon the ground that the rail-

road there in question was within the drainage district, and the Jackson Case upon the ground that the railroad had built an embankment across a valley without providing sufficient culverts to carry off the water of the creek in time of heavy rains. It is contended that since, in the present case, the Lake Shore & Michigan Southern and the Chicago, Indiana, & Southern Roads lie upon the top of the ridge between the Little Calumet river and Lake Michigan, and do not in any wise cause or contribute to the marsh, and are not benefited by the proposed drainage, they cannot lawfully be included within the drainage district. And as to the Michigan Central, it is argued that, since its bridge as heretofore constructed does not obstruct the natural flow of the stream, it cannot be subjected to any part of the cost of the drainage system. These distinctions, and a reference made in the same connection to *Myles Salt Co. v. Iberia & St. M. Drainage Dist.* 239 U. S. 478, 60 L. ed. 392, L.R.A.

—, —, 36 Sup. Ct. Rep. 204, are aside from the real point of the case. The state is not proposing to assess plaintiffs in error for benefits with respect to the drainage project, nor to tax them for its support. It is requiring them merely to bear the cost of constructing crossings for their railroad lines over the proposed new channel and outlet, "so as not to interfere with the free use of the same," and "in a sufficient manner not to unnecessarily impair its usefulness." With respect to this duty, if the state has a right to impose it in aid of the drainage project, the remoteness or proximity of the area to be drained is wholly immaterial.

In view of the obligations assumed by the respective companies when they accepted their franchises at the hands of the state, it is very clear that the state may exercise its police power in laying out an artificial watercourse across the rights of way without making compensation to the companies for the inconvenience and expense to which they are thereby subjected, unless, indeed, it be made to appear that the power is being exerted arbitrarily or wantonly, or for private as distinguished from public benefit, or otherwise in disregard of the fundamental rights of the companies concerned, in either of which cases there would be an abuse rather than an exercise of the power, and the project could not lawfully be carried out against their opposition, with or without compensation.

In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 252, 41 L. ed. 979, 990, 17 Sup. Ct. Rep. 581, where the city was condemning certain parts of the right of way of the railroad for the opening and widen-

ing of a street across it, and only nominal compensation was awarded, it was contended among other things that the company was deprived of its property without due process of law because, in ascertaining the compensation, the cost of constructing gates and a tower for operating them, planking the crossing, filling between the rails, putting in an extra rail, and the annual expense of depreciations, maintenance, etc., were disregarded.* But the court held that* since the company took its charter and laid its tracks subject to the condition that their use might be regulated by the state so as to insure the public safety, the exercise of that authority by the state was not subject to a condition that the company should be indemnified for the damage resulting from its exercise. In *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 582, 595, 50 L. ed. 596, 605, 610, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175, a plan of drainage required the enlarging and deepening of a natural watercourse over which the railway crossed by a bridge, and the plan could not be carried out without the removal of certain timbers and stones placed in the creek by the company when it constructed the foundation for the bridge, and these could not be removed without destroying the foundation and rendering it necessary to construct another bridge with an opening wide enough to carry the increased flow of the creek under the drainage system adopted. The court held it to be the duty of the railway company at its own expense to remove from the creek the bridge, culvert, timbers, and stones placed there by it, and at its own expense to erect and maintain a new bridge to conform to the regulation established by the drainage commissioners under the authority of the state, and that the enforcement of such a requirement would not amount to a taking of private property for public use within the meaning of the Constitution. In *Cincinnati, I. & W. R. Co. v. Connersville*, 218 U. S. 336, 344, 54 L. ed. 1060, 1064, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206, it was held that since the railway company accepted its franchise from the state subject to the condition that it would conform, at its own expense, to any regulations not arbitrary in their character as to the opening or use of streets which had for their object the safety of the public or the promotion of the public convenience, the company had no right to be reimbursed for the moneys necessarily expended in constructing a bridge over a public street laid out through its embankment. In *Chicago, M. & St. P. R. Co. v. Minneapolis*, 232 U. S. 430, 58 L. ed. 671, 34 Sup. Ct. Rep. 400, the same doctrine was applied, and held to sustain

the refusal of compensation for the cost of constructing and maintaining a railroad bridge across a gap in the right of way made by the construction, under the authority of the state, of a canal to unite two lakes that formed a part of a public park.

It requires no argument to show that the establishment of a system of public drainage in the interest of the health and general welfare of the people is likewise an object that legitimately invokes the exercise of the police power of the state. *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 460, 49 L. ed. 831, 834, 25 Sup. Ct. Rep. 471; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 561, 58 L. ed. 721, 727, 34 Sup. Ct. Rep. 364.

In the present case it is not and could not reasonably be contended that the state is exercising its power arbitrarily, or wantonly, or for a private benefit. It cannot be doubted that the general object of the Drainage Act of 1907 is to subserve the public interest. Its 2d section requires that petitioners for the establishment of a drainage project shall declare their opinion "that the public health will be improved, or that one or more public highways of the county, or street or streets of, or within the corporate limits of a city or town, will be benefited by the proposed drainage, or that the proposed work will be of public utility." [3 Burns's Anno. Stat. (Ind.) 1914, § 6141, p. 131.] By the 3d section the commissioners are required to consider whether this is true, and, if not, the petition is to be dismissed; and by § 4 it is made a sufficient ground of remonstrance, resulting, if sustained, in the dismissal of the proceedings, "that the proposed work will neither improve the public health, nor benefit any public highway of the county, nor be of public utility." As to the particular project under consideration, it is specifically found, as we have seen, that a public benefit* will result. In the *Luddington Case*, 175 Ind. 38, 91 N. E. 939, 93 N. E. 273, it was expressly declared that ditches established under this law are public ditches of the state, whose construction and repair are matters of public or state concern. There exists, therefore, no basis for holding that, by the judgment under review, the property of any of the plaintiffs in error is taken without due process of law within the meaning of the 14th Amendment.

The "equal protection" clause of the same Amendment is invoked upon the ground that whereas by § 3 of the Drainage Act (Laws 1907, p. 513; 3 Burns's Anno. Stat. [Ind.] 1914, § 6142, p. 135) the

commissioners are required to "assess the benefits or damages as the case may be to each separate tract of land to be affected thereby, and to easements held by railway or other corporations, as well as to cities, towns, or other public or private corporations, including any land, rights, easements or water power, injuriously or beneficially affected," there is discrimination in the judgment, in that an award is made in favor of Lake county for damage to bridges and highways, while compensation to plaintiffs in error for damages to their respective roads, and to the Michigan Central for damages to its bridge, is denied. But, as has been held many times, the "equal protection" clause does not deprive the states of power to resort to classification for purposes of legislation; and unless it appears that a state law as construed and applied by the state court of last resort bases discriminations upon arbitrary distinctions, we cannot judicially declare that the state has refused to give equal protection of the laws. *Singer Sewing Mach. Co. v. Brickell*, 233 U. S. 304, 315, 58 L. ed. 974, 979, 34 Sup. Ct. Rep. 493; *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, 650, 58 L. ed. 1135, 1138, 34 Sup. Ct. Rep. 678. In the present case the supreme court of Indiana in effect held that § 3 of the Drainage Act did not entitle a railway company to damages in respect of its right of way which was not affected by the proposed drainage in any manner otherwise than, by acceptance of its charter, it had agreed to submit to. There is a very evident and substantial basis for a distinction that denies compensation to a private corporation in such a case, while at the same time allowing compensation to a public corporation that has made no such agreement.

Judgment affirmed.

(242 U. S. 386)

JESSE L. HARNAGE and Delohee Gas & Oil Company, Plffs. in Err.,
v.

ANNIE M. MARTIN and Roth, Argue, & Maire Brothers Oil Company.

INDIANS — 13 — ALLOTMENTS — CONCLUSIVENESS OF DECISION OF LAND DEPARTMENT.

1. A decision of the Land Department that a contestant was the owner of the improvements, within the meaning of a provision of the Cherokee Allotment Act of July 1, 1902 (32 Stat. at L. 716, chap. 1375), § 11, giving such owner a preferential right to the allotment, is binding on the courts unless there is no evidence to support it, or it was otherwise the result of some error of law on the part of the officer of such Department.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. § 13.]

INDIANS $\S$ 13—INDIAN ALLOTMENTS — OWNERSHIP OF IMPROVEMENTS—PREFERENTIAL RIGHT.

2. An agreement by which the head of an Indian family gave her granddaughter the right to select some portion of the home place as her allotment may fairly be held equivalent to giving her a sufficient interest in improvements thereon to support a preferential right to an allotment under the Cherokee Allotment Act of July 1, 1902 (32 Stat. at L. 716, chap. 1375), § 11, providing that the land may be selected by each allottee so as to include his improvements.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. $\S$ 13.]

INDIANS $\S$ 13 — INDIAN ALLOTMENTS — SURPLUS LANDS.

3. The prohibition in the Cherokee Allotment Act of July 1, 1902 (32 Stat. at L. 716, chap. 1375), § 18, against the holding of possession by a member of the tribe by himself or through another of lands in excess of 110 acres of average allottable lands for himself, and a like amount for each of his minor children, does not apply to land not in excess of that amount which the head of an Indian family, in addition to her own holdings, held for her adult granddaughter, herself a member of the tribe, since, by the very terms of such section, the granddaughter could hold possession by herself, or through another, of lands not exceeding in value 110 acres of average allottable lands, and thus could hold the lands by her grandmother as her agent.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. $\S$ 13.]

INDIANS $\S$ 13 — INDIAN ALLOTMENTS — IMPROVEMENTS—PREFERENTIAL RIGHT.

4. There is nothing inconsistent with the policy of the Cherokee allotment act of July 1, 1902 (32 Stat. at L. 716, chap. 1375), in giving to a tribal member, as owner of a substantial equitable interest in the improvements upon a tract of land when the act was passed, a preferential right to select that as her allotment.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. $\S$ 13.]

INDIANS $\S$ 20—LANDS—JUDICIAL SALE—RES JUDICATA—PARTIES.

5. Proceedings resulting in a judicial sale of improvements upon certain Cherokee allotments as being surplus holdings can have no effect against an Indian not a party, where they were taken long after her application for allotment.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 53; Dec. Dig. $\S$ 20.]

[No. 112.]

Argued December 19, 1916. Decided January 8, 1917.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the District Court of Washington County, in that state, in favor of defendants in a suit to charge the legal title to an Indian allotment with a trust in plaintiff's favor. Affirmed.

See same case below, 40 Okla. 341, 136 Pac. 154.

The facts are stated in the opinion.

Messrs. James A. Veasey, Lloyd A. Rowland, and Jere P. O'Meara for plaintiffs in error.

Mr. Robert J. Boone for defendants in error.

* Mr. Justice Pitney delivered the opinion of the court:

This was an equity action involving the right to an allotment of land in the Cherokee Nation, containing about 77 acres. The plaintiff in error Harnage and the defendant in error Martin are members of the Cherokee Tribe, and rival claimants to the allotment. The other parties are two oil companies that claim under Harnage and Martin respectively, and admittedly have no higher rights than theirs. Harnage brought an action in one of the district courts of Oklahoma for the purpose of charging the legal title to the lands in question, which stood in Mrs. Martin, with a trust in his favor, upon the ground that the Secretary of the Interior, through a gross misapprehension of the facts or an error of law, had awarded the land to her, when, under the provisions of the Cherokee Agreement and other acts of Congress pertaining to the subject, it should have been awarded to him.

By the Agreement (Act of July 1, 1902, chap. 1375, 32 Stat. at L. 716, 717) it was provided as follows:

"Sec. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee Tribe, . . . ² land equal in value to one hundred and ten ² acres of the average allottable lands of*the* Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the government survey, which land may be selected by each allottee so as to include his improvements.

"Sec. 18. It shall be unlawful after ninety days after the ratification of this act by the Cherokees, for any member of the Cherokee Tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation, either for himself or for his wife, or for each of his minor children, if members of said tribe; and any member of said tribe found in such possession of lands, or having the same in any manner inclosed, after the expiration of ninety days after the date of the ratification of this act shall be deemed guilty of a misdemeanor."

By §§ 74 and 75 (p. 727) the act was to

take effect upon ratification by a majority of the legal voters of the Nation. It was thus ratified on August 7, 1902.

On May 13, 1904, Harnage made application to the Dawes Commission to have the land in controversy allotted to him, and his application was granted. Thirteen days later Mrs. Martin made a similar application, and this was refused on the ground of the prior allotment to Harnage; thereupon she instituted a contest before the commission against the Harnage allotment. It came to trial before the Dawes Commissioner in September, 1907, and resulted in a decision in favor of Mrs. Martin. Harnage appealed to the Commissioner of Indian Affairs, who rendered a like decision, and this, on appeal to the Secretary of the Interior, was affirmed; and deeds for the land in contest were made to Mrs. Martin pursuant to the act.

Upon the trial of the equity case plaintiffs in error introduced a certified transcript of all proceedings and evidence in the contest proceeding, and this was the only evidence offered that was at all pertinent to the question we have to decide. Defendants in error demurred to the evidence, and the demurrer was sustained and the bill of complaint dismissed. This judgment was affirmed by the supreme court of Oklahoma (40 Okla. 341, 136 Pac. 154).

Harnage having admittedly filed first upon the land in controversy, Mrs. Martin was entitled to prevail in the contest only by showing that at the time of the Harnage filing she was the owner of the improvements, within the meaning of § 11 of the Agreement, and for that reason entitled, under the provisions of the same section, to take this particular land for her allotment. It was found by the Commissioner to the Five Civilized Tribes who heard the contest, and by the Commissioner of Indian Affairs and the Secretary of the Interior who heard the successive appeals, that Mrs. Martin was the owner of the improvements; and the only question for our determination is whether this decision was without evidence to support it, or was otherwise the result of some error of law on the part of those officers. *Ross v. Stewart*, 227 U. S. 530, 535, 57 L. ed. 626, 629, 33 Sup. Ct. Rep. 345; *Ross v. Day*, 232 U. S. 110, 117, 58 L. ed. 528, 530, 34 Sup. Ct. Rep. 233; *Johnson v. Riddle*, 240 U. S. 467, 474, 60 L. ed. 752, 756, 36 Sup. Ct. Rep. 393.

Each of the departmental decisions was made in writing, but the findings are somewhat informal, each appeal having resulted in adding something to what had been found before,—a fact not surprising, since the testimony is very voluminous, occupying more than 500 pages of the printed tran-

script in this court. The following is an outline of the facts found: Mrs. Martin was the granddaughter of an Indian woman known as Mary Anderson, or Anson, afterwards Mary Thursday, and was the daughter of William Bob Anson, otherwise known as Wild Bill. She had a brother known as Sam Bob. All these parties were Delaware Indians, adopted into the Cherokee Tribe, and as such were entitled to certain Delaware payments from the government. During Mrs. Martin's childhood, she and her brother and their parents resided with the grandmother, who was the head of the family, upon an improved tract of land known as the "old home place," located south and west of the land in controversy. Wild Bill died in 1889, and his wife about the same time; and, after this, such payments as were due to Wild Bill as a Delaware were paid to Mary Thursday, and also certain small payments that were due to the contestant. About the year 1891, contestant, then a child of about ten years, was removed by force or undue influence to the home of a Delaware named Frenchman, and kept there until the Delaware payments of 1891 and 1893, averaging over \$500 each, were paid to the members of the tribe. The payments due to contestant were collected by Frenchman, who appropriated them to his own use, this having been his object in assuming control over the child. Later she was sent away to school at the expense of the government, and afterwards returned to the vicinity of her home, where she supported herself by her labor. In November, 1898, when she was about eighteen years of age, she was married to George Martin, and shortly after this she and her husband visited Mary Thursday, and the latter then ascertained that contestant had not secured any land for future allotment. (This was after the establishment of the Dawes Commission, and after the passage of the Curtis Act of June 28, 1898 [chap. 517, § 11, 30 Stat. at L. 495-497], when the allotment of the Indian lands in the then territory was in contemplation; *Woodward v. De Graffenried*, 238 U. S. 284, 291, 59 L. ed. 1310, 1317, 35 Sup. Ct. Rep. 764.) During contestant's absence the original home place had been added to by the purchase in 1893 of the improvements on about 90 acres of land lying immediately north of it for \$800, the purchase price having been paid by Mary Thursday and Sam Bob from the proceeds of the Delaware payments, and the bill of sale for the improvements having been made to them. The entire place then comprised about 200 acres of improvements. Mrs. Thursday, recognizing an indebtedness to contestant on account of having received Delaware payments due to her and to her father, and there being

sufficient land for herself and Sam Bob and contestant, gave to contestant a right to select the land in controversy, or at least to take as an allotment some portion of the home place, with the understanding that she, Mary Thursday, would hold it until the time for allotment, which was done. From the time of the making of this arrangement Mrs. Martin was recognized by her grandmother and her brother as having an interest in the place; that is, a right to share in the improvements to the extent necessary to entitle her to an allotment out of the land, notwithstanding her involuntary absence from home during her childhood. It was contended that Mary Thursday, at the time of the transaction referred to, was of unsound mind, but this was overruled as unsupported by the evidence.

It appears that before Mrs. Martin filed her allotment selection Mrs. Thursday had located her own allotment in the southern part of the home place, and Sam Bob had located his in the northern part, and the land lying between these was left for Mrs. Martin. This, in view of the previous agreement of Mrs. Thursday, was found to be equivalent to a transfer to Mrs. Martin of the specific improvements upon the intervening tract. The Department found that after the northern and southern portions of the farm were merged into one place there was a recognized community of interest among the members of the family growing out of their relationship and the commingling of their funds, whereby Mrs. Martin had an interest in every part of the family holdings, and that when Sam Bob elected to take his allotment in the northern part of the place and Mary Thursday to take hers in the southern part they impliedly relinquished to the contestant as the remaining member of the family their interest in the tract of land lying between.

* An agreement that Mrs. Martin should have a part of the Thursday place for her allotment might fairly be held to be equivalent to giving her a sufficient interest in the improvements to support a preferential right to the allotment, for, by Cherokee law, ownership of improvements entitled the owner to possession of the land; and in § 11 of the Curtis Act there was a proviso "that whenever it shall appear that any member of a Tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home, if the holder so desires." The same general policy was afterwards carried into § 11 of the Cherokee Agreement, with more particular recognition of ownership of the improvements as the decisive point.

The contention that the findings were unsupported by evidence cannot be sustained.

The evidence is to some extent circumstantial, but it is sufficient. It was contradicted by Wallace Thursday, the husband of Mary, but his unreliability was clearly shown.

It is argued that, under § 18 of the Agreement, Mrs. Thursday's possession, after November 5 of that year (ninety days after date of ratification), of all lands in excess of the value of 110 acres of average allottable lands for herself and a like amount for each of her minor children, if any, was unlawful, and that because Mrs. Martin reached the age of twenty-one before the ratification of the Agreement, Mrs. Thursday could not lawfully hold for her any part of the surplus lands. This is based upon a clear misinterpretation of § 18, the very terms of which permitted Mrs. Martin, as a member of the Cherokee Tribe, to hold possession, by herself or "through another," of lands not exceeding in value 110 acres of average allottable lands, and thus authorized her to hold the lands by her grandmother as her agent.

There is no question that the improvements upon the allotment in question, as well as upon the adjoining lands,* were substantial in value, and were such as, under the tribal law, carried a right of occupancy, and such as were recognized in § 11 of the Curtis Act and § 11 of the Agreement. There is nothing inconsistent with the policy of the latter act in giving to Mrs. Martin, as owner of a substantial equitable interest in the improvements that were upon the tract in question when the act was passed, a preferential right to select that as her allotment. The policy was to give recognition to the established laws and customs of the Cherokees (Const. art. I., § 2; Laws 1892, §§ 706, 761, 762), under which citizens of the Nation might and did inclose and improve portions of their common domain and thereby establish a prior right to the possession of those lands, transferable to another citizen by a sale of the improvements. The Agreement substituted a system of allotments with ownership of the soil in the place of a mere possessory right, and its provisions were intended to limit the quantity of land that might be held by or for a single citizen, but they recognized the superior equity of an owner of improvements over that of a citizen who had no such ownership, and the precise character of the ownership was of little consequence as against a party having none at all.

Among the records that were introduced in evidence in the equity suit was an application made in the year 1905 to the Commissioner to the Five Civilized Tribes by Wallace Thursday, acting as guardian of the person and estate of Sam Bob, a minor

and of Mary Thursday, an insane person, for the sale of the improvements upon the allotment in controversy as surplus holdings of those Indians, and certain orders made in the same year by the United States court for the northern district of the Indian Territory upon the application of Wallace Thursday, authorizing him in the same capacity to sell the improvements to Harnage. But as Mrs. Martin was not a party to these proceedings, and they were taken long after the filing of her application for allotment, they can have no effect as against her.

Since we are convinced that the decision of the Supreme Court of Oklahoma deprived plaintiffs in error of no right to which they were entitled under the laws of the United States, it results that the judgment must be and it is affirmed.

(242 U. S. 394)

JOSIE C. BAKER, Individually and as Administratrix of Charles Baker, Deceased, Plff. in Err.,

v.

BAKER, ECCLES, & COMPANY and Augusta H. Baker, Individually and as Administratrix of Charles Baker, Deceased.

CONSTITUTIONAL LAW §309(1) — JUDGMENT §818(2) — OF SISTER STATE — AGAINST NONRESIDENT — FULL FAITH AND CREDIT—DUE PROCESS OF LAW.

The asserted right of the mother of an intestate to share as distributee in the personal property situate in the state of the mother's residence, such as shares of stock in a corporation of that state, having no situs outside of its own state, and a claim of indebtedness against the same corporation, cannot, consistently with due process of law, be adjudicated adversely by decrees of courts of another state, adjudging that the decedent was domiciled there and that his widow was the sole distributee, where those courts acquired no jurisdiction over the person of the mother or over the corporation, either by service of process within the state or by appearance, and such decrees are, therefore, not entitled, by virtue of the full faith and credit provisions of U. S. Const. art. 4, § 1, and U. S. Rev. Stat. § 905,¹ to extraterritorial recognition so far as they affect the ownership of the property in question.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. §309(1); Judgment, Cent. Dig. §§ 1460-1465; Dec. Dig. §818(2).]

[No. 115.]

Argued December 19, 1916. Decided January 8, 1917.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which directed the entry of a judgment in the Circuit Court of McCracken County, in that

state, determining the domicile of an intestate and the distribution of his personal estate situate within that state. Affirmed.

See same case below, 162 Ky. 683, L.R.A. 1917C, 171, 173 S. W. 109.

The facts are stated in the opinion.

Messrs. John A. Pitts and E. W. Ross for plaintiff in error.

Messrs. Charles K. Wheeler, Daniel Henry Hughes, and James Guthrie Wheeler for defendants in error.

* Mr. Justice Pitney delivered the opinion of the court:

The Federal question presented in this record is whether the court of appeals of Kentucky gave such faith and credit to certain judicial proceedings of the state of Tennessee as were required by art. 4, § 1, of the Constitution, and the act of Congress passed in pursuance thereof (Act of May 26, 1790, chap. 11, 1 Stat. at L. 122, Rev. Stat. § 905, Comp. Stat. 1913, § 1519).

The facts are as follows: Charles Baker died in September, 1912, the owner of certain real and personal property in Hardin county, Tennessee, and of 270 shares of stock of Baker, Eccles, & Company, a Kentucky corporation, of the par value of \$27,000, and a claim of several thousand dollars against that corporation for surplus profits. He left a widow, Josie C. Baker, now plaintiff in error, and a mother, Augusta H. Baker, one of the defendants in error. He appears to have left no children or descendants, nor any considerable indebtedness, and the personal estate, if distributable according to the laws of Tennessee, would go entirely to the widow; if distributable according to the laws of Kentucky, it would go one half to the widow, the other half to the mother. The place of his domicile, admittedly determinative of the law of distribution, was in controversy.

Shortly after his death the widow applied to the county court of Hardin county, Tennessee, for letters of administration. The proceedings were ex parte, and her application was granted, the order of the court appointing her administratrix reciting that at the time of his death the residence of Charles Baker was in that county. Afterwards, and in December, 1912, the widow presented to the same court a settlement of her accounts as administratrix, and an order was made reciting that it appeared from proof that Charles Baker died intestate, and at the time of his death was a resident of Hardin county, Tennessee, and that he left no children or descendants of such surviving, but left surviving his widow, the said Josie C. Baker, and under the laws of Tennessee she, as widow, was entitled to

all of the surplus personal property; whereupon it was ordered that she, as administratrix, transfer and deliver to herself, as the widow of the deceased, all of the personal estate in her possession, including the stock in the Kentucky corporation, the certificates for which she held. Subsequently, and on December 28, 1912, the widow, individually and as administratrix, filed in the chancery court of Hardin county, Tennessee, her bill of complaint against Mrs. Augusta H. Baker, the mother, as a non-resident of Tennessee and a resident of the state of Kentucky, and also against several persons who were residents of Tennessee, setting up her appointment as administratrix, averring that her husband died intestate, a resident of and domiciled in Tennessee, leaving his widow as his sole heir and distributee, and his mother and a brother his only heirs at law. The bill further set up the widow's ownership of the stock in Baker, Eccles, & Company, and averred that the mother was asserting an interest in one half of the personal estate left by the intestate, upon the theory that he died a resident of Kentucky and that, under the laws of that state, the mother was entitled to one-half of his surplus personal estate.* The prayer was (inter alia) that the mother be brought before the court in the manner provided for nonresidents and be required to assert whatever claim she might have to the estate left by the deceased; and that it might be adjudged that Charles Baker died a resident of Tennessee, and that complainant, as his widow, was the sole distributee and entitled to all of his personal estate. Upon the filing of the bill an order of publication was made, citing Augusta H. Baker as a nonresident to make defense upon a day named, and, she having failed to appear, the bill was taken for confessed against her, and eventually a decree was made "that the said Charles Baker at the time of his death was a citizen of and had his domicile at Savannah, Tennessee, and that the complainant, as his widow, is his sole distributee, and as such entitled to all of the personal estate of the said Charles Baker, after payment of such debts as were owed by him at the time of his death," and also that the title to the stock of Baker, Eccles, & Company was in complainant, and that she was entitled to have a new certificate or certificates in her own name issued by the corporation in lieu of the certificates issued to said Charles Baker, and was entitled to receive from the corporation the amount of the accumulated profits and surplus and other amounts due from it to the decedent.

Meanwhile, the county court of McCracken county, Kentucky, had granted letters of administration to Mrs. Augusta H. Baker, the mother, and she, as such administratrix, filed a petition in the McCracken circuit court for a settlement of the estate, making the widow and Baker, Eccles, & Company defendants. The widow did not appear, and a judgment was rendered that Charles Baker died a resident of McCracken county, Kentucky, and that, under the law of that state, the mother and the widow were each entitled to one half of the surplus of the personal estate. The corporation was directed to cancel the 270 shares of stock issued to decedent, and reissue* one half of these to the widow, the other half to the mother. This judgment has only historical importance, since the Kentucky court of appeals in the present case held it invalid as against the widow because of failure to comply with the local law respecting notice to her.

In June, 1913, the widow, individually and as administratrix of Charles Baker, began a suit in equity in the McCracken county circuit court, which resulted in the judgment now under review. Baker, Eccles, & Company was made defendant. The widow's petition, after setting up the orders and judgments of the Tennessee courts and alleging her sole ownership of the personal estate of the deceased by virtue thereof, prayed that the corporation be required to transfer to her individually the 270 shares of stock adjudged to her by the Tennessee chancery decree, and also prayed judgment for \$11,429.17, the alleged indebtedness due from the corporation to her husband at the time of his death. Baker, Eccles, & Company filed an answer putting in issue all the averments of the petition. Mrs. Augusta H. Baker, the mother, came into the suit by an intervening petition, in which she averred that Charles Baker died a resident of the state of Kentucky, and that, under the laws of that state, she was entitled to one half of the shares of stock and of the debt sued for, invoking the McCracken circuit court judgment as an adjudication to that effect. She further put in issue the validity of the orders and judgments in both the Tennessee courts, averring that so far as they determined that Charles Baker died a resident of that state, and that his widow was entitled to the whole of his personalty after payment of his debts, they were void, because neither of the Tennessee courts had jurisdiction to make such orders or judgments. The pleadings having been made up, evidence was taken on the issue of fact as to the domicile of Charles Baker at the time of his death. Upon this evidence, the records of the judicial proceedings above mentioned, and a showing of the pertinent Tennessee law, the

case was submitted for hearing, and it was adjudged that the widow's petition be dismissed. The widow appealed to the Kentucky court of appeals, and that court, having determined the judgment of the McCracken circuit court in the mother's administration suit to be invalid as against the widow, held that the judgments of both Tennessee courts were invalid as against the mother because entered without process of law as against her; and then, passing upon the question of fact as to the domicile of Charles Baker, found upon the evidence that he was domiciled in the state of Kentucky and his personality was distributable according to the laws of that state, and affirmed the judgment, with a modification directing the lower court to enter a judgment that Charles Baker died a resident of Kentucky, that his mother and his widow were each entitled to one half of his personal estate situate in Kentucky at the time of his death, after the payment of his debts, that Baker, Eccles, & Company should cancel all certificates of stock issued to Charles Baker, and reissue one half of these to the widow and the other half to the mother, and that the lower court embody in the judgment such other matters as would, after the payment of debts, distribute equally between the widow and the mother all other personal estate situate in Kentucky of which Charles Baker died possessed. 162 Ky. 683, L.R.A. 1917C, 171, 173 S. W. 109. To review this judgment upon the Federal question, the widow brings the case here upon writ of error.

No question is made by defendants in error but that the Tennessee courts had general jurisdiction over the subject matter, nor that the proceedings were in conformity with the Tennessee statutes respecting practice. The sole question is whether they were entitled, under the Constitution of the United States and the act of Congress, to recognition in the courts of Kentucky as adjudicating adversely the mother's asserted right to share as distributee in the personal property situate in Kentucky, or as conclusively determining the fact of the domicile of the decedent as affecting that right, in view of the failure of the Tennessee courts to acquire jurisdiction over her person or over the corporation, Baker, Eccles, & Company.

It is the fundamental contention of plaintiff in error that the personal estate of an intestate decedent is a legal unit, having its situs at the owner's domicile; that the title to the whole of it, wherever situate, is vested in the duly qualified domiciliary administrator, and not in the distributees, and that its distribution is governed by the law of the domicile of the

deceased owner. *Wilkins v. Ellett*, 9 Wall. 740, 19 L. ed. 586, 108 U. S. 256, 27 L. ed. 718, 2 Sup. Ct. Rep. 641. Conceding that such is the general rule of law, it is so not because of any provision of the Federal Constitution, but only because the several states, or most of them, have adopted it from the common law into their respective systems. And the question remains, How is the fact of decedent's domicile to be judicially ascertained as a step in determining what law is to govern the distribution? Obviously, if fundamental principles of justice are to be observed, the ascertainment must be according to due process of law; that is, either by a proceeding in rem in a court having control of the estate, or by a proceeding in personam after service of process upon the parties to be affected by the judgment.

We have no concern with the effect of the Tennessee judgments upon the distribution of so much of decedent's personality as was situate within that state. The present action affects only the ownership of shares of stock in a Kentucky corporation having no situs outside of its own state, so far as appears, and a claim of indebtedness against the same corporation. For the purpose of founding administration, it is commonly held that simple contract debts are assets at the domicile of the debtor, even where a bill of exchange or promissory note has been given as evidence. *Wyman v. Halstead* (*Wyman v. United States*) 109 U. S. 654, 656, 27 L. ed. 1068, 1069, 3 Sup. Ct. Rep. 417. The state of the debtor's domicile may impose a succession tax. *Blackstone v. Miller*, 188 U. S. 189, 205, 47 L. ed. 439, 444, 23 Sup. Ct. Rep. 277. It is equally clear that the state which has created a corporation has such control over the transfer of its shares of stock that it may administer upon the shares of a deceased owner and tax the succession. See *Re Bronson*, 150 N. Y. 1, 9, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; *Re Fitch*, 160 N. Y. 87, 90, 54 N. E. 701; *Greves v. Shaw*, 173 Mass. 205, 208, 53 N. E. 372; *Kingsbury v. Chapin*, 196 Mass. 533, 535, 82 N. E. 700, 13 Ann. Cas. 733; *Dixon v. Russell*, 79 N. J. L. 490, 492, 76 Atl. 982; *Hopper v. Edwards*, 88 N. J. L. 471, 96 Atl. 667; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313. The rule generally adopted throughout the states is that an administrator appointed in one state has no power *virtute officii* over property in another. No state need allow property of a decedent to be taken without its borders until debts due to its own citizens have been satisfied; and there is nothing in the Constitution of the United States aside from the full faith and credit clause to

prevent a state from giving a like protection to its own citizens or residents who are interested in the surplus after payments of debts. All of which goes to show, what plaintiff in error in effect acknowledged when she brought her present action in a Kentucky court, that the Tennessee judgments had no effect in rem upon the Kentucky assets now in controversy. She invokes the aid of those judgments as judgments in personam. But it is now too well settled to be open to further dispute that the "full faith and credit" clause and the act of Congress passed pursuant to it do not entitle a judgment in personam to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound.

This rule became established long before the adoption of the 14th Amendment, as a result of applying fundamental principles of justice and the rules of international law as they existed among the states at the inception of the government.* Notwithstanding that *Mills v. Duryee* (1813) 7 Cranch, 481, 484, 3 L. ed. 411, 413,—where, as the opinion shows, the defendant had full notice of the suit, was arrested, and gave bail,—was by some courts interpreted as holding that, irrespective of such notice, the act of Congress required a judgment under all circumstances to receive the same faith and credit in every other state that it had in the state of its origin (*Field v. Gibbs* (1815) Pet. C. C. 155, 158, Fed. Cas. No. 4,766; *Com. v. Green* (1822) 17 Mass. 515, 546), the view soon came to prevail in the state courts that the case was not authority for so broad a proposition, and that whenever a judgment of a state court was produced as evidence, the jurisdiction of the court rendering it was open to inquiry; and if it appeared that the court had no jurisdiction, the judgment was entitled to no faith or credit.¹

Mr. Justice Story, who wrote the opinion in *Mills v. Duryee*, in his treatise on the Conflict of the Laws, published in 1834 (§ 609), declared that the "full faith and credit" clause and the act of Congress did not prevent an inquiry into the jurisdiction of the court to pronounce the judgment, and

this view was adopted and made the basis of decision by this court in *D'Arcy v. Ketchum* (1850) 11 How. 165, 13 L. ed. 648, which was followed by *Thompson v. Whitman*, 18 Wall. 457, 459, 21 L. ed. 897, with a review of many cases.

During the same period, however, it occasionally was*intimated, if not held, by some of the state courts, that a personal judgment, effective within the territory of the state, could be rendered against a non-resident defendant who did not appear and submit himself to the jurisdiction, provided notice of the suit had been served upon him in the state of his residence, or had been published in the state within which the court was situate, pursuant to the provisions of a local statute. See *Smith v. Colloty*, 69 N. J. L. 365, 371, 55 Atl. 805. As was said by Mr. Justice Field, speaking for this court in *Pennoyer v. Neff*, 95 U. S. 714, 732, 24 L. ed. 565, 572, it is difficult to see how such a judgment could legitimately have force even within the state. But until the adoption of the 14th Amendment (1868) this remained a question of state law; the effect of the "due process" clause of that amendment being, as was held in the case just mentioned, to establish it as the law for all the states that a judgment rendered against a nonresident who had neither been served with process nor appeared in the suit was devoid of validity within as well as without the territory of the state whose court had rendered it, and to make the assertion of its invalidity a matter of Federal right.

The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard. *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 236, 44 L. ed. 747, 750, 20 Sup. Ct. Rep. 620; *Simon v. Craft*, 182 U. S. 427, 436, 45 L. ed. 1165, 1170, 21 Sup. Ct. Rep. 836; *Grannis v. Ordean*, 234 U. S. 385, 394, 58 L. ed. 1363, 1368, 34 Sup. Ct. Rep. 779. To hold one bound by the judgment who has not had such opportunity is contrary to the first principles of justice. And to assume that a party resident beyond the confines of a state is required to come within its borders and submit his personal controversy to its

¹ *Borden v. Fitch* (1818) 15 Johns. 121, 143, 144, 8 Am. Dec. 225; *Aldrich v. Kinney* (1822) 4 Conn. 380, 383, 10 Am. Dec. 151; *Hall v. Williams* (1828) 6 Pick. 232, 242-245, 17 Am. Dec. 356; *Miller v. Miller* (1829) 1 Bail. L. 242, 248; *Hall v. Williams* (1883) 10 Me. 278, 287; *Wernwag v. Pawling* (1833) 5 Gill & J. 500, 507, 25 Am. Dec. 317. See also *Phelps v. Holker* (1788) 1 Dall. 261, 264, 1 L. ed. 128, 129; *Curtis v. Martin* (1805) 2 N. J. L. 399, 405, 406e;

Rogers v. Coleman (1808) Hardin (Ky.) 413, 415; *Kilburn v. Woodworth* (1809) 5 Johns. 37, 41, 4 Am. Dec. 321; *Fenton v. Garlick* (1811) 8 Johns. 194, 197; *Shumway v. Stillman* (1825) 4 Cow. 292, 294, 15 Am. Dec. 374, (1831) 6 Wend. 447, 449, 453; *Starbuck v. Murray* (1830) 5 Wend. 148, 156, 21 Am. Dec. 172; *Bissell v. Briggs* (1813) 9 Mass. 462, 468, 6 Am. Dec. 88; *Whittier v. Wendell* (1834) 7 N. H. 257.

tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a state beyond its own territory.

So far as the case for plaintiff in error depends upon the adjudication of domicile by the county court of Hardin county, Tennessee, for the mere purpose of appointing an administratrix, it is controlled by *Thormann v. Frame*, 176 U. S. 350, 44 L. ed. 500, 20 Sup. Ct. Rep. 446, and *Overby v. Gordon*, 177 U. S. 214, 227, 44 L. ed. 741, 746, 20 Sup. Ct. Rep. 603. But, it is pointed out, in this case the county court went beyond the bare appointment of an administratrix, and proceeded to a settlement and distribution of the estate. Moreover, plaintiff in error relies not merely upon this judgment, but upon the decree in the chancery court of the same county, which in form specifically determined her exclusive right to the Kentucky personalty. It results, however, from what we have already said, that this right could not be conclusively established by any Tennessee court as against a resident of Kentucky who was not served with process and did not appear therein, and that the Kentucky courts did not go counter to the Federal Constitution and the act of Congress in refusing to give faith and credit to the Tennessee judgments.

In many forms, and with much emphasis, the plaintiff in error presses the argument *ab inconvenienti*. Starting from the proposition that the entire personalty of an intestate decedent, wherever in fact located, is a unit, having its legal situs at the owner's domicile, and that its distribution ought to be in accordance with the law of that domicile, it is argued: How is it possible to judicially determine that domicile under the theory of the Kentucky court of appeals in the case of an intestate entitled to personalty in several states having different laws of distribution, and with parties claiming to be distributees residing in different jurisdictions? Assuming a lawful grant of administration in each state wherein part of the personalty is located and some of the possible distributees reside, how, it is asked, is any one of these administrators, or any one of the claimants of a share in the whole estate, to have the place of the intestate's domicile settled authoritatively and the lawful distributees ascertained? The answer is clear: Unless all possible distributees can be brought within the jurisdiction of a single court having authority to pass upon the subject matter, either by service of process or by their voluntary appearance, it must in many cases be impossible to have a single controlling decision upon the question. In some cases, the ideal distribution of the

entire personal estate as a unit may thus be interfered with; but whatever inconvenience may result is a necessary incident of the operation of the fundamental rule that a court of justice may not determine the personal rights of parties without giving them an opportunity to be heard.

Judgment affirmed.

(242 U. S. 405)

NEWARK NATURAL GAS & FUEL COMPANY, Plff. in Err.,
v.

CITY OF NEWARK, Ohio.

CONSTITUTIONAL LAW ¶42—ORDINANCES
—REGULATING GAS RATES — WHO MAY
ASSAIL VALIDITY.

1. A gas-distributing company cannot assert that constitutional rights of a gas-producing and transporting company furnishing gas to the former company upon the basis of a percentage of meter readings will be infringed by a municipal ordinance fixing the gas rates which the distributing company may charge.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. ¶42.]

CONSTITUTIONAL LAW ¶315—DUE PROCESS OF LAW — MUNICIPAL REGULATION OF GAS RATES.

2. The property of a gas-distributing company cannot be said to have been taken without due process of law, contrary to U. S. Const. 14th Amend., by a decree which enforced, without prejudice to the right to apply thereafter for a modification, a municipal ordinance fixing gas rates for five years, where there was no claim that the company could not operate profitably under such ordinance so long as its contract with a producing gas company, under which the latter was to furnish gas to the former upon the basis of a percentage of meter readings, which had two or three years to run when the suit was commenced, remained in force, and no evidence was offered to show the rate paid by the distributing to the producing company after the expiration of such contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 935, 937, 941, 947; Dec. Dig. ¶315.]

[No. 232.]

Argued December 4, 1916. Decided January 8, 1917.

IN ERROR to the Supreme Court of the State of Ohio to review a decree which affirmed a decree of the Court of Appeals of Licking County, in that state, granting a mandatory injunction to enforce a municipal ordinance fixing gas rates. Affirmed.

See same case below, 92 Ohio St. 393, 111 N. E. 150.

The facts are stated in the opinion.

Messrs. **James R. Fitzgibbon**, Eugene Mackey, S. M. Douglass, and Charles Montgomery for plaintiff in error.

Messrs. **Frank A. Bolton**, Ralph Norpell, and Edward Kibler for defendant in error.

* Mr. Justice Pitney delivered the opinion of the court:

The question upon which our jurisdiction is here invoked is whether an ordinance of the city of Newark, Ohio, passed March 6, 1911, fixing the maximum price that plaintiff in error might charge to consumers of natural gas in that city for a period of five years at 20 cents per thousand cubic feet, with 10 per cent discount for prompt payment,—a rate described as “18 cents net,”—is confiscatory, and therefore in violation of the “due process” clause of the 14th Amendment. Plaintiff in error operates under a franchise granted by a city ordinance passed February 21, 1898, for a term of twenty-five years, which permitted a rate of 25 cents per thousand for a period of ten years from its passage, but within that period the company voluntarily introduced a net rate of 18 cents and maintained it for some years prior to the adoption of the ordinance of 1911. The company refused to accept the provisions of the latter ordinance and notified its customers that it would discontinue service unless the rate of 25 cents was paid. Thereupon the city filed a petition in the court of common pleas of Licking county, praying a mandatory injunction. The company answered that the ordinance provided no just compensation for the use of its property and therefore deprived it of its constitutional rights. Voluminous evidence was taken upon this issue, and the court found the defense to be unfounded in fact, and made a decree in favor of the city, but without prejudice to the right of the company to apply for a modification “if at any time it should appear that said rate of 18 cents net does not render an adequate return to said defendant company.” An appeal was taken to the court of appeals and there heard upon the evidence taken in the court of common pleas and additional evidence, and the same decree was entered as in the court of common pleas. The supreme court of Ohio affirmed the decree (92 Ohio St. 393, 111 N. E. 150).

The opinions of the state courts show that they gave careful consideration to the questions of the value of the property of plaintiff in error at the time of the inquiry, the total amount of net profits that could be earned under the rate fixed, and whether this would be sufficient to provide a fair return on the value of the property. The

concurring judgments were based upon principles thoroughly established by repeated decisions of this court (*Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 597, 598, 41 L. ed. 560, 566, 567, 17 Sup. Ct. Rep. 198; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 48, 53 L. ed. 382, 398, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 163, 59 L. ed. 1244, 1250, P.U.R.1915D, 577, 35 Sup. Ct. Rep. 811), and the finding that there was no confiscation is amply supported by the evidence. The reservation of the right to apply thereafter for a modification was in accord with the action of this court in the *Knoxville* and *Willcox* Cases, 212 U. S. pp. 19, 55.

A distinction is sought to be based upon the fact that two companies are necessarily affected by the rate,—a producing and a distributing company; it being contended that the state courts have ignored the cost of production. It appears that after the granting of the franchise of 1898, plaintiff in error, which theretofore had been both a producer and a distributor of gas, sold all of its property to the stockholders of the Logan Natural Gas & Fuel Company, and thereafter confined its activities to distribution, the Logan Company being in control of production and transportation; and that in 1904 the Logan Company entered into a contract with plaintiff in error to furnish the gas needed to supply the city for a term of years, on the basis of a percentage of the aggregate readings of the consumers' meters, in the proportion of 70 per cent of the gross receipts for the Logan Company and 30 per cent for plaintiff in error. At the time the suit was commenced the contract had two or three years to run, while the limiting ordinance was to continue for five years. There is no contention that plaintiff in error could not operate profitably under the ordinance of 1911 so long as the contract remained in force; but it is said that, because of changed conditions, including the partial exhaustion of the gas-producing field, the contract was no longer profitable to the Logan Company under the rate permitted by the ordinance of 1911, the cost of production and transportation of natural gas alone being at that time, as is asserted, as much as the entire amount of the net rate of 18 cents allowed by the ordinance. But plaintiff in error cannot be heard here to assert the constitutional rights of the Logan Company (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S.

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531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359), and the pertinent question is what plaintiff in error would probably have to pay for gas during the life of the ordinance. The contract measured this so long as it continued in effect. And, although it expired some time before the closing of the evidence in the court of appeals, as the supreme court pointed out, no evidence was offered to show the rate paid by the Newark Company to the Logan Company after its expiration. The ordinance specified a period of five years; but, by the decree, this was made subject to the provision giving a right to plaintiff in error to apply for relief if it should appear that the 18-cent rate did not render an adequate return.

* Plaintiff in error has failed to show that the ordinance has the effect of depriving it of property without due process of law within the meaning of the 14th Amendment, and the judgment under review is affirmed.

(212 U. S. 409)

LOUISVILLE BRIDGE COMPANY, Appt.,
v.
UNITED STATES.

NAVIGABLE WATERS $\S$ 20(6) — FEDERAL CONTROL OF NAVIGATION — REQUIRING ALTERATIONS IN BRIDGE—IRREPEALABLE FRANCHISE—VESTED RIGHTS—COMPENSATION.

1. A bridge company which has erected a bridge over the Ohio river, in accordance with the requirements of the Acts of July 14, 1862 (12 Stat. at L. 569, chap. 167), and February 17, 1865 (13 Stat. at L. 431, chap. 38), each of which declared that a bridge erected under its provisions shall be a lawful structure and be recognized and known as a post route, and neither of which contains any reservation of the right to alter, amend, or revoke the franchise, was given no irrepealable franchise to maintain its bridge precisely as it was originally constructed, and no vested right entitling the bridge company to compensation under U. S. Const. 5th Amend., in case Congress should thereafter, in the exercise of its power to regulate commerce, require changes to be made in the interest of navigation, but the authority of Congress to compel changes was precisely the same as if the bridge had been constructed under state legislation without license from Congress, or had been constructed under congressional consent or usage, coupled with an express reservation of the right of revocation or amendment.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. $\S$ 91; Dec. Dig. $\S$ 20(6).]

NAVIGABLE WATERS $\S$ 20(2) — BRIDGE OVER NAVIGABLE WATERWAY—COMPELLING ALTERATIONS—IMPLIED REPEAL OF A SPECIAL FRANCHISE.

2. The declaration by Congress in the Acts of July 14, 1862 (12 Stat. at L. 569, chap. 167), and February 17, 1865 (13 Stat. at L. 431, chap. 38), that a bridge

across the Ohio river, when erected in accordance with the requirements of those acts, should be a lawful structure, and be recognized and known as a post route, was impliedly repealed by the provisions of the River and Harbor Act of March 3, 1899 (30 Stat. at L. 1121, chap. 425, Comp. Stat. 1913, $\S$ 9970), $\S$ 18, that whenever the Secretary of War finds any bridge theretofore or thereafter constructed over any of the navigable waterways of the United States to be an unreasonable obstruction to free navigation it shall be his duty, after hearing, to take action looking to the removal or alteration of the bridge, so as to render navigation reasonably free, easy, and unobstructed.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. $\S\S$ 74-83; Dec. Dig. $\S$ 20(2).]

[No. 540.]

Argued December 8 and 11, 1916. Decided January 8, 1917.

APPEAL from the District Court of the United States for the Western District of Kentucky to review a decree restraining a bridge company from reconstructing the superstructure of its bridge, contrary to the provisions of an order of the Secretary of War. Affirmed.

See same case below, 233 Fed. 270.

The facts are stated in the opinion.

Messrs. William W. Crawford, Lawrence Maxwell, and Charles H. Gibson for appellant.

Assistant Attorney General Wallace for appellee.

* Mr. Justice Pitney delivered the opinion of the court:

Appellant is the owner of a bridge across the Ohio river at Louisville, Kentucky, known as the "Ohio Falls bridge," which was built under an act of Congress approved February 17, 1865 (chap. 38, 13 Stat. at L. 431), supplementary to an act approved July 14, 1862 (chap. 167, 12 Stat. at L. 569). The 1862 Act, as amended, allowed the bridge to be built under one of several plans detailed, and with a prescribed minimum width for spans and a minimum clearance height above the water. This act, in its 5th section, declared: "That any bridge or bridges erected under the provisions of this act shall be lawful structures, and shall be recognized and known as post routes, . . . and the officers and crews of all vessels, boats, or rafts navigating the said Ohio river are required to regulate the use of the said vessels and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction, or use of any of the bridges erected or legalized under the provisions of this act." The 1st section of the 1865 Act con-

tained a proviso "that said bridge and draws shall be so constructed as not to interrupt the navigation of the Ohio river;" the 2d section declared "that the bridge erected under the provisions of this act shall be a lawful structure, and shall be recognized and known as a post route."

*415 The Ohio Falls bridge was built in all respects in accordance with the requirements of these acts, except that, instead of the minimum channel span of 300 feet prescribed, the builders made spans of 380 feet and 352½ feet respectively, and exceeded the clearance height of the highest of the authorized plans, thus expending \$150,000 more than was necessary to comply with the letter of the law. The bridge was completed in the year 1870, and since then has been continuously in use as a railroad bridge, furnishing one of the principal thoroughfares across the Ohio river from north to south. Its superstructure now requires renewal, but this can be done without obstructing navigation any further than the bridge does at present and has done ever since its construction.

In the year 1914 the Secretary of War, proceeding under § 18 of an act of Congress approved March 3, 1899 (chap. 425, 30 Stat. at L. 1121, 1153, Comp. Stat. 1913, § 9970), gave notice to appellant that he had good reason to believe the bridge was an obstruction to navigation because of insufficient horizontal clearance of the channel span crossing the main navigable channel of the river, and insufficient width of opening in the existing swing span crossing the Louisville & Portland Canal, and appointed a time and place for a hearing upon this question. Appellant introduced no evidence at the hearing, but filed a protest against any action by the Secretary under the Act of 1899, on the ground that this act did not affect bridges constructed under the Acts of 1862 and 1865, or that, if it attempted to do so, it was unconstitutional. After the hearing the Secretary made an order notifying appellant to alter the bridge within three years, so as to provide an enlarged horizontal opening for the main navigable channel, and to change the swing span across the channel to a lift span having a prescribed horizontal clearance, and a prescribed vertical clearance when open. A further hearing and some correspondence having led to no result, appellant notified the Secretary of War in writing that it insisted on the right to renew its superstructure on the existing masonry without changing the length of any of the existing spans, "so that when completed it will not interfere with navigation any more than it does now," and that it intended to commence the

work of renewal at once. Shortly thereafter the Attorney General filed a bill for an injunction in the district court; appellant answered, setting up its claims as above indicated; and the case was brought to a hearing upon stipulated facts presenting, as the sole question to be determined,—the legality of the order of the Secretary of War as applied to the bridge in question. A final decree was made restraining appellant from reconstructing the superstructure of the bridge in a manner inconsistent with the provisions of the Secretary's order (233 Fed. 270), and the case comes here by direct appeal, as permitted by § 18 of the 1899 Act.

Concisely stated, the position of appellant is that the Ohio Falls bridge was constructed under an irrevocable franchise, and became upon its completion a lawful structure and the private property of appellant; that Congress had no power to require its removal except in the exercise of the Federal authority to regulate commerce, and subject to the provision of the 5th Amendment that private property shall not be taken for public use without just compensation; and that the Act of 1899, being a general act, does not, by fair construction, operate to repeal the special franchise conferred by the Acts of 1862 and 1865, and, if it does, it is unconstitutional because it fails to make provision for compensation.

The first and fundamental contention is rested in part upon facts of which we may take judicial notice, that when the Acts of 1862 and 1865 were passed the Civil War was in progress, and there was urgent need of a bridge over the Ohio river west of the Big Sandy (the eastern boundary of Kentucky) to provide for the transfer of troops and supplies from the North to the South; that there *were no bridges *417 crossing the Ohio at either of the cities of Cincinnati or Louisville, or at any point west of them, and that the movement of troops and supplies was thereby greatly hampered; that the river at Louisville is approximately a mile wide, the current quite rapid on account of the Falls, and in winter frequently filled with ice, so as to render a bridge a pressing necessity; and that the war had disturbed somewhat the finances of the country, and capital for large undertakings was difficult to secure. But the argument lays especial stress upon the declaration that the bridge in question should be a lawful structure and recognized and known as a post route, and the fact that neither the original nor the supplemental acts contained any reservation of the right to alter, or amend, or revoke the franchise.

These are no doubt weighty considerations, and raise a grave question, but they do not necessarily dispose of it. Clearly, the acts were passed under the power of Congress to regulate commerce. That power is a very great power, and in its nature continuing, not being exhausted by any particular exercise. We need not go so far as to say that Congress could not in any case, by contract or estoppel, prevent itself from modifying or revoking a regulation once made and substituting another in its place without compensation. But when private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of this power, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised. As this court, speaking through Mr. Chief Justice Waite, declared in *Newport & C. Bridge Co. v. United States*, 105 U. S. 470, 480, 26 L. ed. 1143, 1147: "Congress, which alone exercises the legislative power of the government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the government."

The absence of an express reservation of the right to alter or amend is not conclusive. As is well understood, reservations of this kind have a peculiar fitness in state legislation, being traceable historically to the decision of this court in *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629, that a corporate charter is a contract within the meaning of that clause of art. 1, § 10, of the Constitution, which declares that no state shall pass any law impairing the obligation of contracts, so that a state law altering such a charter in a material respect without the consent of the corporation is unconstitutional and void; and the suggestion in the concurring opinion of Mr. Justice Story (p. 675) that the reservation of a power to alter or amend the charter would leave the state free to enact subsequent amendatory legislation. *Miller v. New York*, 15 Wall. 478, 494, 21 L. ed. 98, 103; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 20, 26 L. ed. 961, 964; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 352, 28 L. ed. 173, 175, 4 Sup. Ct. Rep. 48. Congress is not prevented by

the Constitution from passing laws that impair the obligation of contracts, and in its enactments the presence or absence of such a reservation has not the same peculiar significance that it has in state legislation. It is no doubt a circumstance, but not by any means conclusive.

At the time the Acts of 1862 and 1865 were passed, it was not customary for Congress to include in legislation of this character an express reservation of a power of future control or repeal. In an Act of August 31, 1852 (chap. 111, 10 Stat. at L. 112, §§ 6 and 7), certain bridges already in existence across the Ohio river were declared to be lawful structures. The next acts of a similar character appear to have been those now under consideration. Contemporaneously with the second of these, an act was passed (chap. 39, 13 Stat. at L. 431) declaring a bridge then under construction across the Ohio between Cincinnati and Covington to be a lawful structure. In neither of these was there any express reservation of future control. In succeeding years¹ numerous bridge acts were passed containing in one form or another a reservation of the power to alter or amend the act or to withdraw the assent given. These provisions may well have been inserted from abundant caution, and because provisions of like character had become familiar in state legislation. But obviously, they throw no direct light upon the intent of Congress in preceding legislation.

While scrutinizing the acts of 1862 and 1865 in the effort to determine the legislative intent as therein expressed, we should primarily consider the fact that they were exertions of a power to regulate commerce. Such a regulation, designed as it is to furnish a guiding rule for future conduct, carries with it the suggestion that it may not always remain unchanged. And since our interstate and foreign commerce is a thing that grows with the growth of the people, and its instrumentalities change with the development and progress of the country, it was not natural that Congress, in enacting a regulation of such commerce, should intend to put shackles upon its own power in respect of future regulation. The act declared that the bridge, when erected,

¹ Acts of July 25, 1866 (chap. 246, § 13, 14 Stat. at L. 244); February 27, 1867 (chap. 98, 14 Stat. at L. 412); February 21, 1868 (chap. 10, 15 Stat. at L. 37); July 6, 1868 (chap. 134, 15 Stat. at L. 82); July 20, 1868 (chap. 179, 15 Stat. at L. 121); February 19, 1869 (chap. 37, 15 Stat. at L. 272); March 3, 1869 (chap. 139, 15 Stat. at L. 336); Joint Resolution of March 3, 1869 (15 Stat. at L. 347).

should be "a lawful structure;" but there are no words of perpetuity, nor any express covenant against a change in the law. There is a proviso in the 1865 Act that the bridge and draws shall be so constructed as not to interrupt the navigation of the river,—an evident modification of that clause of the 1862 Act which required vessels to be so regulated as not to interfere with the bridge. It is possible to construe the proviso as referring solely to the time of original construction, and as satisfied if the bridge and draws did not then obstruct navigation; but this would disregard the fundamental rule that requires strict construction of such grants as against the private right. In the light of that rule, the true meaning rather is that the bridge and draws should be so constructed as not at any time to interrupt navigation. (See *West Chicago Street R. Co. v. Illinois*, 201 U. S. 506, 515, 521, 50 L. ed. 845, 848, 851, 26 Sup. Ct. Rep. 518.) Indeed, the proviso seems to have been so interpreted by the recipients of the grant, for, as appears from the stipulation, the original builders of the bridge did not limit themselves to giving only what they were compelled by law to give, but, at large expense to themselves, exceeded the heights and widths that the act required.

It is true that Congress must have contemplated that a large investment of private capital would be necessary, and that the bridge when once constructed could not be abandoned or materially changed without a total or partial loss of value. This is a very grave consideration, and we have not at all overlooked it; but we cannot deem it controlling of the question presented. It may be assumed that the parties foresaw, what experience since has demonstrated, that it would be many years before changing conditions of navigation would render the bridge out of date, and that the investors were satisfied with the prospect of the profit to be gained from the use of the bridge in the meantime.

A circumstance perhaps bearing in the same direction is that appellant is a Kentucky corporation, chartered by an act of the legislature approved March 10, 1856 (Acts*1855-56, vol. 2, p. 426), which contains a proviso, "that said bridge shall be constructed so as not to obstruct navigation, further than the laws of the United States and the decisions of the Supreme Court of the United States shall hold to be legal."

Reviewing the entire question, bearing in mind the nature of the subject matter, the circumstances of the period of the enactments, and the language employed by Congress, and construing this strictly

against the grantee, as the familiar rule requires, we are constrained to hold that the Acts of 1862 and 1865 conferred upon appellant no irrevocable franchise to maintain its bridge precisely as it was originally constructed, and created no vested right entitling appellant to compensation under the 5th Amendment in case Congress should thereafter, in the exercise of its power to regulate commerce, require changes to be made in the interest of navigation.

This being so, the authority of Congress to compel changes was precisely the same as if the bridge had been constructed under state legislation without license from Congress, as in *Union Bridge Co. v. United States*, 204 U. S. 364, 388, 400, 51 L. ed. 523, 534, 539, 27 Sup. Ct. Rep. 367; *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 193, 54 L. ed. 435, 442, 30 Sup. Ct. Rep. 356; or had been constructed under congressional consent or authorization coupled with an express reservation of the right of revocation or amendment, as in *Newport & C. Bridge Co. v. United States*, 105 U. S. 470, 481, 26 L. ed. 1143, 1147; *Hannibal Bridge Co. v. United States*, 221 U. S. 194, 207, 55 L. ed. 699, 704, 31 Sup. Ct. Rep. 603. We are aware that a different result was reached by the circuit court and circuit court of appeals in *United States v. Parkersburg Branch R. Co.* 134 Fed. 969, 74 C. C. A. 354, 143 Fed. 224; and by the circuit court in some previous cases referred to in 134 Fed. 973. But, upon mature consideration, we have concluded that these decisions must be overruled.

Appellant cites *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622, but it is plainly distinguishable.* There the Navigation Company under a state charter had constructed locks and dams in the Monongahela river, to the great improvement of its navigation, and by a supplement to its charter had been required to commence the construction of lock and dam No. 7 in such manner and on such plan as would extend the navigation from its then present terminus to the state line. This work was to complete the company's improvements in the state of Pennsylvania. Thereafter Congress, in 1881, appropriated \$25,000 for improving the Monongahela river in West Virginia and Pennsylvania, with the proviso that the money should not be expended until the Navigation Company had undertaken in good faith the building of lock and dam No. 7 and had given assurance to the Secretary of War of its ability and purpose to complete the same. The company gave satisfactory assurance to the Secretary, com-

menced the work in 1882, and completed it in 1884. By Act of August 11, 1888 (25 Stat. at L. 400, 411, chap. 860), Congress authorized the Secretary of War to purchase this lock and dam from the company, and in the event of his inability to make a voluntary purchase within a specified limit of expense, then to take proceedings for their condemnation, with a proviso that, in estimating the sum to be paid by the United States, the franchise of the corporation to collect tolls should not be considered or estimated. It appeared that the tolls received by the company for the use of its works, including lock and dam No. 7, averaged \$240,000 per annum, that the money value of the entire works and franchise was not less than \$4,000,000, and that the actual toll receipts of lock and dam No. 7 were in excess of \$2,800 per annum, and would probably increase in the near future. This court held the proviso excluding the franchise to collect tolls from consideration in the condemnation proceedings to be inconsistent with the 5th Amendment (p. 336). But it will be observed that this was not a case of removing a structure from the river on the ground that it interfered with navigation, but a taking over of a structure and employing it in the public use as an instrumentality of navigation. In short, there was a clear taking of the property of the company for public use as property, and an attempt at the same time to exclude from consideration an essential element of its value when ascertaining the compensation to be paid. The case has no bearing upon the one at bar.

Reference is made also to our recent decision in *United States v. Baltimore & O. R. Co.* 229 U. S. 244, 57 L. ed. 1169, 33 Sup. Ct. Rep. 851, and although this court merely affirmed the circuit court on the ground that the matter was *res judicata*, it is argued that we necessarily decided the questions raised in the present case in order to come to the conclusion that the question was one of *res judicata*. In view of the very plain language employed in the opinion (pp. 251, 254), the argument is baseless.

There remains only the contention that the Act of 1899, being a general act, does not by fair construction operate to repeal or modify the special rights conferred upon appellant by the Acts of 1862 and 1865. We deem this point likewise untenable. In terms the act applies without qualification to "any railroad or other bridge now constructed or which may hereafter be constructed over any of the navigable waterways of the United States." It is argued that at the time of its passage there were

two classes of bridges to which the term "now constructed" would properly apply without affecting any vested right, namely (1) bridges theretofore built under state authority only, and (2) bridges theretofore built under congressional authority with a power of amendment or repeal expressly reserved; and that full effect can be given to the language of § 18 without holding that it is a repeal by implication of the declaration of Congress in the Act of 1865 that the Ohio Falls bridge as constructed was a lawful structure and a post route of the United States. But the 1899 Act is not only unqualified in its terms, but from the nature of the subject matter there is every reason for giving it a universal application. As we have seen, appellant had no indefeasible right to maintain its bridge as originally constructed, and the absence of an express right of repeal from the Acts of 1862 and 1865 has as little bearing upon the question of the practical justice or injustice of requiring an alteration in the bridge as it has upon the question of constitutional right. And of course, from the point of view of the requirements of navigation, the particular phraseology of the acts by which the construction of the different bridges was authorized is altogether insignificant.

It may be conceded that the declaration of Congress in the Act of 1865 that the bridge was a lawful structure was conclusive upon the question until Congress passed some inconsistent enactment. As was said by Mr. Justice Nelson, speaking for the court in the *Wheeling Bridge Case*, 18 How. at p. 430, 15 L. ed. 436, although it may have been an obstruction in fact, it was not such in the contemplation of the law. But § 18 of the 1899 Act wrought a change in the law. (There were similar provisions in an Act of August 11, 1888, chap. 860, § 9, 25 Stat. at L. 400, 424; and in an Act of September 19, 1890, chap. 907, § 4, 26 Stat. at L. 426, 453; but we pass them by.) Congress thereby declared that whenever the Secretary of War should find any bridge theretofore or thereafter constructed over any of the navigable waterways of the United States to be an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, it should be the duty of the Secretary, after hearing the parties concerned, to take action looking to the removal or alteration of the bridge, so as to render navigation through or under it reasonably free, easy, and unobstructed. As this court repeatedly has held, this is not an unconstitutional delegation of legislative or judicial power to the Secretary. *Union Bridge Co. v. United*

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^{*41} States, 204 U. S. 364, 385, 51 L. ed. 523, 533, 27 Sup. Ct. Rep. 367; * Monongahela Bridge Co. v. United States, 216 U. S. 177, 192, 54 L. ed. 435, 441, 30 Sup. Ct. Rep. 356; Hannibal Bridge Co. v. United States, 221 U. S. 194, 205, 55 L. ed. 699, 703, 31 Sup. Ct. Rep. 603. The statute itself prescribed the general rule applicable to all navigable waters, and merely charged the Secretary of War with the duty of ascertaining in each case, upon notice to the parties concerned, whether the particular bridge came within the general rule. Of course, the Secretary's finding must be based upon the conditions as they exist at the time he acts. But the law imposing this duty upon him speaks from the time of its enactment. And there is no real inconsistency between a declaration by Congress in 1865 that a certain bridge was a lawful structure and not an improper impediment to navigation, and a contrary finding by the Secretary of War in the year 1914.

Since we are constrained to hold that none of appellant's contentions is well founded, it results that the decree under review must be affirmed.

(212 U. S. 361)

HARRY F. HILL et al., Plffs. in Err.,
v.
FRANK REYNOLDS.

INDIANS $\hookrightarrow$ 13 — INDIAN ALLOTMENTS — OWNERSHIP OF IMPROVEMENTS—PREFERENTIAL RIGHT.

1. Indians claiming the ownership of improvements on Choctaw and Chickasaw lands by virtue of the surrender of surplus lands, with meager improvements thereon, by a widow, the head of a Chickasaw family, and apparently its only active agent, after the condemnation in the Curtis Act of June 28, 1898 (30 Stat. at L. 502, chap. 517), §§ 17, 18, of the practice of holding possession of tribal lands in excess of the approximate or allottable shares of all the members of the family, to one who took possession in good faith and made extensive, lasting, and valuable improvements, have a better claim to such improvements, and therefore a better right to select the land for their allotment, than other Indians who claim under a subsequent conveyance from the widow, her adult sons, and the guardian of those who were still minors, made after the first purchaser had been in possession for nearly four years, with no serious effort to dispossess him, his vendees having continued in possession of all the land save a tract of 80 acres or less which the second purchasers had entered adversely, adding no improvements except a short and unsubstantial fence.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. $\hookrightarrow$ 13.]

INDIANS $\hookrightarrow$ 13 — INDIAN ALLOTMENTS — EXCESSIVE INCLOSURE OR HOLDINGS — CORRECTION.

2. Indian citizens were not given the right to revive and reassert long dormant claims to Choctaw and Chickasaw lands after others had entered into possession of and highly improved the lands, by the provisions of the supplemental agreement with the Choctaws and Chickasaws, §§ 19-21, set forth in the Act of July 1, 1902 (32 Stat. at L. 641, chap. 1362), permitting excessive inclosure or holdings to be reduced or corrected at any time within ninety days after its final ratification.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. $\hookrightarrow$ 13.]

[No. 61.]

Argued November 2, 1916. Decided January 8, 1917.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which reversed a decree of the Superior Court of Grady County, in that state, in favor of plaintiffs in a suit to impress a trust upon Indian allotments. Affirmed.

See same case below, 43 Okla. 749, 143 Pac. 1155.

The facts are stated in the opinion.

Messrs. Alger Melton, Joseph W. Bailey, Reford Bond, and C. B. Stuart for plaintiffs in error.

Messrs. F. E. Riddle and Harry Hammerly for defendant in error.

*Mr. Justice Van Devanter delivered the opinion of the court:

This is a controversy arising out of conflicting applications for the allotment of 420 acres of Choctaw and Chickasaw lands. The lands were subject to allotment and all the applicants possessed the requisite qualifications, so it was merely a question as to who had the better right to select the particular lands. The applicants were minors and are designated in the record as the Reynolds children and the Hill children. The former were the first to apply, and the latter instituted a contest which ultimately reached the Secretary of the Interior. That officer sustained the claims of the Reynolds children and patents were issued to them. The Hill children then brought this suit to charge the others as trustees and to compel a conveyance. In the trial court the plaintiffs prevailed, but in the supreme court there was a judgment for the defendants. 43 Okla. 749, 143 Pac. 1155.

The chief contention of the plaintiffs is that the Secretary of the Interior misconstrued the law applicable to the facts conceded and proved, and that this resulted in the issue of patents to one set of claimants

when the other set was entitled to them. Under a familiar rule, if this were true, the plaintiffs would be entitled to the relief sought. *Ross v. Stewart*, 227 U. S. 530, 535, 57 L. ed. 626, 629, 33 Sup. Ct. Rep. 345. But was there any material misconstruction of the law by the Secretary? We say material misconstruction, because, if his decision was otherwise right, its force was not lessened by anything he may have said concerning what was not material at the time.

The lands of the two tribes were being allotted in severalty among their members under the agreement set forth in § 29 of the Act of June 28, 1898, chap. 517, 30 Stat. at L. 505, and the supplemental agreement embodied in the Act of July 1, 1902, chap. 1362, 32 Stat. at L. 641. These agreements defined what should be a standard allotment, entitled each member to such an allotment, to be selected by or for him, and permitted the selection to be so made as to include his improvements, if any, but without exceeding a standard allotment. When the conflicting applications therefor were made the lands in controversy were not wild or vacant, but improved and occupied, and the issues in the contest all centered about the ownership of the improvements. Both sides claimed to own them, and to have in consequence a preferred right of selection.

The facts found by the Secretary of the Interior—and his findings were not without evidence to sustain them—are as follows: These lands were part of a much larger body, containing 12,000 or 15,000 acres, which had been inclosed and occupied by one Campbell in his lifetime. He was a white man who had married into the Chickasaw tribe. Of the lands so inclosed he reduced 1,200 or 1,500 acres to cultivation and used the remainder for pasturing live stock. His dwelling and the improvements connected therewith were upon part of the inclosed lands, but not upon those in controversy. He died in 1896, leaving a widow, two married daughters, and five minor sons. A guardian for the minors was appointed, but permitted matters to drift without any particular control by him. The widow and minor sons continued to occupy the home place, and she, with the guardian's assent, looked after the cultivation and renting of the tillable fields and made some use of the pasture land. In January, 1899, for a consideration not challenged, she surrendered 640 acres of the inclosed land, with the improvements thereon, to one Blassingame. This tract embraced the lands in controversy. At that time the improvements on the latter consisted of a surrounding 4-wire fence and two or three

fields reduced to cultivation,—the tillable ground being regarded as an improvement. Blassingame took possession of all the lands now in dispute, ditched a large part of them, brought practically all under cultivation, and erected substantial buildings thereon, the estimated cost of this work being \$2,500. He remained in possession until December, 1902, and then sold to one Brimmage. Two or three months later Brimmage sold to one Reynolds, who went into possession of all but about 80 acres, presently to be noticed, and afterwards made application for the allotment of the lands to his minor children, the contestees.

At no time during Blassingame's occupancy was there any serious effort by any of the Campbells or by the guardian to dispossess him. By a court decree he and his family had been adjudged to be members of the Chickasaw tribe and were accordingly entitled to share in the occupancy and use of the tribal lands. By a later decree they lost this status, but not until after the sale to Brimmage. The status of the latter, as also that of Reynolds, was such that either could hold whatever passed by Blassingame's sale.

In November and December, 1902, Campbell's widow, three of his sons who then had attained their majority, and the guardian of two of his sons who were still minors, sold and quitclaimed to one Hill all of their rights in the lands in controversy and the improvements thereon. Afterwards Hill made application to have the lands allotted to his minor children, the contestants. His status was such that he could hold whatever he received from the Campbells.

*No improvements were added by Hill, save a short and unsubstantial fence, and when the contest was begun he had not been in possession of any part of the lands, save a tract of 80 acres or less. He had been in possession of it less than a year, and had entered without leave, and in disregard of such rights as had arisen out of Blassingame's occupancy and improvement for nearly four years. In this way Reynolds was prevented from taking possession of this tract.

The members of the Campbell family all selected and received other lands for their allotments, so none of those in dispute were needed for that purpose.

Upon these facts the Secretary of the Interior concluded that the contestees, the Reynolds children, had the better claim to the improvements and therefore the better right to select the lands for their allotments. In this we perceive neither any misconstruction nor any misapplication of the law. We assume, of course, that upon

Campbell's death in 1896 his family succeeded to his rights in these lands; that is, to his possessory claim and his improvements. But at best the improvements were meager, and continued occupancy was essential to sustain the possessory claim. This was the situation when the Act of June 28, 1898, supra, came into operation. It not only made provision for the allotment in severalty of the tribal lands, but directed the correction in the meantime of various practices respecting those lands that were deemed particularly objectionable. One of these was the practice of inclosing or holding possession of tribal lands greatly in excess of what would be the approximate or allotable share of the occupant and his family. By its 17th and 18th sections the act provided that after the expiration of nine months from its passage all such inclosures or holdings should be deemed unlawful, and that proceedings should be taken to terminate them and to punish the offenders. The agreement set forth in the 29th section became* effective through tribal ratification on August 24, 1898 (*Woodward v. De Graffenried*, 238 U. S. 308, 59 L. ed. 1324, 35 Sup. Ct. Rep. 764), and superseded many provisions of the act, so far as the Choctaws and Chickasaws were concerned, but it left the 17th and 18th sections in force as to them, and made new and more elaborate provision for allotting their lands in severalty. The inclosure or holding of the Campbell family, embracing as it did 12,000 or 15,000 acres, came within the letter and spirit of the 17th and 18th sections; for, as was pointed out by the Secretary of the Interior, that acreage was several times greater than the approximate or allotable share of all the members of the family, including the two married daughters. Thus it was essential that a considerable portion of the holding be surrendered, and the time for doing this was limited. The widow was the head of the family and apparently its only active agent. The guardian was inactive, and besides, under the statute (30 Stat. at L. 507, chap. 517), the widow was to have precedence over him in selecting the lands to be allotted to the minor children. She therefore was in a position to exercise a real voice in determining which lands should be surrendered and which retained. It was in these circumstances that she surrendered to Blassingame the lands in controversy with the meager improvements thereon. Presumably the consideration was adequate, for no objection on that score was made. He went into possession in evident good faith and there was no real effort to disturb him. He made extensive, lasting, and valuable improvements, the ownership of which

plainly was in him. Upon no permissible theory did the Campbells have any right to them, legal or equitable, for they were made after the Campbell occupancy ended and at a time when its continuance would have been unlawful. By comparison the original improvements made by Campbell were inconsiderable, if not entirely negligible, and were such that they could not well be retained after the lands were surrendered. It follows* that Reynolds succeeded to the rights of Blassingame, and that Hill took nothing by his purchase from the Campbells, made after Blassingame had been in possession almost four years, because they were then without any interest in the lands or the improvements.

But it is urged that §§ 19 to 21 of the supplemental agreement set forth in the Act of July 1, 1902, supra, permitted excessive inclosures or holdings to be reduced or corrected at any time within ninety days after its final ratification, which was on September 25, 1902, when Blassingame had been in undisturbed possession for considerably more than three years. Upon this point the Secretary of the Interior was of opinion that the agreement of 1902 "was certainly not intended to permit Indian citizens to revive and reassert claims long dormant after others had entered into possession of and highly improved the lands." We concur in that view.

What we have said sufficiently covers the rulings of the Secretary of the Interior upon the questions of law which were material to the contest in hand. Criticism is made of some observations in his opinion upon other questions, but they need not be noticed here.

Judgment affirmed.

(242 U. S. 367)

FERNAND VAUGHAN GASQUET, Plff. in Err.,
v.

GEORGE F. LAPEYRE and J. Martial Lapeyre.

COURTS ⇐394(1)—ERROR TO STATE COURT —FEDERAL QUESTION — SUSPENSION OF HABEAS CORPUS.

1. A contention founded upon U. S. Const. art. 1, § 9, forbidding the suspension of the writ of habeas corpus, presents no Federal question which will support the appellate jurisdiction of the Federal Supreme Court over state courts, since this provision is not restrictive of state, but only of Federal, action.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1649; Dec. Dig. ⇐394(1).]

COURTS ⇐394(10) — ERROR TO STATE COURT—FRIVOLOUS FEDERAL QUESTION—CONSTRUCTION OF STATE CONSTITUTION AND LAWS.

2. There is nothing in the clauses of U. S. Const. 14th Amend., guarantying due

process of law and the equal protection of the laws, which converts an issue respecting the jurisdiction of a state court under the Constitution and statutes of the state into anything other than a question of state law, the decision of which by the state court of last resort is binding upon the Federal Supreme Court, and such question, therefore, will not support a writ of error from that court to a state court.

[Ed. Note.—For other cases, see *Courts, Cent. Dig.* § 1056; *Dec. Dig.* 394(10).]

COURTS 396(7)—**ERROR TO STATE COURT**
—**FEDERAL QUESTION—FULL FAITH AND CREDIT.**

3. The claim that a state court denied to the judgment of a sister state the full faith and credit to which it was entitled under U. S. Const. art. 4, § 1, and U. S. Rev. Stat. § 905, Comp. Stat. 1913, § 1519, is so devoid of merit as not to serve as the basis of a writ of error from the Federal Supreme Court to the state court, where the effect which such judgment has by law or usage in the courts of the state of its rendition was not in any way brought to the attention of the court below.

[Ed. Note.—For other cases, see *Courts, Cent. Dig.* § 1080; *Dec. Dig.* 396(7).]

[No. 116.]

Argued and submitted November 16, 1916.
Decided January 8, 1917.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of interdiction rendered by the Civil District Court for the Parish of Orleans, in that state. Dismissed for want of jurisdiction.

See same case below, 136 La. 957, 68 So. 89.

The facts are stated in the opinion.

Messrs. William Winans Wall, Edward N. Pugh, J. C. Gilmore, and Thomas Gilmore for plaintiff in error.

Messrs. George Denegre, Victor Leovy, and Henry H. Chaffe for defendants in error.

* Mr. Justice Van Devanter delivered the opinion of the court:

In a proceeding against the plaintiff in error, wherein he was fully heard, the civil district court of the parish of his residence and domicile pronounced a judgment of interdiction against him. He appealed to the supreme court of the state, which affirmed the judgment (136 La. 957, 68 So. 89), and thereafter he sued out this writ of error. Our jurisdiction is challenged by a motion to dismiss.

There are three assignments of error, and the facts essential to an understanding of two of them are these: After the judgment of interdiction, and before the hearing upon the appeal, the plaintiff in error, who was in custody under an order of the criminal

district court of the parish, committing him to an asylum as a dangerous insane person, secured his release from such custody through an original proceeding in habeas corpus in the court of appeal of the parish, which adjudged that he had recovered his sanity. He then called the attention of the supreme court to this judgment and insisted that it was decisive of his sanity at a time subsequent to the judgment of interdiction, and was res judicata of the issue presented on the appeal. But the supreme court held that under the state Constitution and statutes the court of appeal was without jurisdiction, and therefore its judgment was not res judicata. In the assignments of error it is said of this ruling, first, that it practically suspended the privilege of the writ of habeas corpus, contrary to § 9 of article 1 of the Constitution of the United States, and, second, that it denied the plaintiff in error the due process and equal protection guaranteed by the 14th Amendment, in that it did not give proper effect to certain provisions of the Constitution and statutes of the state, bearing upon the jurisdiction of the court of appeal and the supreme court. Both claims, in so far as the Federal Constitution is concerned, are so obviously ill founded and so certainly foreclosed by prior decisions that they afford no basis for invoking our jurisdiction. Section 9 of article 1, as has long been settled, is not restrictive of state, but only of national, action. *Munn v. Illinois*, 94 U. S. 113, 135, 24 L. ed. 77, 87; *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 467, 30 L. ed. 237, 242, 6 Sup. Ct. Rep. 1114; *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388, 400, 30 L. ed. 447, 451, 7 Sup. Ct. Rep. 254. This is also true of the 5th Amendment. *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Booth v. Indiana*, 237 U. S. 391, 394, 59 L. ed. 1011, 1016, 35 Sup. Ct. Rep. 617; *Hunter v. Pittsburgh*, 207 U. S. 161, 176, 52 L. ed. 151, 158, 28 Sup. Ct. Rep. 40. And, as our decisions show, there is nothing in the clauses of the 14th Amendment guarantying due process and equal protection which converts an issue respecting the jurisdiction of a state court under the Constitution and statutes of the state into anything other than a question of state law, the decision of which by the state court of last resort is binding upon this court. *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344; *Castillo v. McConnico*, 168 U. S. 674, 683, 42 L. ed. 622, 625, 18 Sup. Ct. Rep. 229; *Rawlins v. Georgia*, 201 U. S. 638, 50 L. ed. 899, 26 Sup. Ct. Rep. 560, 5 Ann. Cas. 783; *Burt v. Smith*, 203 U. S. 129, 135, 51 L. ed. 121, 126, 27 Sup. Ct. Rep. 37; *Standard Oil Co. v. Missouri*, 224 U. S. 270, 280, 281, 56 L. ed. 760, 767, 768, 32

Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936; De Bearn v. Safe Deposit & T. Co. 233 U. S. 24, 34, 58 L. ed. 833, 837, 34 Sup. Ct. Rep. 584; McDonald v. Oregon R. & Nav. Co. 233 U. S. 665, 669, 670, 58 L. ed. 1145, 1148, 1149, 34 Sup. Ct. Rep. 772; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 30, 25 L. ed. 989, 992.

The facts bearing upon the remaining assignment are as follows: After the judgment of affirmance by the supreme court, and during the pendency of a petition for rehearing, the plaintiff in error, claiming that upon his release from custody by habeas corpus he had removed to, and become a resident and citizen of, Shelby county, Tennessee, petitioned the probate court of that county for an inquisition respecting his sanity. The court entertained the petition and within a day or two rendered a judgment thereon finding that the plaintiff in error had become a resident and citizen of Tennessee, adjudging that he was sane and able to control his person and property, and declaring that any disability arising from the proceedings in Louisiana was thereby removed. He then brought the proceedings in Tennessee—all certified conformably to the law of Congress—to the attention of the Louisiana supreme court by a motion where-in he insisted that, under the Constitution of the United States, art. 4, § 1, and the law passed by Congress to carry it into effect, Rev. Stat. § 905, Comp. Stat. 1913, § 1519, the judgment in Tennessee was conclusive of his residence and citizenship in that state and of his sanity and ability to care for his person and property, and that in consequence the interdiction proceeding should be abated. But the motion was denied, along with the petition for a rehearing, and in the assignments of error it is said that, in denying the motion, the court declined to give the judgment in Tennessee the full faith and credit required by the Constitution and the law of Congress.

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* There are several reasons why this assignment affords no basis for a review here, but the statement of one will suffice. What the Constitution and the congressional enactment require is that a judgment of a court of one state, if founded upon adequate jurisdiction of the parties and subject matter, shall be given the same faith and credit in a court of another state that it has by law or usage in the courts of the state of its rendition. This presupposes that the law or usage in the latter state will be brought to the attention of the court in the other state by appropriate allegation and proof, or in some other recognized mode; for the courts of one state are not presumed to know, and therefore not bound to take ju-

dicial notice of, the laws or usage of another state. Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; Lloyd v. Matthews, 155 U. S. 222, 227, 39 L. ed. 128, 130, 15 Sup. Ct. Rep. 70; Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 275, 59 L. ed. 220, 225, 35 Sup. Ct. Rep. 37. Here the law or usage in Tennessee, where the judgment was rendered, was not in any way brought to the attention of the Louisiana court, and therefore an essential step in invoking the full faith and credit clause was omitted. In this situation the claim that the Louisiana court refused to give effect to that clause is so devoid of merit as to be frivolous.

Writ of error dismissed.

(242 U. S. 371)

F. A. DICKSON, Plff. in Err.,
v.

LUCK LAND COMPANY.

INDIANS — 13—CONCLUSIVENESS OF DECISION OF LAND DEPARTMENT — AGE OF INDIAN ALLOTTEE.

The administrative finding that an Indian allottee had attained his majority, which is imported from the issuing of a patent to him in fee under the provisions of the Act of March 1, 1907 (34 Stat. at L. 1015, chap. 2285), declaring that all restrictions as to the sale, encumbrance, or taxation of allotments within the White Earth Reservation in the state of Minnesota, heretofore or hereafter held by adult mixed-blood Indians, are removed, and that such mixedbloods, upon application, shall be entitled to receive a patent in fee simple for such allotments,—is not to be taken as decisive of the allottee's age for any other purpose than that of fixing his right to receive the full title, freed from all restrictions upon its disposal which Congress had imposed, and the validity of a conveyance subsequently executed by the patentee must be tested by the state laws governing the transfer of real property, fixing the age of majority and declaring the disability of minors, these being among the laws to which the allottee became subject under the provisions of the Act of May 8, 1906 (34 Stat. at L. 182, chap. 2348, Comp. Stat. 1913, § 4203), that when an Indian allottee is given a patent for his allotment, he shall have the benefit of, and be subject to, all the laws, both civil and criminal, of the state.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. — 13.]

[No. 600.]

Submitted December 6, 1916. Decided January 8, 1917.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of Becker County, in that state, in favor of plaintiff in an action to determine adverse claims to real property. Affirmed.

See same case below, 132 Minn. 396, 157 N. W. 655.

The facts are stated in the opinion.

Messrs. Frank Healy, Clyde R. White, and Charles C. Haupt for plaintiff in error.

Mr. Marshall A. Spooner for defendant in error.

*Mr. Justice Van Devanter delivered the opinion of the court:

A tract of land in the White Earth Indian Reservation in the state of Minnesota is here in dispute. It was allotted and patented to a mixed-blood Chippewa Indian, and both parties claim under him. The allotment was made under legislation providing that the United States would hold the land in trust for the period of twenty-five years, and at the expiration of that period would convey the same to the allottee or his heirs by patent in fee discharged of such trust and free of all charge or encumbrance, and also that if any conveyance should be made of the land, or if any contract should be made touching the same, before the expiration of the trust period, such conveyance or contract should be absolutely null and void. 24 Stat. at L. 388, chap. 119, § 5, Comp. Stat. 1913, § 4201; 25 Stat. at L. 642, chap. 24, § 3. Afterwards, upon the allottee's application, a fee-simple patent was issued to him under a provision in the act of March 1, 1907, chap. 2285, 34 Stat. at L. 1015, 1034, declaring: "That all restrictions as to the sale, encumbrance, or taxation for [of] allotments within the White Earth Reservation in the state of Minnesota, heretofore or hereafter held by adult mixed-blood Indians, are hereby removed, and . . . such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments." Following the issue of this patent, and on dates considerably separated, the allottee executed two deeds for the land, each to a distinct grantee. The plaintiff in this suit claims under the second deed and the defendant under the first. The object of the suit is to obtain an adjudication of these adverse claims. In the trial court the plaintiff prevailed and the judgment was affirmed. 132 Minn. 396, 157 N. W. 655.

In both courts the decision was put upon the ground that the first deed was made while the allottee was a minor, and the second after he became an adult, and that,

under the law of the state, the deed given during his minority was disaffirmed and avoided by the one given after he became an adult. The only Federal question presented or considered was whether the patent was conclusive of his having attained his majority at that time. The defendant contended that it was, but the ruling was the other way, and the plaintiff was permitted to show the allottee's age by other evidence. The defendant concedes that, if the patent was not conclusive upon that point, the judgment must stand.

The validity of the patent is not assailed. On the contrary, both parties claim under it, one as much as the other. Nor is it questioned that the allottee received the full title, freed from all the restrictions upon its disposal* which Congress had imposed. Thus the question for decision is whether the patent was to be taken as determining the allottee's age for any purpose other than that of fixing his right to receive the full title, freed from all the restrictions imposed by Congress.

There is no mention of his age in the patent, and yet it must be taken as impliedly containing a finding that he was then an adult. This is so, because every patent for public or Indian lands carries with it an implied affirmation or finding of every fact made a prerequisite to its issue, and because the provision in the act of 1907 made the majority of the allottee a prerequisite to the issue of this patent. But such implications, although appropriately and generally indulged in support of titles held under the government's patents (*Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 450, et seq., 27 L. ed. 226, 227, 1 Sup. Ct. Rep. 389), are not regarded as otherwise having any conclusive or controlling force. They are not judgments in the sense of the rules respecting estoppel by judgment, and we perceive no reason for giving them any greater force or influence than has been sanctioned by prior decisions.

The provision in the act of 1907, under which this patent was issued, does not make for a different conclusion. In so far as it is applicable here, it does no more than to withdraw a particular class of allotments from the restrictions imposed by Congress, and to authorize the immediate issue of fee-simple patents for them. Although saying nothing on the point, it evidently intends that the administrative officers shall be satisfied in each instance before issuing the patent that the allotment belongs to the particular class; and so the patent when issued carries with it an implication that those officers found the allotment to be of that class. But the provision gives no warrant for thinking that this finding should

have any greater effect or wider application than is accorded to the finding implied from the issue of other patents.

* We conclude, therefore, that the administrative finding which this patent imports was not to be taken as decisive of the allottee's age for any purpose other than that of fixing his right to receive the full title, freed from all the restrictions upon its disposal which Congress had imposed.

With those restrictions entirely removed and the fee-simple patent issued, it would seem that the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the state. And that Congress so intended is shown by the Act of May 8, 1906, chap. 2348, 34 Stat. at L. 182, Comp. Stat. 1913, § 4203, which provides that when an Indian allottee is given a patent in fee for his allotment he "shall have the benefit of and be subject to all the laws, both civil and criminal, of the state." Among the laws to which the allottee became subject, and to the benefit of which he became entitled, under this enactment, were those governing the transfer of real property, fixing the age of majority, and declaring the disability of minors.

Judgment affirmed.

(242 U. S. 350)

CECIL F. ADAMSON, Petitioner,
v.

DAVID C. GILLILAND.

APPEAL AND ERROR $\hookrightarrow$ 1009(3)—REVIEW OF FINDINGS—PATENT SUIT — PRIOR PRODUCTION AND USE.

So far as the finding of a Federal district court judge that the defendant in a patent infringement suit had not shown prior production and use of the invention in question depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3972; Dec. Dig. $\hookrightarrow$ 1009(3).]

[No. 396.]

Submitted November 13, 1916. Decided January 8, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the District Court for the Eastern District of Missouri in favor of plaintiff in a patent infringement suit. Reversed.

See same case below, 141 C. C. A. 641, 227 Fed. 93.

The facts are stated in the opinion.

Messrs. Percy B. Hills and Douglas W. Robert for petitioner.

Messrs. James A. Carr and T. Percy Carr for respondent.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit brought by the petitioner for the infringement of a patent for a vulcanizing device, "including a vulcanizing member constructed to retain a combustible fluid upon and in contact with its upper surface, the lower surface of the vulcanizing member being adapted to be applied to the material to be vulcanized." In other words, the upper side of the upper of two sheets of metal, between* which, when heated, the material is to be vulcanized, is fashioned as a cup in which gasoline can be burned to heat it. The specific character of the machine has made of it a valuable success. The respondent admitted making and selling devices like the plaintiff's, but alleged and testified that he made them first. In a previous suit by the plaintiff, the plaintiff and the present defendant testified and District Judge Geiger gave the plaintiff a decree. In this case again the district judge in his turn saw the defendant and heard additional evidence, but, after criticizing it, said that his own judgment was that the new testimony would not have changed Judge Geiger's opinion, and, while professing to follow that opinion, according to the usage of district judges in such matters, evidently, to our mind, signified that he agreed with Judge Geiger, although in terms only following what had been done. The circuit court of appeals treated the action of the district judge as a mere yielding to the authority of the former decision, and reversed the decree upon the evidence as it stood in print.

We are unable to agree with the circuit court of appeals. There is no question that the plaintiff did not copy the defendant, that he put his invention into the market in November, 1911, and that the defendant did not put out his vulcanizer until February or March of the following year; but the defendant says that on August 7, 1911, twelve days before the plaintiff made the drawing that depicted his invention, he had had castings made that are substantially identical with the plaintiff's device and identical in particulars that the plaintiff's patent made material, but that the defendant declared to answer no useful end. The plaintiff's cup had pins projecting from the bottom, arranged in circles around a central one, which his specification described as serving to conduct the heat of the flame downwards into the vulcanizing plate and the combustible fluid. The defendant's

original casting^{*} showed pins of similar arrangement. He explained that the similarity was accidental, that the pins were of no use, but that "we expected to tell the poor, unsuspecting public that they conducted the heat . . . to the bottom of the vulcanizer," "which is a false statement." It needs no emphasis to point out the improbability that the defendant, at nearly the same time as the plaintiff, should have hit by accident upon the same configuration in striking particulars that he regarded as immaterial, and, merely to deceive the public, have invented the same by no means obvious explanation that was offered seriously by the plaintiff, but that the defendant regarded as false. The improbability is intensified by a further coincidence also explained by the defendant as accident. The lugs by which the cup was to be fastened to the lower surface happened to face in opposite directions in the plaintiff's device, although later they were made to face the same way. The defendant's also faced in opposite directions. It surpasses the power of belief that a man who testified that there was nothing in the invention, that it was merely arranging to fasten a ladle to a board, should have come by pure chance to make so exact a replica of the plaintiff's specific form. Inspection of the two castings shows more clearly than can words that one must have been a copy of the other. The plaintiff and defendant lived far apart. Adamson had no chance to copy Gilliland. On the other hand, after Adamson's vulcanizers were made public, Gilliland could copy them. The man who made the castings shows that the resemblance was even more complete than we have stated, by reason of the presence of a base plate, although Gilliland denies that he had one at that time.

There is no doubt that the defendant had castings made. The essential question is the time when they first were made. We shall not discuss the evidence of those concerned in the making beyond recurring to the impression that the witnesses made upon the district judge, and mentioning that a dray ticket relied upon as fixing that date appears to have been open to grave suspicion from its character, marking, and other details. Considering that a patent has been granted to the plaintiff, the case is pre-eminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses "depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable." *Davis v. Schwartz*, 155 U. S. 631, 636, 39 L. ed. 289, 291, 15 Sup. Ct. Rep. 237. The reasons for requiring the defend-

ant to prove his case beyond a reasonable doubt are stated in the case of *Barbed Wire Patent (Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co.)* 143 U. S. 275, 284, 36 L. ed. 154, 158, 12 Sup. Ct. Rep. 443, 450. Upon these considerations and a review of the evidence we are of opinion that the decree must be reversed.

Decree reversed.

(242 U. S. 353)

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Plff. in Err.,

v.

GEORGE H. WINTERS.

APPEAL AND ERROR $\hookrightarrow$ 882(3) — ERRORS WAIVED OR CURED BELOW.

1. Error, if any, in basing a recovery in a personal-injury action upon the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149),¹ does not entitle the defendant to have the judgment reversed, where such defendant in no way saved its rights to deny that the parties were engaged in interstate commerce at the time of the accident, or to object to the application of the Federal statute, but, on the contrary, invoked and relied, without qualification, upon that statute and the rights that, because of that statute, it supposed itself to possess.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3593, 3594; Dec. Dig. $\hookrightarrow$ 882(3).]

COMMERCE $\hookrightarrow$ 27(8)—MASTER AND SERVANT — EMPLOYERS' LIABILITY — WHEN SERVANT IS "ENGAGED IN INTERSTATE COMMERCE."

2. A machinist's helper, engaged, while making repairs in the roundhouse, upon an engine which had been used in hauling over the railway company's lines freight trains carrying both intrastate and interstate freight, and which was used in the same way after the accident, was not then employed in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149 [Comp. St. 1913, §§ 8657-8665]), governing the liability of an interstate carrier for injuries to its employees when employed in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. $\hookrightarrow$ 27(8).]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

[No. 420.]

Argued December 5, 1916. Decided January 8, 1917.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which, on a third appeal, affirmed a judgment of the District Court of Ramsey County, in that state, in favor of plaintiff in a personal-injury action against an interstate carrier. Affirmed.

See same case below, on first appeal, 126 Minn. 260, 148 N. W. 106; on second appeal, 131 Minn. 181, 154 N. W. 964; on third appeal, 131 Minn. 496, 155 N. W. 1103.

The facts are stated in the opinion.

$\hookrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

¹ Comp. St. 1913, §§ 8657-8665.

Messrs. Frederick M. Miner and William H. Bremner for plaintiff in error.

Messrs. Humphrey Barton and John H. Kay for defendant in error.

* Mr. Justice Holmes delivered the opinion of the court:

This is an action for personal injuries suffered by the plaintiff, the defendant in error, at Marshalltown, Iowa, on October 21, 1912. The decisions below will be found in 126 Minn. 260, 148 N. W. 106, and 131 Minn. 181, 154 N. W. 964. The declaration alleged that at the time the plaintiff was employed by the defendant in interstate commerce, although it went on to set forth laws of the state of Iowa concerning the liability of railroads and contributory negligence. It alleged that the injury was caused by the negligence of the defendant in failing to furnish a reasonably safe instrument for the work that the plaintiff was set to do. The answer denied, among other things, that the plaintiff was employed in interstate commerce, and set up the plaintiff's negligence and assumption of the risk. In the course of the trial, the facts touching the employment having been agreed, the counsel for the defendant intimated that he might want to take the question whether the commerce was interstate to this court, but said no more about it, and later moved to dismiss the suit upon the ground, among others, that the plaintiff assumed the risk, advertising to a decision that that defense was open under the Federal act. Later still the presiding judge in his charge, without objection, told the jury that the action was tried under the law of the United States; and in the assignment of errors to the supreme court of the state, one error assigned was that the jury was instructed that they might find a less than unanimous verdict in a suit founded upon the Federal Employers' Liability Act,—a proposition disposed of since the trial by a decision of this court. *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211, 60 L. ed. 961, L.R.A. 1917A, 86, 36 Sup. Ct. Rep. 595.

It is true that error is assigned because the court affirmed its opinion rendered after a former trial. But in the assignment of errors to the state court no such error is alleged, and beyond judicial recitals that the evidence, with some exceptions, was the same at both trials, and quotations from the decision as to negligence, the record shows nothing but a casual statement of counsel as to what was done or ruled before. In short, at the trial the defendant in no way saved its rights to deny that the parties were engaged in interstate commerce at the time of the accident, or to object to the application of

the Federal statute. On the contrary, without qualification it invoked and relied upon that statute and the rights that, because of that statute, it supposed itself to possess. There is an ambiguous assignment of error that the supreme court of the state erred in holding as matter of law that the plaintiff was engaged in interstate commerce, and in holding that the question of the plaintiff's assumption of the risk was for the jury, "thereby depriving the appellant of a right guaranteed to it under the provisions of" the Federal Employers' Liability Act. But if the first clause is more than an introduction to and reason for the second, then, as we have indicated, no foundation for such an assignment was laid in the proceedings before the state courts.* Therefore even if the courts and parties were wrong about the proper basis for the suit, that fact does not entitle the defendant to have the judgment reversed. It cannot complain of a course to which it assented below.

The defendant, however, as has been seen, did save the questions concerning its right to a unanimous verdict and the assumption of risk under the act of Congress, and also concerning the evidence of its negligence, all of which, of course, in a case arising under the act, could be brought to this court. In the present case the facts upon which the act of Congress was supposed to apply are stated and were agreed, so that although, for the reasons that we have stated, an error on that point would not entitle the defendant to a new trial, it necessarily must be determined whether they show a foundation for the attempt to come here upon the questions that were reserved. The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine "had been used in the hauling of freight trains over the defendant's line . . . which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury." The last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business

and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events.

Judgment affirmed.

(242 U. S. 357)

SAVINGS BANK OF DANBURY, of Danbury, Connecticut, Plff. in Err.,
v.

DIETRICH E. LOEWE, as Surviving Partner of the Firm of D. E. Loewe & Company.

GARNISHMENT 115—EFFECT REACHED—INTEREST ON SAVINGS BANK DEPOSITS.

1. A garnishment of savings bank deposits reaches the so-called dividends accrued since the writ was served upon the garnishee, where, under the local laws, a garnishment, while reaching only effects in the hands of the garnishee at the time of such service, holds the subsequently accruing interest on an interest-bearing debt as well as the principal, although such local law (Conn. Gen. Stat. 1902, §§ 849, 852) gives the right to release the attachment by giving a bond equal to the value of the effects attached.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 234; Dec. Dig. 115.]

GARNISHMENT 109—EFFECTS REACHED—ASSIGNMENT.

2. An assignment of savings bank deposits after they had been garnished has no effect upon the rights of the attaching creditor to the so-called dividends accruing after the service of the garnishment process.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 227-229; Dec. Dig. 109.]

[No. 713.]

Argued December 11, 1916. Decided January 8, 1917.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which modified a judgment of the District Court for the District of Connecticut in scire facias to recover savings bank accounts attached by trustee process, so as to include the dividends accruing after the service of the writ of garnishment upon the garnishee. Affirmed.

See same case below, L.R.A. 1917B, 938, 236 Fed. 444.

The facts are stated in the opinion.

Messrs. William F. Tammany and John H. Light for plaintiff in error.

Messrs. Walter Gordon Merritt and Daniel Davenport for defendant in error.

* Mr. Justice Holmes delivered the opinion of the court:

This is scire facias, where the statutes of Connecticut provide a similar remedy, to recover savings bank accounts attached by trustee process in the hands of the plaintiff in error, judgment having been recovered in the original suit by the defendant in error and execution taken out. The garnishee submitted itself to the judgment of the court, admitting deposits, but setting up that after the attachment the accounts had been assigned to the United Hatters of North America, and that the assignee claimed the dividends that had accrued since the writ was served. The assignee was cited, appeared, and made the claim. The principal, except an item of \$428.52, now has been paid, and the right to the dividends is the only question in the case. The circuit court of appeals decided that the attaching creditor had the better right. L.R.A. 1917B, 938, 236 Fed. 444.

There is no doubt that under the statutes of Connecticut, as usual elsewhere, a garnishment reaches only effects of the defendant in the hands of the garnishee at the time of service upon the latter, as distinguished from contingent liabilities that do not become effects in the garnishee's hands until a later time. Gen. Stat. 1902, §§ 880, 931. But the commonest object of such attachments is a right, regarded as a thing within reach of the process because of the power of the court over the person subject to the corresponding obligation. Barber v. Morgan, 84 Conn. 618, 623, 80 Atl. 791, Ann. Cas. 1912D, 951; Osborn v. Lloyd, 1 Root, 447; Harris v. Baik, 198 U. S. 215, 222, 49 L. ed. 1023, 1026, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084. If the right is vested, the attachment reaches the whole of it, and therefore, there being no doubt that a debitum in presenti solvendum in futuro could be attached (Gen. Stat. § 936), it was admitted at the argument that in the case of an interest-bearing debt the subsequently accruing interest was held as well as the principal. The obligation to pay the one stands on the same footing as the obligation to pay the other; the two are one; they are limbs of the same contract; and there is no reason for splitting them up. Adams v. Cordis, 8 Pick. 260, 269. It may be true that, apart from statute, the attachment of stock in a corporation would not hold subsequently declared dividends; but, if so, that is because the stockholders have no right to the dividends until they are declared, which may never be if the directors see fit to convert earnings into capital. Gibbons v. Mahon, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057. Compare Norton v. Norton, 43 Ohio St. 509, 525, 3

N. E. 348. The question then narrows itself to whether the so-called dividends of savings banks are analogous to dividends of a corporation, or to interest due by contract upon a debt.

The plaintiff in error is an ordinary savings bank without stockholders. It is subject to a fiduciary duty to hold and invest for the benefit of its depositors all the funds that it receives, and to pay over to them all the net income earned, after the retention of enough to constitute a small safety fund. Gen. Stat. §§ 3440, 3441. This duty certainly is no less because created by statute rather than by contract. It is guarded by other statutes limiting the investments allowed and requiring inspection, with the object of making principal and income secure rather than large. Gen. Stat. §§ 3428, 3457. The minimum amount of the dividends generally is as fixed in practice as if it were written in a bond. The practical certainty that a savings bank will pay is greater, in short, than that an average debtor will pay 6 per cent according to his promise in a note. The only element of uncertainty other than that conditioning all future conduct is the possibility that the dividend may be greater than that which experience has led the depositor to expect. He has a vested right to the dividends,—a vested right that the corporation should take the most prudent steps to secure them, with an identified fund devoted to the result. We do not perceive why the possibility of there being no earnings because of fraud or a cataclysm, or a possibility of the earnings being greater than was expected, should make the right less a present one, subject to and covered by the attachment, than the right to the capital, which runs the same risks (*Bunnell v. Collinsville Sav. Soc.* 38 Conn. 203, 9 Am. Rep. 380), or than that arising from the promise of a debtor, who may fail or abscond, or, if a corporation, may have no assets.

The case certainly is not weakened, it rather seems to us to be strengthened, by the fact that the statutes of Connecticut provide that the levy of attachments and executions upon even the shares of a corporation shall include dividends growing due thereon. The provision indicates a policy, and although, of course, the words do not include dividends from savings banks, as, in our opinion, they did not need to, it is only by imagining unreal distinctions that the policy embodied in the statute, and extending by the common law to interest due upon contract, can be held to exclude the claim to subsequently earned income of ordinary savings banks, when that claim, as we have tried to show, is a vested right. *Middletown Sav. Bank v. Jarvis*, 33 Conn. 372, 379. See *Norton v. Norton*, supra.

No argument against our conclusion can be based on the right to release the attachment by giving a bond equal to the value of the effects attached. Gen. Stat. §§ 849, 852. We presume that ordinarily a plaintiff would be satisfied with a bond for the principal of a debt or deposit. If he should raise a question we will wait for the Connecticut courts to decide whether he might or might not be entitled to more.

Finally, the assignment, of course, has no effect upon the rights of the defendant in error. If the attachment would have held dividends as against the original defendant, it holds them as against the assignee.

Judgment affirmed.

(242 U. S. 333)

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, Plff. in Err.,
v.

STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS.

COMMERCE ⚡34 — STATE REGULATION OF
INTRASTATE RATES—CONGRESSIONAL IN-
ACTION.

1. A separate local freight rate for coal shipped from Galewood, a station inside of Chicago, to Morton Grove, Illinois, a distance of about 12 miles, over a route wholly within that state, is not so related to through freight rates to Galewood from coal-producing districts inside or outside the state as to exclude regulation by the Illinois Public Utilities Commission, Congress not having exerted its paramount constitutional power, where there may be a blending of interstate and intrastate operations of interstate carriers, to limit the authority of the state, and there being nothing to show that the order of the state Commission gives commercial advantages to shippers and producers of coal in Illinois over shippers and producers outside the state.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 26, 82; Dec. Dig. ⚡34.]

COURTS ⚡394(15) — ERROR TO STATE
COURT—FEDERAL QUESTION—STATE REG-
ULATION OF INTERSTATE FREIGHT RATES.

2. The Federal Supreme Court has jurisdiction of a writ of error to a state court to review a decision adverse to the contention that a local freight rate for coal shipped from Galewood, a station inside of Chicago, to Morton Grove, Illinois, a distance of about 12 miles, over a route wholly within that state, is so related to through freight rates to Galewood from coal-producing districts inside or outside the state, as to exclude regulation by the Illinois Public Utilities Commission.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1064; Dec. Dig. ⚡394(15).]

[No. 148.]

Argued December 5, 1916. Decided January 8, 1917.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Circuit Court of Sangamon County, in that state, sustaining an order of the State Public Utilities Commission, regulating an interstate freight rate. Affirmed.

See same case below, 268 Ill. 49, P.U.R. 1915D, 133, 108 N. E. 729.

The facts are stated in the opinion.

Messrs. O. W. Dynes and Burton Hanson for plaintiff in error.

Messrs. M. F. Gallagher and Everett Jennings for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

Error to review a judgment of the supreme court of Illinois sustaining an order of the State Public Utilities Commission, made in a proceeding brought by Poehlmann Brothers Company against plaintiff in error, here called the railway company.

³³⁴ Poehlmann Brothers Company is an Illinois corporation* engaged in growing and selling flowers, and has its greenhouse at Morton Grove, Cook county, Illinois, a station on the railway company's line, 3 miles northeast of Chicago. Poehlmann Brothers Company uses in its greenhouse about 30,000 tons of coal each year, 95 per cent of which is mined in Illinois, and 500 cars of manure which comes from places in and around Chicago. The coal and manure move to Morton Grove over the railway, which receives them at Galewood, a station inside of Chicago.

The distance from Galewood to Morton Grove is about 12 miles and is the haul involved in this case. There are no joint or through rates on coal to Morton Grove from points in Illinois or from points in other states, the rate from Galewood to Morton Grove being a separate rate.

The rates on cars of coal to Chicago vary according to point of origin, but in all cases the charge of the railway company from Galewood to Morton Grove is 40 cents a ton, and is published as such, for which the railway company is alone responsible.

July 18, 1913, Poehlmann Brothers Company filed a petition with the Warehouse Commission of Illinois, predecessor of defendant in error, charging that such rate of 40 cents a ton on coal and manure from Galewood to Morton Grove was unjust and unreasonable. After a hearing the Commission so found, and that 20 cents a ton on coal and 25 cents on manure were just and reasonable rates, and should be put into effect by the railway company.

The order was affirmed by the circuit court of Sangamon county and subsequent-

ly by the supreme court of the state. 268 Ill. 49, P.U.R.1915D, 133, 108 N. E. 729.

The error assigned against the order of the Commission and the judgment sustaining it is that so far as the order relates to coal, the rates on manure not being involved, it violates the commerce clause of the Constitution of the United States in that: (1) The order assumes to regulate a feature of commerce in which interstate and intrastate* commerce are commingled,* and after jurisdiction of that feature had been taken by the Interstate Commerce Commission, and regulates such feature of commerce differently from and inconsistently with the regulation of the Interstate Commerce Commission. (2) It requires the railway company to discriminate against localities outside of Illinois and give preference to those inside of the state in the charges that the company makes for the same service. (3) It violates § 3 of the Interstate Commerce Act as amended (Comp. St. 1913, § 8565) by requiring the company to give unreasonable preference and advantage to producers and shippers of coal in the state, and subject those outside of the state to unreasonable prejudice and disadvantage by obliging the company to charge a less rate for the transportation of coal in carload lots between specified points on its rails when the coal originates within the state than it is lawfully permitted to charge and does charge for the same service on interstate shipments of coal. (4) It violates § 6 of the Interstate Commerce Act as amended (section 8569) by requiring the railway company to charge a less compensation on carloads of coal between certain points named in tariffs on file with the Interstate Commerce Commission than the rates and charges specified in such tariffs. (5) It violates § 13 of the Interstate Commerce Act (section 8581) by disregarding the right of the railway company to have the Interstate Commerce Commission investigate any complaint of the Railroad Commission of any state and obtain such relief as the complaint might merit. (6) It violates § 15 of the Interstate Commerce Act (section 8583), which gives the Interstate Commerce Commission power over through rates and joint rates and transportation participated in by two or more carriers, the order under review seeking to regulate one factor of such through or joint rate without regard to the other. (7) The order is unreasonable and unlawful in that the Commission, without finding the through rate excessive or discriminatory, or having facts before it on which to make such finding, made the order to reduce solely for the benefit of Illinois shippers and producers, the transportation charges being a factor of the transportation service involved that is com-

mon to interstate and intrastate commerce, and over which factor the Interstate Commerce Commission had previously assumed jurisdiction.

The case, we think, is in small compass, although on its face and in the argument of counsel for plaintiff in error it concerns such relation between state and interstate rates as to make the order an interference with the latter. The facts remove the order from such effect. The coal that the order regulates has its point of shipment and its point of destination in Illinois, and was for transportation for 12 miles on the lines of the railway company in the state. But counsel say that the rate for those 12 miles, that is, for the haul from Galewood to Morton Grove, is part of the through rate from the coal-producing districts to Galewood, which is a station in Chicago, that such producing districts may be inside or outside of the state, and that the rate, therefore, may be a part of interstate commerce as well as intrastate commerce. There hence comes into the case, counsel contends, "a feature of commerce in which interstate and intrastate commerce are commingled;" and that, the interstate element dominating, the State Commission had no jurisdiction to make its order, and it is asserted that discriminations and preferences between shippers and localities will result from it.

The contention based upon an interstate commerce element in a rate, that is, the relation of interstate and intrastate rates and their reciprocal effect, was at one time quite formidable, but since the Minnesota Rate Cases (*Simpson v. Shepard*) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, its perplexity, arising from a conflict of powers, has been simplified. In those cases it was decided that there is a field of operation for the power of the state over intrastate rates and the power of the nation over interstate rates. In other words, and in the language of Mr. Justice Hughes, who delivered the opinion of the court: "The fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the states and the agencies created by the states to deal with that subject (*Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214)," until the authority of the state is limited "through the exertion by Congress of its paramount constitutional power where there may be a blending of interstate and intrastate operations of interstate carriers." But it was decided that Congress had not exerted its power by the enactment of the Interstate Commerce Act.

It is, however, said that the Interstate

Commerce Commission had assumed jurisdiction of the rates at the instance of Poehlmann Brothers Company, and had rendered a decision sustaining the rates that the order under review adjudges unreasonable.

There was such a complaint and the testimony taken was introduced in the present case. But the complaints are different. That before the Interstate Commerce Commission concerned coal from West Virginia. The complaint in the present case concerns coal shipped from a place in Illinois to another place in Illinois, the latter place being Morton Grove, and the rate to it from Galewood being involved. The testimony taken before the Interstate Commerce Commission happened to have material relevancy to such rate and hence was admitted in evidence. The rulings were different. It was proper for the Interstate Commerce Commission to consider the rate as part of a through rate from points outside of the state. It was equally proper for the State Commission to consider it as part of the intrastate haul, and we do not think the rates were so related as to exclude the exercise of jurisdiction by the State Commission.

* The order of the Interstate Commerce Commission is not in the record. It is, however, quoted in the briefs of counsel, and it appears therefrom that neither the through rate nor the carriers responsible for and participating in it were before the Commission. The Commission said: "Considering the absence of evidence as to the reasonableness of the through rate, and the unsatisfactory evidence as to the separately established rates under attack, we must refrain from expressing any conclusion upon the reasonableness of either rate."

But a relation is asserted between the state and interstate haul because it is said to be manifest that the order of the State Commission gives commercial advantages to shippers and producers of coal in Illinois over shippers and producers outside of the state. But there is nothing in the record that justifies the confidence of the assertion. There are too many factors to be considered for such offhand declarations to be accepted. Some relation we may admit between the state and interstate service, but the evidence does not bring it within that certainty and precision of influence that induced the decision in *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833, but leaves it controlled by the Minnesota Rate Cases, supra; *Oregon R. & Nav. Co. v. Campbell*, 230 U. S. 525, 57 L. ed. 1604, 33 Sup. Ct. Rep. 1026; and *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, 34

Sup. Ct. Rep. 48. Therefore, the order is not subject to the charges against it, and §§ 3, 13, and 15 of the Interstate Commerce Act have no application.

The motion to dismiss is denied. The judgment is affirmed.

(242 U. S. 339)

P. L. CRANE, Appt.,

v.

HIRAM W. JOHNSON, Governor of the State of California, et al.

CONSTITUTIONAL LAW — 230(2) — EQUAL PROTECTION OF THE LAWS — LICENSING DRUGLESS PRACTITIONERS—EXEMPTIONS.

1. The exemption in favor of persons treating the sick by prayer from the application of Cal. Laws 1913, chap. 354, as amended by Laws 1915, chap. 105, which provides that persons may not practise drugless healing unless holding a "drugless practitioner certificate," obtainable only upon completion of a prescribed course of study and after an examination, does not render the statute invalid as denying the equal protection of the laws guaranteed by U. S. Const. 14th Amend., to one who does not employ prayer in his treatment of disease, but does use faith, hope, the processes of mental suggestion and mental adaptation, a form of treatment in which skill enhanced by practice is to be exercised.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. — 230(2).]

PHYSICIANS AND SURGEONS — 1—POLICE POWER — LICENSING DRUGLESS PRACTITIONERS.

2. The state's police power extends to requiring, as is done by Cal. Laws 1913, chap. 354, as amended by Laws 1915, chap. 105, that drugless practitioners employing faith, hope, and the processes of mental suggestion and mental adaptation in the treatment of disease, shall have completed a prescribed course of study and passed an examination.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 1; Dec. Dig. — 1.]

[No. 493.]

Argued December 12, 1916. Decided January 8, 1917.

APPEAL from the District Court of the United States for the Southern District of California to review a decree denying an interlocutory injunction to restrain the enforcement of a state statute requiring drugless practitioners to have completed a prescribed course of study and passed an examination. Affirmed.

See same case below, 233 Fed. 334.

The facts are stated in the opinion.

Mr. Tom L. Johnston for appellant.

Messrs. Robert M. Clarke, Thomas Lee Woolwine, George E. Cryer, and Mr. U. S. Webb, Attorney General of California, for appellees.

Mr. Justice McKenna delivered the opinion of the court:

Appeal from an order denying an interlocutory injunction, three judges sitting. The court took jurisdiction of the action, citing *Raich v. Truax*, 219 Fed. 273, 283, but denied the injunction on the ground that the averments of the complaint did not justify it.

Complainant is a drugless practitioner, he avers (we state the facts averred narratively), and has practised his profession in the city and county of Los Angeles for the last seven years, and is dependent upon it for making a living. He does not employ either medicine, drugs, or surgery in his practice, nor is there anything harmful in it to the individual or dangerous to society; but he does employ in practice faith, hope, and the processes of mental suggestion and mental adaptation.

Under a statute of the state that went into effect August 10, 1913, amended in 1915, a board of medical examiners was created which was empowered to prescribe a course of study and examination for those practising medicine (using this word in a broad sense for convenience), and to issue certificates of qualifications and licenses.

Three forms of certificates were required to be issued: First, a certificate authorizing the holder thereof to use drugs, or what are known as medicinal preparations, in or upon human beings, and to perform surgical operations, which certificate shall be designated, "physician and surgeon certificate." Second, a certificate authorizing an opposite treatment to that which the first certificate authorized (we are using general description), which certificate shall be designated, "drugless practitioner certificate." Third, a certificate authorizing the holder to practise chiropody. And the statute also provides for the issuance of what it designates as a "reciprocity certificate." Any of these certificates, on being recorded in the office of the county clerk, as provided in the act, shall constitute the holder thereof a duly licensed practitioner in accordance with the provisions of his certificate.

Applicants must file with the board testimonials of good moral character and diplomas of a school or schools, and, in addition, each applicant for a "physician and surgeon certificate" must show that he has attended four courses of study, each to have been not less than thirty-two weeks' duration, with some other additions; and each applicant for a "drugless practitioner certificate" must show that he has attended two courses of study, each of such courses to have been not less than thirty-two weeks' duration, but not necessarily pursued con-

tinuously or consecutively, and at least ten months shall have intervened between the beginning of any course and the beginning of the preceding course; and the course in chiropody is to be of not less than thirty-nine weeks' duration, consisting of not less than 664 hours. There is a provision that, in lieu of a diploma or diplomas and preliminary requirements in the other courses, if the applicant can show to the board that he has taken the courses required by the statute in a school or schools approved by the board, totaling not less than sixty-four weeks' study of not less than 2,000 hours for a "drugless practitioner certificate," or 128 weeks' study of not less than 4,000 hours for a "physician and surgeon certificate," he shall be admitted to examination for his form of certificate.

The statute sets out the course of instruction which the respective applicants must have pursued, giving the course that is necessary for a "physician and surgeon certificate" and the course for a "drugless practitioner certificate." The descriptions are very elaborate and technical. The statute also prescribes the manner of examination, states the exemptions from its provisions, the penalties for its violation, and for what conduct and upon what conditions the certificates may be revoked. Among the latter is the following:

"Ninth. The use, by the holder of a 'drugless practitioner certificate,' of drugs or what are known as medicinal preparations, in or upon any human being, or the severing or penetrating by the holder of said 'drugless practitioner certificate' of the tissues of any human being in the treatment of any disease, injury, deformity, or other physical or mental condition of such human being, excepting the severing of the umbilical cord." [Stat. 1913, chap. 354, p. 734.]

By § 22 of the original act (unaffected by the Act of 1915), it is provided: "Nor shall this act be construed so as to discriminate against any particular school of medicine or surgery, or any other treatment, nor to regulate, prohibit or to apply to, any kind of treatment by prayer, nor to interfere in any way with the practice of religion." [Stat. 1913, chap. 354, p. 736.]

It is alleged that the statute violates the 14th Amendment of the Constitution of the United States, especially the equal protection clause thereof, in that it imposes greater burdens upon complainant than upon others in the same calling and position. That it discriminates in favor of the Christian Science drugless practitioner, distinguishes between the treatment of the sick by prayer, the treatment of the sick

by faith, mental suggestion, and mental adaptation, and treatment by laying on of hands, anointing with holy oil, or other kindred treatment.

Complainant does not employ prayer in the treatment of disease, and is, therefore, not exempt from examination by the medical board, and is subject, therefore, to the penalties of the act if he practises his profession, for which he has fitted himself by study and practice, and upon which he is dependent, and by reason of his age he is in large measure unable to take up any new branch of work. That defendants, appellants here, are threatening prosecutions under the act, and he is without remedy at law.

There is an allegation that the supreme court of the state of California has decided that the statute is not offensive to the 14th Amendment, in habeas corpus proceedings prosecuted by one Chow Juyan, who was convicted of practising some form of Chinese healing which was adjudged a violation of the act.

The allegations of the bill set forth complainant's particular grievance to be that the statute discriminates between forms of healing the sick and the use of prayer and other drugless methods, and invoke the equal protection clause of the 14th Amendment of the Constitution of the United States. In other words, he attacks the classification of the statute as having no relation to the purpose of the legislation. Of course, complainant is confined to the special discrimination against him; he cannot get assistance from the discrimination, if any exist, against other drugless practitioners. The case, therefore, is brought to the short point of the distinction made between his practice and certain forms of practice, or, more specifically, between his practice of drugless healing and the use of prayer.

The principle of decision needs no exposition, and the only question is whether it was competent for the state to recognize a distinction in its legislation between drugless healing as practised by complainant and such healing by prayer. That there is a distinction between his practice and that of prayer, complainant himself, it seems to us, has charged in his bill. He has not only charged that he does not employ either medicine, drugs, or surgery in his practice, but that he does employ faith, hope, and the processes of mental suggestion and mental adaptation. These processes he does not describe. Presumably they are different from healing by prayer,—different from the treatment by Christian Science. But he alleges that for his practice he has become "particularly fitted by many years of

study and practice therein." In other words, the treatment is one in which skill is to be exercised, and the skill can be enhanced by practice, and the objects of the treatment are diseased human beings whose condition is to be diagnosed. To treat a disease there*must be an appreciation of it, a distinction between it and other diseases, and special knowledge is therefore required. And this was the determination of the state; but it determined otherwise as to prayer, the use of which, it decided, was a practice of religion. We cannot say that the state's estimate of the practices and of their differences is arbitrary, and therefore beyond the power of government. And this we should have to say to sustain the contentions of complainant, and say besides, possibly against the judgment of the state, that there was not greater opportunity for deception in complainant's practice than in other forms of drugless healing.

Because of our very recent opinions we omit extended reply to the argument of counsel and the cases cited by him, not only of the general scope of the police power of the state, but also of the distinctions which may be made in classifying the objects of legislation. And for like reason we do not review or comment upon the cases cited in opposition to complainant's contentions.

It is to be observed that the order of the court was put upon the narrow ground of the averments of the complaint, no opinion beyond such averments being expressed.

Decree affirmed.

(242 U. S. 344)

KATE P. McNAUGHTON, Appt.,

v.

HIRAM W. JOHNSON, Governor of the State of California, et al.

PHYSICIANS AND SURGEONS 1—POLICE POWER—LICENSING OPTOMETRISTS.

1. A state may, in the exercise of its police power, confine to registered optometrists who have passed the examination prescribed by Cal. Laws 1913, chap. 598, the right to employ means other than drugs to measure the range of human vision, and the accommodative and refractive states of the human eye.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 1; Dec. Dig. 1.]

CONSTITUTIONAL LAW 230(2) — EQUAL PROTECTION OF THE LAWS — LICENSING OPTOMETRISTS — EXEMPTING PHYSICIANS AND SURGEONS.

2. The exemption in favor of duly licensed physicians and surgeons, which is made by Cal. Laws 1913, chap. 598, confining to registered optometrists who have passed the prescribed examination the right to employ means other than the use of drugs to measure the range of human vision, and

the accommodative and refractive states of the human eye, does not deny the equal protection of the laws guaranteed by U. S. Const. 14th Amend., to a regularly graduated ophthalmologist who employs drugless means for such purposes.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. 230(2).]

[No. 494.]

Argued December 12, 1916. Decided January 8, 1917.

APPEAL from the District Court of the United States for the Southern District of California to review a decree denying an interlocutory injunction to restrain the enforcement of a state statute licensing optometrists. Affirmed.

See same case below, 233 Fed. 334.

The facts are stated in the opinion.

Mr. Tom L. Johnston for appellant.

Messrs. Robert M. Clarke, Thomas Lee Woolwine, George E. Cryer, Ray E. Nimmo, and Mr. U. S. Webb, Attorney General of California, for appellees.

* Mr. Justice McKenna delivered the opinion of the court:

This case was submitted with *Crane v. Johnson*, just decided [242 U. S. 339, 61 L. ed. 348, 37 Sup. Ct. Rep. 176]. It was considered in the district court with that case, three judges sitting as in that case. It comes here on appeal from an order denying an interlocutory injunction. The court entertained jurisdiction upon the authority of *Raich v. Truax*, 219 Fed. 273, 283; *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L.R.A. 1916D, 545, 36 Sup. Ct. Rep. 7.

The court, in denying the injunction, said "that the granting of such orders is within the sound discretion of the court, and, in the exercise of such discretion, based upon the averments of the bills, we are of opinion that the application should be denied." The court did not pass upon the merits, expressing a doubt of its authority to do so, as the court said it was composed of three judges, "under statutory requirement."

Appellant—we shall call her complainant, and state*^{231c}narratively the facts she alleged—is a regularly graduated ophthalmologist, which is a school of scientific learning and practice confined to the treatment of the inflammation of the eye and its membranes and in fitting glasses to the human eye. She has practised her profession in the city of Los Angeles for the past three years and is dependent upon the proceeds of her labor and services. She does not employ either medicine, drugs, or surgery, nor is there anything in her practice hurtful to the individual or dangerous to society.

In her practice it is absolutely necessary and indispensable that she measure the powers and range of human vision without the use of drugs, and there is no law in the state of California prescribing an examination for and regulating the practice of ophthalmology.

At its 40th session the legislature of California enacted a statute by which it provided that it should be unlawful for any person to engage in the practice of optometry without first having obtained a certificate of registration from the State Board of Optometry under an act to regulate that practice, approved March 20, 1903, and the acts amendatory thereof.

The practice of optometry is defined to be the employment of any means other than the use of drugs for the measurement of the powers or range of human vision, or the determination of the accommodative and refractive states of the human eye, or the scope of its functions in general, or the adaptation of lenses or frames for the aid thereof.

The board is given the power, among others, to visit schools where the science of optometry is taught, and accredit such as the board finds give a sufficient course of study for the preparation of optometrists; to keep a register of all persons to whom certificates of registration have been issued and of all itinerant licenses, and to grant or refuse or revoke such certificates. The act*prescribes a course of examination, describes the particulars of the examinations, and provides that every applicant for an examination, upon passing it, shall be entitled to be registered in the board's register of optometrists, and a certificate of registration shall be issued to him.

"At such examinations the board shall examine applicants in the anatomy of the eye, in normal and abnormal refractive and accommodative and muscular conditions and co-ordination of the eye, in subjective and objective optometry, including the fitting of glasses, the principles of lens grinding and frame adjusting, and in such other subjects as pertain to the science and practice of optometry, such subjects to be enumerated in publication by the board. In case of failure, the applicant shall be examined at the next examination only in the subjects in which he failed. All such applicants, without discrimination, who shall satisfactorily pass such examination shall thereupon be registered in the board's register of optometrists and a certificate of registration shall be issued to them, under the seal and signature of the members of

said board upon payment of a fee of \$5. Such certificate shall continue in force until the first day of August in the year next succeeding." [Stat. 1913, chap. 598, p. 1100.]

Before engaging in practice it shall be the duty of each registered optometrist to notify the board in writing of the place or places where he is to engage or intends to engage in practice, and of changes in such places.

There are other provisions intended to fortify those above mentioned, and violations of the act are made misdemeanors, with fines and imprisonment, increasing with repetition of the offense.

It is provided that the act shall not be construed to prevent duly licensed physicians and surgeons from treating the human eye, nor to prohibit the sale of complete ready-to-wear eyeglasses as merchandise from a permanent place of business, in good faith, and not in evasion of the act, by the person not holding himself out as competent to examine and prescribe for the human eye.

*Registry certificates may be revoked for certain specified causes.

Complainant charges that the act offends the 14th Amendment of the Constitution of the United States in that it deprives her of her property without due process of law and denies her the equal protection of the laws; and as specifications of the last she instances the exemption from the provisions of the act of licensed physicians and surgeons; the appropriation to the sole use of registered optometrists of the right to employ any means other than the use of drugs in the measurement of the powers or range of vision; the denial to all other schools of scientific learning and practice the right to measure the range of human vision other than by the use of drugs on equal terms with the physician and surgeon; and contends generally that her occupation being a lawful one, not hurtful to the individual or dangerous to the community, the state has no power to impose discriminatory regulations upon it.

She alleges her competency to practise her profession and apply its treatment, that appellees are threatening to enforce the law, and hence prays temporary and permanent injunctions.

These specific objections are brought down to the general objection that the statute discriminates against those who employ any other means than the use of drugs, and therefore "creates a monopoly favored and protected by law in the interest of prac-

tioners who employ drugs in determining the accommodative and refractive states of the human eye."

To sustain the statute appellees adduce the police power of the state; against the statute complainant urges the 14th Amendment and its prohibition of discrimination. The case requires, under the averments of the bill, adjustment of these contentions.

* 343 It is established that a state may regulate the practice* of medicine, using this word in its most general sense. *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Watson v. Maryland*, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; *Collins v. Texas*, 223 U. S. 238, 56 L. ed. 439, 32 Sup. Ct. Rep. 286.

Complainant tries to escape from the rulings of those cases by asserting a discrimination against her. She is an ophthalmologist, she avers, "which is a school of scientific learning and practice confined to the treatment of the inflammation of the eye and its membranes and in fitting glasses to the human eye," and that she has practised her profession for the past three years, and does not employ medicine, drugs, or surgery. She, however, attacks the statute because, to use the language of her counsel, it "arbitrarily discriminates against every other school of scientific knowledge and practice in favor of the school employing drugs in determining the accommodative and refractive states of the human eye." It undoubtedly does, but gives the name of the school that of "optometry" and its practitioners "optometrists." We cannot suppose that any injury is done her by the difference in names, and yet she gives no other tangible ground of complaint. Whether they are different, and whether the difference is of substantial or unsubstantial degree, she does not inform us. She practises one of them in preference to the other, and for the practice of that one the state has declared that its certificate of competency is necessary. The cases cited above establish that the state has such power and it requires no more of complainant than it requires of any other ophthalmologist, to use her word, or of any other optometrist, to use the word of the statute.

The District Court was, therefore, right when it decided that, on the averments of the bill, complainant was not entitled to an injunction.

Decree affirmed.

JAMES CLARK DISTILLING COMPANY,
Appt.,
v.

WESTERN MARYLAND RAILWAY COMPANY and the State of West Virginia.
(No. 75.)

JAMES CLARK DISTILLING COMPANY,
Appt.,
v.

AMERICAN EXPRESS COMPANY and the State of West Virginia. (No. 76.)

CONSTITUTIONAL LAW 295—DUE PROCESS OF LAW—FORBIDDING SHIPMENTS OF INTOXICATING LIQUOR—PERSONAL USE.

1. A state may, consistently with the due process of law clause of U. S. Const. 14th Amend., forbid all shipments of intoxicating liquor, whether intended for personal use or otherwise.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 841; Dec. Dig. 295.]

COMMERCE 14—STATE REGULATION—TRANSPORTING INTOXICATING LIQUOR—WEBB-KENYON ACT.

2. Any immunity from the prohibitions of W. Va. Code 1913, chap. 32A, as amended by Laws 1915, chap. 7, § 7, Laws 1915, 2d Ex. Sess. p. 660, § 34, against the shipment from without the state of intoxicating liquors intended for personal use, and the receipt and possession of liquors so transported, which the interstate character of such a shipment might otherwise give, was taken away by the provisions of the Webb-Kenyon Act of March 1, 1913 (37 Stat. at L. 699, chap. 90, Comp. Stat. 1913, § 8739), forbidding the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the law of the state to which the liquor is transported, although individual use may not have been prohibited by the West Virginia law.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 30, 92; Dec. Dig. 14.]

COMMERCE 61(1)—POWER OF CONGRESS—INTERSTATE TRANSPORTATION OF INTOXICATING LIQUORS—WEBB-KENYON ACT.

3. Congress did not exceed its power under the commerce clause in enacting the provision of the Webb-Kenyon Act of March 1, 1913 (37 Stat. at L. 699, chap. 90, Comp. Stat. 1913, § 8739), forbidding the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the state into which the liquor is transported.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 81, 89; Dec. Dig. 61(1).]

CONSTITUTIONAL LAW 296(1)—DUE PROCESS OF LAW—FORBIDDING SHIPMENTS OF INTOXICATING LIQUOR—PERSONAL USE.

4. There is nothing repugnant to the due process of law clause of U. S. Const. 5th

Amend., in the provisions of the Webb-Kenyon Act of March 1, 1913 (37 Stat. at L. 699, chap. 90, Comp. Stat. 1913, § 8739), under which an interstate shipment of intoxicating liquor, though intended for personal use, may be subjected to the state prohibitory laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 841; Dec. Dig. 296(1).]

[Nos. 75 and 76.]

Argued May 10 and 11, 1915. Ordered for reargument November 1, 1915. Reargued November 8 and 9, 1916. Decided January 8, 1917.

TWO APPEALS from the District Court of the United States for the District of Maryland to review decrees dismissing the bills in suits to compel carriers to accept shipments of intoxicating liquor for interstate transportation forbidden by the laws of the state into which the liquor was to be transported. Affirmed.

The facts are stated in the opinion.

Messrs. Lawrence Maxwell, Joseph S. Graydon, Walter C. Capper, and J. Phillip Roman for appellant.

Messrs. W. B. Wheeler and Fred O. Blue for the state of West Virginia.

Mr. Wiley E. Jones, Attorney General of Arizona, Mr. Clifford Walker, Attorney General of Georgia, Mr. J. H. Peterson, Attorney General of Idaho, Mr. George Cosson, Attorney General of Iowa, Mr. S. M. Brewster, Attorney General of Kansas, Mr. Ross Collins, Attorney General of Mississippi, Mr. T. W. Bickett, Attorney General of North Carolina, Mr. Henry J. Linde, Attorney General of North Dakota, Mr. S. P. Freeling, Attorney General of Oklahoma, Mr. George M. Brown, Attorney General of Oregon, Mr. Thomas H. Peebles, Attorney General of South Carolina, Mr. Frank M. Thompson, Attorney General of Tennessee, Mr. John Garland Pollard, Attorney General of Virginia, Mr. W. V. Tanner, Attorney General of Washington, and Mr. William L. Martin, Attorney General of Alabama, as amici curiæ.

*Mr. Chief Justice White delivered the opinion of the court:

To refer to the principal state law relating to these suits, to the pleadings and the decision of the court below, will make the issues in these cases clear and point directly to the elements required to be considered in deciding them.

West Virginia in February, 1913, enacted a prohibition law to go into effect on July 1st of the following year. Code 1913, chap. 32A. Putting out of view the right of druggists, under stringent regulations provided by the statute, to sell for medicinal

purposes, and the right otherwise to sell wine for sacramental and alcohol for scientific and manufacturing purposes, the law forbade "the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale," intoxicating liquors, and the intoxicants embraced were comprehensively defined. The statute contained many restrictions concerning hotels, restaurants, clubs, and so-called associations where liquor was kept and served either as a result of membership or by gift or otherwise, which were evidently intended to prevent the frustration of the prohibitions against the keeping of intoxicants for sale and purchase by subterfuge in the guise of the exercise of an individual right. There was no express prohibition against the individual right to use intoxicants and none implied unless that result arose (a) from the prohibition in universal terms of all sales and purchases of liquor within the state, (b) from the clause providing that every delivery made in the state by a common or other carrier of the prohibited intoxicants should be considered as a consummation of a sale made in the state at the point of delivery, and (c) from the prohibitions which the statute contained against solicitations made to induce purchases of liquor, and against the publication in the state of all circulars, advertisements, price lists, etc., which might tend to stimulate purchases of liquor.

Under this statute, and in reliance upon the provisions of the act of Congress known as the Webb-Kenyon Law (Act of Congress of March 1, 1913, 37 Stat. at L. 699, chap. 90, Comp. Stat. 1913, § 8739), the state of West Virginia in one of its courts sued the Western Maryland Railroad Company and the Adams Express Company to enjoin them from carrying from Maryland into West Virginia liquor in violation of law. In substance it was charged that very many shipments had been taken by the carriers contrary to the law, both as to solicitations and as to the use for which the liquor was intended. Preliminary injunctions were issued restraining the carrying of liquor into the state, subject to many conditions as to investigation, etc., etc. With these injunctions in force, these suits were commenced by the Clark Distilling Company to compel the carriers to take a shipment of liquor which it was asserted was ordered for personal use, and deliver it in West Virginia, on the ground that the Act of Congress to Regulate Commerce imposed the duty to receive and carry, and that, besides, the West Virginia prohibition law, when rightly construed, did not forbid it. The carriers, not challenging the asserted meaning of the West Virginia law, set up the injunctions

and averred that to receive and carry the liquor would violate their provisions, and therefore there was no duty under the United States law to do so. West Virginia intervened in the suits, relying upon the state law and the injunctions which had been issued. At the trial it was shown that the plaintiff Distilling Company had systematically solicited purchases and constantly shipped liquor from Maryland into West Virginia in violation of the prohibition law. The court held that the West Virginia law did not prohibit personal use, and did not forbid shipments for such use, and that, as there was no state prohibition, the Webb-Kenyon Law had no application, and that, as the solicitations forbidden by the state statute were solicitations to do that which was forbidden, that consideration was irrelevant. The construction of the statute made by the state court was held not authoritatively binding, as that court was not one of last resort, and the right to practically modify the injunctions was declared to exist because West Virginia, by making herself a party to the suits, had submitted herself to the jurisdiction of the state court. All questions concerning the power of the state of West Virginia to pass the prohibition law if it meant otherwise, and of the right of Congress to adopt the Webb-Kenyon Act under a like hypothesis, were reserved. 219 Fed. 333. Before the decrees entered became final, the circuit court of appeals for the fourth circuit, in a case pending before it (*West Virginia v. Adams Exp. Co.* L.R.A.1916C, 291, 135 C. C. A. 464, 219 Fed. 794), decided directly to the contrary. It held that the law of West Virginia did prohibit shipments for personal use; that it did forbid solicitations therefore for such purchases; that, by operation of the Webb-Kenyon Act, there was no longer a right to ship liquor into the state in violation of its laws; and that both the state law and the Webb-Kenyon Act were constitutional. Controlled by such decision, the trial court recalled its opinion, heard a reargument, and, although not changing its view, accepted and gave effect to the conclusions reached by the circuit court of appeals because they were deemed to be authoritative, and the cases were brought directly here, because of the constitutional questions, to review such action.

The issues to be decided may be embraced in four propositions which we proceed separately to consider.

1. The correct meaning of the West Virginia law as to the subjects in dispute.

The difference as to the meaning of the statute in the court below was whether or not the West Virginia law prohibited the receipt of liquor for personal use; and, if

it did, whether or not the prohibitions of the law equally applied to shipments from outside and to those originating in the state. But the possibility of dispute over these subjects no longer exists because, after the decision below, and since the cases were first argued (for they have been here argued twice), the state of West Virginia amended the statute so as to leave no room for doubt that it does forbid all shipments, whether for personal use or otherwise, and whether from within or without the state. The pertinent provisions of the amendments are placed in the margin.¹ As the relief sought is the permanent right to ship in the future, the meaning of the statute now, that is, as amended, is the test by which we must consider the questions requiring solution. Indeed, this is frankly admitted by the parties, since it is unequivocally declared that the question is the operation and effect of the statute as amended and its constitutionality. We therefore come to the second question, which is:

2. The power of the state to enact the prohibition law consistently with the due process clause of the 14th Amendment and the exclusive power of Congress to regulate commerce among the several states.

That government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that there goes along with this power full police authority to make it effective, is also not open. Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use was permitted. This being true, there can be no doubt that the West Virginia prohibition law did not offend against the due process clause of the 14th Amendment.

But that it was a direct burden upon

¹"Sec. 7. It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use, or permit another to have, keep or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine as provided by §§ 4 and 24), fruit stand, news stand, room, or place where bowling alleys, billiard or pool tables are maintained, livery stable, boathouse, public building, park, road, street or alley. It shall also be unlawful for any person to give or furnish to another intoxicating liquors, except as otherwise hereinafter provided in this section. Any one violating this section shall be guilty of a misdemeanor."

interstate commerce and conflicted with the power of Congress to regulate commerce among the several states, and therefore could not be used to prevent interstate shipments from Maryland into West Virginia, has been not open to question since the decision in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681. And this brings us to consider whether the Webb-Kenyon Law has so regulated interstate commerce as to give the state the power to do what it did in enacting the prohibition law, and cause its provisions to be applicable to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States, which is the third proposition for consideration.

3. Assuming the constitutionality of the Webb-Kenyon Act, what is its true meaning and its operation upon the prohibitions contained in the West Virginia law?

Omitting words irrelevant to the subject now under consideration, the title and text of the Webb-Kenyon Act are as follows:

"An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.

" . . . That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, . . . into any other state, territory, or district of the United States, . . . which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to

be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States . . . is hereby prohibited."

As the state law forbade the shipment into or transportation of liquor in the state, whether from inside or out, and all receipt and possession of liquor so transported, without regard to the use to which the liquor was to be put, and as the Webb-Kenyon Act prohibited the transportation in interstate commerce of all liquor "intended to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such state," there would seem* to be no room for doubt that the prohibitions of the state law were made applicable by the Webb-Kenyon Law. If that law was valid, therefore, the state law was not repugnant to the commerce clause. It is insisted that this view gives too wide an effect to the Webb-Kenyon Law, since that act was only intended to include state prohibitions in so far as they forbade the shipment, receipt, and possession of liquor for a forbidden use, and hence, as individual use was not forbidden by the state law, the shipment, receipt, and possession for such use was not embraced by the Webb-Kenyon Act, and the state law, so far as it was outside of that Act, was repugnant to the commerce clause. This is sought to be supported by the historical environment of the Webb-Kenyon Act as evidenced by the debates on its passage and by a decision of this court, as well as decisions of state

or, and upon conviction thereof shall be fined not less than \$100, nor more than \$500, and be imprisoned in the county jail not less than two nor more than six months; provided, however, that nothing contained in this section shall prevent one, in his home, from having and there giving to another intoxicating liquors when such having or giving is in no way a shift, scheme or device to evade the provisions of this act; but the word 'home' as used herein, shall not be construed to be one's club, place of common resort, or room of a transient guest in a hotel or boarding house. And, provided, further, that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in §§ 4 and 24; and, provided, further, however, that in case of search and seizure, the find-

ing of any liquors shall be prima facie evidence that the same are being kept and stored for unlawful purposes." [Acts 1915, chap. 7, p. 34.]

"Sec. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$100 nor more than \$200 and in addition thereto may be imprisoned not more than three months; provided, however, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in §§ 4 and 24." [Acts 1915, 2d Ex. Sess. chap. 7, p. 660.]

courts (which are in the margin²), which, it is insisted, have so construed that act.

Assuming, for the sake of argument only, that the debates may be resorted to for the purpose of showing environment, we are of opinion they clearly establish a result directly contrary to that which they are cited to maintain. Undoubtedly they show that it was insisted the act was not intended to interfere with personal use, as of course it was not, since its only purpose was to give effect to state prohibitions, not to compel the states to prohibit personal use. Indeed, the meaning which it is sought to affix to the Webb-Kenyon Act, if accepted, would cause that act to have the effect of compelling the states to prohibit personal use, since, if all the prohibitions of state laws against manufacture, sale, receipt, and possession of intoxicants remained subject to the danger of indirect*violation by permitting shipment, receipt, and possession for personal use, it would follow that a necessary and immediate incentive was imposed upon the states by the Webb-Kenyon Act to enact a provision against personal use.

The antecedents of the Webb-Kenyon Act, that is, its legislative and judicial progenitors, leave no room for the contention made. To correct the great evil which was asserted to arise from the right to ship liquor into a state through the channels of interstate commerce, and there receive and sell the same in the original package, in violation of state prohibitions, was indisputably the purpose which led to the enactment of the Wilson Law (Act of Congress of August 8, 1890, 26 Stat. at L. 313, chap. 728, Comp. Stat. 1913, § 8738), forbidding the sale of liquor in a state in the original package even although brought in through interstate commerce, when the existing or future state laws forbade sales of intoxicants. And this was recognized by the long line of decisions (a few of the leading cases are in the margin³) which upheld that law, and pointed out that it permitted

the state prohibitions to take away from interstate commerce shipments a right which they otherwise would have embraced; that is, the right to sell after receipt in the original package, any state law to the contrary notwithstanding. At the same time it was recognized, however, that as the right to receive liquor was not affected by the Wilson Act, such receipt and the possession following from it and the resulting right to use remained protected by the commerce clause even in a state where what is known as the dispensary system prevailed. *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained⁴ and applied it,* there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt, and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears, since, if that be not true, the coming into being of the act is wholly inexplicable.

The case in this court relied upon to establish the contrary (*Adams Exp. Co. v. Kentucky*, 238 U. S. 190, 59 L. ed. 1267, L.R.A.1916C, 273, 35 Sup. Ct. Rep. 824, Ann. Cas. 1915D, 1167) clearly does not do so. All that was decided in that case was that, as the court of last resort of Kentucky, into which liquor had been shipped, had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited. The leading state case cited is *Van Winkle v. State, 4 Boyce (Del.)* 578, 91 Atl. 385, Ann. Cas. 1916D, 104. It is true in that case the state law prohibited shipment to and receipt of intoxicants in local-option territory, and if the Webb-Kenyon Law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was held to be protected

² *Van Winkle v. State*, 4 *Boyce* (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104; *Adams Exp. Co. v. Com.* 154 Ky. 462, 48 L.R.A.(N.S.) 342, 157 S. W. 908; *Adams Exp. Co. v. Com.* 160 Ky. 66, 169 S. W. 603; *Palmer v. Southern Exp. Co.* 129 Tenn. 116, 165 S. W. 236; *Ex parte Peede*, 75 Tex. Crim. Rep. 247, 170 S. W. 749.

³ *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1038, 18 Sup. Ct. Rep. 664; *American Exp. Co. v. Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552; *Rosenberger v. Pacific Exp. Co.* 241 U. S. 43, 60 L. ed. 880, 36 Sup. Ct. Rep. 510.

as interstate commerce despite the state prohibition because the Webb-Kenyon Law was not correctly applied, for the following reason: Coming to consider the text of that law, the court said that as the Webb-Kenyon Act* prohibited the shipment of intoxicants "only when liquor is intended to be used in violation of the law of the state," and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made, since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.

The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution; and this brings us to the last question, which is:

4. Did Congress have power to enact the Webb-Kenyon Law?

We are not unmindful that opinions adverse to the power of Congress to enact the law were formed and expressed in other departments of the government. Opinion of the Attorney General, 30 Ops. Atty. Gen. 88; Veto Message of the President, 49 Cong. Rec. 4291. We are additionally conscious, therefore, of the responsibility of determining these issues and of their serious character.

It is not in the slightest degree disputed that if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce, and therefore had prevented all movement between the several states, such action would have been lawful, because within the power* to regulate which the Constitution conferred. Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A. (N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905. The issue, therefore, is not one of an absence of authority to accomplish in substance a more extended result than that brought about by the Webb-Kenyon Law,

but of a want of power to reach the result accomplished because of the method resorted to for that purpose. This is certain since the sole claim is that the act was not within the power given to Congress to regulate because it submitted liquors to the control of the states by subjecting interstate commerce in such liquors to present and future state prohibitions, and hence, in the nature of things, was wanting in uniformity. Let us test the contentions by reason and authority.

The power conferred is to regulate, and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. And the cogency of this is manifest since, if the doctrine were applied to those manifold and important subjects of interstate commerce as to which Congress from the beginning has regulated, not prohibited, the existence of government under the Constitution would be no longer possible.

The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. In fact, the contention previously made, that the prohibitions of the state law were not applicable to the extent that they were broader than the Webb-Kenyon Act, is in direct conflict with the proposition as to delegation now made.

So far as uniformity is concerned, there is no question* that the act uniformly applies to the conditions which call its provisions into play,—that its provisions apply to all the states,—so that the question really is a complaint as to the want of uniform existence of things to which the act applies, and not to an absence of uniformity in the act itself. But, aside from this, it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it; that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States. In view of the conceded power on the part of Congress to prohibit the movement of intoxicants in interstate commerce, we cannot admit that because it did not exert its authority to the full limit, but simply regulated to the extent of permitting the prohibitions in one state to prevent the use of interstate commerce to ship liquor from another

state, Congress exceeded its authority to regulate. We can see, therefore, no force in the argument relied upon tested from the point of view of reason, and we come to the question of authority.

It is settled, says the argument, that interstate commerce is divided into two great classes, one embracing subjects which do not exact uniformity, and which, although subject to the regulation of Congress, are, in the absence of such regulation, subject to the control of the several states (*Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996), and the other embracing subjects which do require uniformity, and which, in the absence of regulation by Congress, remain free from all state control (*Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681). As to the first, it is said, Congress may, when regulating, to the extent it deems wise to do so, permit state legislation enacted or to be enacted to govern, because to do so would only be to do that which would exist if nothing had been done by Congress. As to the second class, the argument is, that in adopting regulations Congress is wholly without power to provide for the application of state power to any degree whatever, because, in the absence of the exertion by Congress of power to regulate, the subject matter would have been free from state control; and because, besides, the recognition of state power under such circumstances would be to bring about a want of uniformity. But granting the accuracy of the two classifications which the proposition states, the limitation upon the power of Congress to regulate which is deduced from the classifications finds no support in the authority relied upon to sustain it. Let us see if this is not the case by examining the authority relied upon. What is that authority? The ruling in *Leisy v. Hardin*, supra. But that case, instead of supporting the contention, plainly refutes it for the following reason: Although *Leisy v. Hardin* declared in express terms that the movement of intoxicants in interstate commerce belonged to that class which was free from all interference by state control in the absence of regulation by Congress, it was at the same time in the most explicit terms declared that the power of Congress to regulate interstate commerce in intoxicants embraced the right to subject such movement to state prohibitions, and that the freedom of intoxicants to move in interstate commerce and the protection over it from state control arose only from the absence of congressional regulation, and would endure only until Congress had otherwise provided. Thus in that case, in pointing out that the

movement of intoxicants in interstate commerce was under the control of Congress despite the wide scope of the police authority of the state over the subject, it was said (p. 108): "Yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action." Again, referring to the uniform operation of interstate commerce regulations, it was said (p. 109): "Hence, inasmuch as interstate commerce, consisting in the transportation,*purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled." Further the court said (p. 119): "The conclusion follows that, as the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that power without the assent of Congress." Again, after pointing out that the question of the prohibition of manufacture and sale of particular articles was a matter of state concern, it was said (p. 123): "But, notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if, in its judgment, the end to be secured justifies and requires such action." And finally, after pointing out that the states had no power to interfere with the movement of goods in interstate commerce before they had been commingled with the property of the state, it was said that this limitation obtained "in the absence of congressional permission" to the state (p. 124).

Thus it follows that although we accept the classification of interstate commerce in intoxicants made in *Leisy v. Hardin*, we could not accept the contention which is now based upon that classification without in effect overruling that case, or, what is equivalent thereto, refusing to give effect to the doctrine of that case announced in terms so certain that there is no room for controversy or contention concerning them. But we would be required to go further than this, since it would result that we would have to shut our eyes to the construction put upon the ruling in *Leisy v. Hardin* by Congress in legislating when

it adopted the Wilson Act, and also to practically overrule the line of decisions which we have already referred to sustaining and enforcing that act. Let us see if this is not certain. As we have already pointed out, the very regulation made by Congress in enacting the Wilson Law to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a state, and selling it in violation of such law, was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have obtained. And that Congress had the right to enact this legislation making existing and future state prohibitions applicable was the express result of the decided cases to which we have referred, beginning with *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865. As the power to regulate which was manifested in the Wilson Act, and that which was exerted in enacting the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity,—a result which, as we have previously said, would reverse *Leisy v. Hardin* and overthrow the many adjudications of this court sustaining the Wilson Act.

These considerations dispose of the contention, but we do not stop with stating them, but recur again to the reason of things for the purpose of pointing out the fundamental error upon which the contention rests. It is this: the mistaken assumption that the accidental considerations which cause a subject, on the one hand, to come under state control in the absence of congressional regulation, and other subjects, on the contrary, to be free from state control until Congress has acted, are the essential criteria by which to test the question of the power of Congress to regulate and the mode in which the exertion of that power may be manifested. The two things are widely different, since the right to regulate and its scope and the mode of exertion must depend upon the power possessed by Congress over the subject regulated. Following the unerring path pointed out by that great principle we can see no reason for saying that although Congress, in view of the nature and character of intoxicants, had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was

done by the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power. Or, in other words, stating the necessary result of the argument from a concrete consideration of the particular subject here involved, that because Congress, in adopting a regulation, had considered the nature and character of our dual system of government, state and nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce co-operation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution. And it is well again to point out that this abnormal result to which the argument leads concerns a subject as to which both state and nation, in their respective spheres of authority, possessed the supremest authority before the action of Congress which is complained of; and hence the argument virtually comes to the assertion that, in some undisclosed way, by the exertion of congressional authority, power possessed has evaporated.

* It is only necessary to point out that the considerations which we have stated dispose of all contentions that the Webb-Kenyon Act is repugnant to the due process clause of the 5th Amendment, since what we have said concerning that clause in the 14th Amendment as applied to state power is decisive.

Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon; that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control, and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which, after all, dominates and controls the question here presented; that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guaranties of the Constitution but for the enlarged right possessed by govern-

ment to regulate liquor has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace.

Affirmed.

Mr. Justice McReynolds concurs in the result.

Mr. Justice Holmes and Mr. Justice Van Devanter dissent.

(242 U. S. 532)

ATLANTIC COAST LINE RAILROAD
COMPANY, Plff. in Err.,

v.

LIZZIE M. MIMS, as Administratrix of
the Estate of John J. Mims, Deceased.

COURTS ⇌ 396(3)—ERROR TO STATE COURT
—FEDERAL QUESTION—HOW AND WHEN
RAISED.

The refusal of the state trial court, upheld by the highest court of the state, to admit testimony in support of a claim under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), is not a denial of a Federal right which the Federal Supreme Court can review by writ of error, where such claim was not asserted at a time or in a manner calling for its consideration by the highest state court under its established system of practice and pleading, it not having been presented until after the plaintiff had rested in the second trial of the case after it had once been taken to the highest state court, and after the defendant, upon the opening of the second trial, had amended its answer by adding a new defense, without mentioning or in any manner attempting to plead the Federal claim, and where the assertion of the claim even at that stage of the trial consisted only of a tender of testimony without any application to amend the answer.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1080; Dec. Dig. ⇌ 396(3).]

[No. 242.]

Argued December 4, 1916. Decided January 15, 1917.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which, on a second appeal, affirmed a judgment of the Circuit Court of

Richland County, in that state, in favor of plaintiff in an action for wrongful death. Dismissed for want of jurisdiction.

See same case below, 100 S. C. 375, 85 S. E. 372.

The facts are stated in the opinion.

Messrs. Frederic D. McKenney, P. A. Willcox, L. W. McLemore, and Douglas McKay for plaintiff in error.

Messrs. William S. Nelson, Jo-Berry Sloan Lyles, J. Team Gettys, and John H. Clifton for defendant in error.

Mr. Justice Clarke delivered the opinion of the court:

On December 10th, 1910, John J. Mims, a car inspector in the employ of the plaintiff in error, when attempting to cross a track to inspect a train of cars which had just arrived, was run down and killed by a switching engine at a public crossing in the city of Sumter, South Carolina.

In April following this suit was commenced by the filing of a complaint, which charges actionable negligence and alleges that the defendant owned and operated a line of railway described as wholly within the state of South Carolina. There is nothing in the complaint tending to state a cause of action under the Federal law. To this complaint the defendant filed an answer which is a specific denial under the South Carolina Code of Civil Procedure and which contains two separate defenses. The first defense admits that Mims was killed at the time alleged, admits the paragraph alleging that the defendant, at the time of the accident complained of, owned and operated the line of railroad described as being wholly within the state of South Carolina, and denies all the other allegations of the complaint. The second defense is one of contributory negligence.

Upon this complaint and answer the case went to trial, and when the testimony was all introduced the trial court granted a nonsuit, which was reversed by the supreme court of the state with an order remanding the case for a new trial.

When the case was called for the second trial the defendant asked leave to amend its answer by pleading "gross and wilful contributory negligence" on the part of deceased, which was granted, and the trial proceeded until plaintiff rested her case.

Up to this time no claim had been made by defendant and no facts had been pleaded or evidence offered by either party from which it could be inferred that the deceased at the time of his death was engaged in interstate commerce, or that the Federal Employers' Liability Act was in any manner applicable to the case.

When the plaintiff rested her case on the

second trial, the defendant for the first time offered to introduce testimony which it is claimed, if admitted, would have tended to prove that the train which the deceased was in the act of approaching to inspect when he was killed "was engaged in interstate commerce and that the deceased was in this respect and otherwise engaged in interstate commerce." The trial court rejected this proffer of testimony on the ground that it came too late and was not relevant to any issue tendered by the pleadings in the case. No application was made for leave to amend the answer by adding the claim under the Federal law.

The practice differs in the courts of the various states as to what testimony may be introduced under "a specific denial," such as was filed in this case, and the supreme court of South Carolina, while recognizing fully the ruling character of the Federal Employers' Liability Act when the facts making it applicable are properly pleaded, yet, upon full and obviously candid and competent consideration, decided, as we have seen, that, under the settled rules of pleading in that state, the evidence tendered was not admissible. The essential justice of this decision, which is the fundamental thing, commends it to our favor. The evidence admitted in the case shows that the train which the deceased was about to inspect when he was killed was a local freight train, with a run habitually, and on the morning of the accident complained of, wholly within the state of South Carolina. If the relation of the deceased to the traffic which this intrastate train carried was such as to give an interstate character to his service, that fact must have been known to the defendant from the day the accident occurred, and it could not possibly have been known to the plaintiff, and therefore surprise and delay certainly, and possibly defeat of plaintiff's claim under statutes of limitation, must have been the inevitable result of permitting the introduction of the proffered testimony late in the second trial, without the Federal right claimed from it having been "specially set up and claimed" in the answer of the defendant.

The plaintiff recovered a judgment, which the supreme court affirmed.

This epitome of the action of the state court shows that the claim under the Federal statute now made was not presented until after the plaintiff had rested in the second trial of the case after it had been to the supreme court, and after the defendant, upon the opening of this second trial, had amended its answer by adding a third defense, without mentioning or in any manner attempting to plead the Federal claim.

Even at this stage of the trial the assertion of the claim consisted only in a tender of testimony, without any application to amend the answer.

To become the basis of a proceeding in error from this court to the supreme court of a state "a right, privilege, or immunity" claimed under a statute of the United States must be "especially set up and claimed," and must be denied by the state court. Rev. Stat. § 709, Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214]. This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice (*Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375), and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of Federal right. *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; *John v. Paullin*, 231 U. S. 583, 58 L. ed. 381, 34 Sup. Ct. Rep. 178; *Erie R. Co. v. Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Layton v. Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137.

The plaintiff in error mistakenly argues that, under recent decisions of this court, it is not necessary to claim the benefits of the Federal Employers' Liability Act in a pleading in a state court in order to obtain a review here of a decision denying or refusing to consider such a claim. Reference to the decisions relied upon shows that the Federal right was in terms claimed in the petition in *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, and *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168, and that in *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703, the decision proceeds upon the statement that, since the supreme court of the state held the Federal question sufficiently raised and decided it, the objection that it was not saved was not open in this court. While it is true that the reports show that in *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156, and in *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306, the Federal act was

not specially referred to in the pleadings, yet they were in such form that the trial court, either without objection or over objection which the supreme court of the state refused to sustain, admitted testimony making it necessary to apply the Federal act in deciding each case. This, of course, was equivalent to holding that the pleadings in the trial court were in a form to justify the introduction of testimony in support of the Federal claim, under the system of practice and pleading prevailing in the courts of the two states in which the cases were decided. This brings these decisions clearly within the principle of the conclusion we are announcing in this case.

While it is true that a substantive Federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a Federal right not having been asserted at a time and in a manner calling for the consideration of it by the state supreme court under its established system of practice and pleading, the refusal of the trial court and of the supreme court to admit the testimony tendered in support of such claim is not a denial of a Federal right which this court can review (*Baldwin v. Kansas*, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709), and therefore, for want of jurisdiction, the writ of error is dismissed.

(242 U. S. 526)

THOMAS CUSACK COMPANY, Plff. in Err.,

v.

CITY OF CHICAGO et al.

COURTS ⇨366(8)—ERROR TO STATE COURT—SCOPE OF REVIEW—QUESTION OF LOCAL LAW.

1. The decision of the highest court of a state that a certain municipal ordinance, challenged as repugnant to the Federal Constitution, is within the scope of the powers conferred by the state legislature upon a municipality, is conclusive upon the Federal Supreme Court on writ of error to the state court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 962, 963; Dec. Dig. ⇨366(8).]

MUNICIPAL CORPORATIONS ⇨602—POLICE POWER—VALIDITY OF MUNICIPAL ORDINANCE—BILLBOARDS.

2. A municipal ordinance passed under authority delegated by the state legislature to regulate or control the construction and maintenance of billboards is a valid exercise of the police power unless it is clearly unreasonable and arbitrary.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. ⇨602.]

CONSTITUTIONAL LAW ⇨240(1), 296(2) — DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS — POLICE POWER — REGULATING BILLBOARDS.

3. The erection of any billboard or sign-

board over 12 square feet in area in any block in which one half of the buildings on both sides of the street are used exclusively for residence purposes, without first obtaining the written consent of the owners of a majority of the frontage on both sides of the street in such block, may be prohibited in the exercise of the state's police power, and such prohibition works no denial to a corporation engaged in outdoor advertising of either the due process of law or equal protection of the laws guaranteed by the 14th Amendment to the Federal Constitution.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 688, 693, 697, 698, 825-829; Dec. Dig. ⇨240(1), 296(2).]

[No. 126.]

Argued December 20 and 21, 1916. Decided January 15, 1917.

IN ERROR to the Supreme Court of the State of Illinois to review a decree which reversed, with directions to dismiss the bill, a decree of the Superior Court of Cook County, in that state, restraining the enforcement of a municipal ordinance regulating the erection and maintenance of billboards in residence districts. Affirmed.

See same case below, 267 Ill. 344, 108 N. E. 340, Ann. Cas. 1916C, 488.

The facts are stated in the opinion.

Messrs. John S. Hummer and James E. McGrath for plaintiff in error.

Messrs. Loring R. Hoover, Chester E. Cleveland, and Samuel A. Ettelson for defendants in error.

* Mr. Justice Clarke delivered the opinion of the court:

In this proceeding the plaintiff in error, a corporation engaged in "outdoor advertising," claims that § 707 of article 23 of an ordinance of the city of Chicago, governing the erection and maintenance of billboards in that city, is unconstitutional.

This section is as follows:

"707. Frontage consents required.—It shall be unlawful for any person, firm or corporation to erect or construct any billboard or signboard in any block on any public street in which one half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent in writing of the owners or duly authorized agents of said owners owning a majority of the frontage of the property on both sides of the street in the block in which such billboard or signboard is to be erected, constructed or located. Such written consents shall be filed with the commissioner of buildings before a permit shall be issued for the erection, construction or location of such billboard or signboard."

The plaintiff in error expressly concedes in this court that it is within the police power of the city of Chicago to exercise within the city limits a reasonable regulation and control over the construction and maintenance of billboards and other similar structures. But it is contended that the section quoted is in terms "an arbitrary, unrestrained" exercise of power, which, if given effect, could be used without any regard "to the safety, health, morals, comfort, or welfare of the public," and that it therefore offends against the 5th and 14th Amendments to the Constitution of the United States.

Obviously, claims made under the 5th Amendment need not be considered (*Livingston v. Moore*, 7 Pet. 469, 551, 8 L. ed. 751, 781; *Lloyd v. Dollison*, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. Rep. 703), and there remains only the question whether the ordinance, if enforced, would work "a denial to the plaintiff in error of the equal protection of the laws," or would "deprive it of its property without due process of law."

The claimed infirmity in the ordinance consists in the requirement that before any billboard or signboard of over 12 square feet in area may be erected in any block in which one half of the buildings are used exclusively for residence purposes, the owners of a majority of the frontage of the property on both sides of the street in such block shall consent in writing thereto. This, it is claimed, is not an exercise by the city of power to regulate or control the construction and maintenance of billboards, but is a delegation of legislative power to the owners of a majority of the frontage of the property in the block "to subject the use to be made of their property by the minority owners of property in such block to the whims and caprices of their neighbors."

*The supreme court of the state of Illinois sustained the validity of the ordinance in an opinion (267 Ill. 344, 108 N. E. 340, Ann. Cas. 1916C, 488) which declares that the act of the legislature of that state, passed in 1912 (*Hurd's Stat.* 1913, chap. 24, ¶ 696) is a clear legislative declaration that the subject of billboard advertising shall be subject to municipal control.

It is settled for this court by this decision that the ordinance assailed is within the scope of the power conferred on the city of Chicago by the legislature, that it is to be treated as proceeding from the law-making power of the state, and that, therefore, it is a valid ordinance unless the record shows it to be clearly unreasonable and arbitrary. *Reinman v. Little Rock*, 237

U. S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511.

Upon the question of the reasonableness of the ordinance, much evidence was introduced upon the trial of the case, from which the supreme court finds that fires had been started in the accumulation of combustible material which gathered about such billboards; that offensive and insanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals. As bearing upon the limitation of the requirement of the section to blocks "used exclusively for residence purposes," the court finds that the trial court erroneously refused to allow testimony to be introduced tending to show that residence sections of the city did not have as full police or fire protection as other sections have, and that the streets of such sections are more frequented by unprotected women and children than, and are not so well lighted as, other sections of the city are, and that most of the crimes against women and children are offenses against their persons.

Neglecting the testimony which was excluded by the trial court, there remains sufficient to convincingly show the propriety of putting billboards, as distinguished from buildings and fences, in a class by themselves (*St. Louis*Gunning Advertising Co. v. St. Louis*, 235 Mo. 99, 137 S. W. 929), and to justify the prohibition against their erection in residence districts of a city in the interest of the safety, morality, health, and decency of the community.

The claim is palpably frivolous that the validity of the ordinance is impaired by the provision that such billboards may be erected in such districts as are described if the consent in writing is obtained of the owners of a majority of the frontage on both sides of the street in any block in which such billboard is to be erected. The plaintiff in error cannot be injured, but obviously may be benefited, by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property. *Tyler v. Judges of Ct. of Registration*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 58 L. ed. 713, 34 Sup. Ct. Rep. 359. To this we may add that such a reference to a neighborhood of the propriety of having carried on within it trades or occupations which are properly the subject of regulation in the exer-

cise of the police power is not uncommon in laws which have been sustained against every possible claim of unconstitutionality, such as the right to maintain saloons (*Swift v. People*, 162 Ill. 534, 33 L.R.A. 470, 44 N. E. 528), and as to the location of garages (*People ex rel. Busching v. Ericsson*, 263 Ill. 368, L.R.A.1915D, 607, 105 N. E. 315, Ann. Cas. 1915C, 183). Such treatment is plainly applicable to offensive structures.

The principles governing the exercise of the police power have received such frequent application and have been so elaborated upon in recent decisions of this court, concluding with *Armour & Co. v. North Dakota*, 240 U. S. 510, 514, 60 L. ed. 771, 775, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548, that further discussion of them would not be profitable, especially in a case falling as clearly as this one does within their scope. We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police*power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. *Jacobson v. Massachusetts*, 197 U. S. 11, 30, 49 L. ed. 643, 651, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765. And this, for the reasons stated, cannot be said of the ordinance which we have here.

The plaintiff in error relies chiefly upon *Eubank v. Richmond*, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192. A sufficient distinction between the ordinance there considered and the one at bar is plain. The former left the establishment of the building line untouched until the lot owners should act, and then made the street committee the mere automatic register of that action, and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one half of the lot owners to remove a restriction from the other property owners.

This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances.

It results that the judgment of the Supreme Court of Illinois will be affirmed.

Mr. Justice McKenna, dissents.

(242 U. S. 476)

F. DREW CAMINETTI, Petitioner,
v.

UNITED STATES. (No. 139.)

MAURY I. DIGGS, Petitioner,
v.

UNITED STATES. (No. 163.)

L. T. HAYS, Petitioner,
v.

UNITED STATES. (No. 464.)

STATUTES 217, 220 — CONSTRUCTION—
NAME OF ACT—COMMITTEE REPORT.

1. The name given to a congressional enactment by way of designation or description in the act or the report of the committee accompanying the introduction of the bill into the House of Representatives cannot change the plain implication of the words of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 293, 298; Dec. Dig. 217, 220.]

PROSTITUTION 1—WHITE SLAVE TRAFFIC—NONMERCANTILE TRANSPORTATION.

2. Transportation of a woman in interstate commerce in order that she may be debauched or become a mistress or concubine, although unaccompanied by the expectation of pecuniary gain, is condemned by the provisions of the White Slave Traffic Act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Comp. Stat. 1913, § 8813), making it an offense knowingly to transport or cause to be transported in interstate commerce any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose to induce such woman or girl to become a prostitute, or to give herself up to debauchery, or engage in any other immoral practice.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. 1.]

COMMERCE 16—POWER OF CONGRESS —
WHITE SLAVE TRAFFIC.

3. Construing as applicable to transportation, unaccompanied by the expectation of pecuniary gain, the provisions of the White Slave Traffic Act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Comp. Stat. 1913, § 8813), making criminal the transportation or the causing to be transported, or the obtaining, aiding, or assisting in the transportation in interstate commerce of women or girls for the purpose of prostitution, debauchery, or other immoral purposes, does not render the statute invalid as in excess of the constitutional power of Congress over interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 2; Dec. Dig. 16.]

CRIMINAL LAW ⚡787(1) — **ACCUSED AS WITNESS — COMMENT ON OMISSIONS IN TESTIMONY—SELF-CRIMINATION.**

4. An accused who takes the stand in his own behalf and voluntarily testifies for himself may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence in which he participated, and concerning which he is fully informed, without subjecting his silence to the inferences naturally to be drawn from it, and justifying comment by the court in his charge to the effect that the jury may take this omission into consideration in reaching a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1902; Dec. Dig. ⚡787(1).]

CRIMINAL LAW ⚡1173(2)—**APPEAL—REFUSAL TO INSTRUCT—TESTIMONY OF ACCOMPLICES.**

5. A conviction under the White Slave Traffic Act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Comp. Stat. 1913, § 8813), making criminal the transportation or the causing to be transported, or the obtaining, aiding, or assisting in the transportation in interstate commerce of women or girls for the purpose of prostitution, debauchery, or other immoral purposes, will not be reversed because of the refusal of the trial court to instruct the jury that the testimony of the women was that of accomplices, and was to be received with great caution, and to be believed only when corroborated by other testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3165; Dec. Dig. ⚡1173(2).]

[Nos. 139, 163, and 464.]

Argued November 13 and 14, 1916. Decided January 15, 1917.

TWO WRITS of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review judgments which affirmed convictions in the District Court of the United States for the Northern District of California of violations of the White Slave Traffic Act. Affirmed. Also **ON WRIT** of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a conviction in the District Court for the Western District of Oklahoma of a violation of the White Slave Traffic Act. Affirmed.

See same case below, in Nos. 139 and 163, 136 C. C. A. 147, 220 Fed. 545, in No. 464, 145 C. C. A. 294, 231 Fed. 106.

The facts are stated in the opinion.

Messrs. **Joseph W. Bailey**, **Marshall B. Woodworth**, and **Robert T. Devlin** for petitioners in Nos. 139 and 163.

Mr. Harry O. Glasser for petitioner in No. 464.

Assistant Attorney General Wallace for the United States.

* **Mr. Justice Day** delivered the opinion of the court:

These three cases were argued together, and may be disposed of in a single opinion. In each of the cases there was a conviction and sentence for violation of the so-called White Slave Traffic Act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Comp. Stat. 1913, § 8813), the judgments were affirmed by the circuit courts of appeals, and writs of certiorari bring the cases here.

In the Caminetti Case, the petitioner was indicted in the United States district court for the northern district of California, upon the 6th day of May, 1913, for alleged violations of the act. The indictment was in four counts, the first of which charged him with transporting and causing to be transported, and aiding and assisting in obtaining transportation for a certain woman from Sacramento, California, to Reno, Nevada, in interstate commerce, for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his mistress and concubine. A verdict of not guilty was returned as to the other three counts of this indictment. As to the first count, defendant was found guilty and sentenced to imprisonment for eighteen months and to pay a fine of \$1,500. Upon writ of error to the United States circuit court of appeals for the ninth circuit, that judgment was affirmed. 136 C. C. A. 147, 220 Fed. 545.

Diggs was indicted at the same time as was Caminetti, upon six counts, with only four of which are we concerned, inasmuch as there was no verdict upon the last two. The first count charged the defendant with transporting and causing to be transported, and aiding and assisting in obtaining transportation for, a certain woman from Sacramento, California, to Reno, Nevada, for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his concubine and mistress. The second count charged him with a like offense as to another woman (the companion of Caminetti) in transportation, etc., from Sacramento to Reno, that she might become the mistress and concubine of Caminetti. The third count charged him (Diggs) with procuring a ticket for the first-mentioned woman from Sacramento to Reno in interstate commerce, with the intent that she should become his concubine and mistress. The fourth count made a like charge as to the girl companion of Caminetti. Upon trial and verdict of guilty on these four counts, he was sentenced to imprisonment for two years and to pay a fine of \$2,000. As in the Cami-

netti case, that judgment was affirmed by the circuit court of appeals. 136 C. C. A. 147, 220 Fed. 545.

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In the Hays Case, upon June 26th, 1914, an indictment was returned in the United States district court for the western district of Oklahoma against Hays and another, charging violations of the act. The first count charged the said defendants with having, on March 17th, 1914, persuaded, induced, enticed, and coerced a certain woman, unmarried and under the age of eighteen years, from Oklahoma City, Oklahoma, to the city of Wichita, Kansas, in interstate commerce and travel, for the purpose and with intent then and there to induce and coerce the said woman, and intending that she should be induced and coerced to engage in prostitution, debauchery, and other immoral practices, and did then and there, in furtherance of such purposes, procure and furnish a railway ticket entitling her to passage over the line of railway, to wit, the Atchison, Topeka, & Santa Fe Railway, and did then and there and thereby, knowingly entice and cause the said woman to go and to be carried and transported as a passenger in interstate commerce upon said line of railway. The second count charged that on the same date the defendants persuaded, induced, enticed, and coerced the same woman to be transported from Oklahoma City to Wichita, Kansas, with the purpose and intent to induce and coerce her to engage in prostitution, debauchery, and other immoral practices at and within the state of Kansas, and that they enticed her and caused her to go and be carried and transported as a passenger in interstate commerce from Oklahoma City, Oklahoma, to Wichita, Kansas, upon a line and route of a common carrier, to wit: The Atchison, Topeka, & Santa Fe Railway. Defendants were found guilty by a jury upon both counts, and Hays was sentenced to imprisonment for eighteen months. Upon writ of error to the circuit court of appeals for the eighth circuit, judgment was affirmed (145 C. C. A. 294, 231 Fed. 106).

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It is contended that the act of Congress is intended to reach only "commercialized vice," or the traffic in women*for gain, and that the conduct for which the several petitioners were indicted and convicted, however reprehensible in morals, is not within the purview of the statute when properly construed in the light of its history and the purposes intended to be accomplished by its enactment. In none of the cases was it charged or proved that the transportation was for gain or for the purpose of furnishing women for prostitution for hire, and it is insisted that, such being the

case, the acts charged and proved, upon which conviction was had, do not come within the statute.

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. *Lake County v. Rollins*, 130 U. S. 602, 670, 671, 32 L. ed. 1060, 1063, 1064, 9 Sup. Ct. Rep. 651; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 33, 39 L. ed. 601, 610, 15 Sup. Ct. Rep. 508; *United States v. Lexington Mill & Elevator Co.* 232 U. S. 399, 409, 58 L. ed. 658, 661, L.R.A.1915B, 774, 34 Sup. Ct. Rep. 337; *United States v. First Nat. Bank*, 234 U. S. 245, 258, 58 L. ed. 1298, 1303, 34 Sup. Ct. Rep. 846.

Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. *Hamilton v. Rathbone*, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for "any other immoral purpose," or with the intent and purpose to induce any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them.* To cause a woman or girl to be transported for the purposes of debauchery, and for an immoral purpose, to wit, becoming a concubine or mistress, for which Caminetti and Diggs were convicted; or to transport an unmarried woman, under eighteen years of age, with the intent to induce her to engage in prostitution, debauchery, and other immoral practices, for which Hays was convicted, would seem by the very statement of the facts to embrace transportation for purposes denounced by the act, and therefore fairly within its meaning.

While such immoral purpose would be more culpable in morals and attributed to baser motives if accompanied with the expectation of pecuniary gain, such considerations do not prevent the lesser offense against morals of furnishing transportation in order that a woman may be debauched, or become a mistress or a concubine, from being the execution of purposes

within the meaning of this law. To say the contrary would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations.

In *United States v. Bitty*, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396, it was held that the act of Congress against the importation of alien women and girls for the purpose of prostitution "and any other immoral purpose" included the importation of an alien woman to live in concubinage with the person importing her. In that case this court said:

"All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of 'prostitution.' It refers to women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to 'the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.' *Murphy v. Ramsey*, 114 U. S. 15, 45, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747. . . . Now the addition in the last statute of the words, 'or for any other immoral purpose,' after the word 'prostitution,' must have been made for some practical object. Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for purposes of 'prostitution.' In forbidding the importation of alien women 'for any other immoral purpose,' Congress evidently thought that there were purposes in connection with the importations of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that, in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words 'any other immoral purpose' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 *Lewis's Sutherland, Stat. Constr.* § 423, and authorities cited. But that rule cannot avail the accused in this case; for the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the pur-

pose strictly of prostitution. The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse."

This definition of an immoral purpose was given prior to the enactment of the act now under consideration, and *must be presumed to have been known to Congress when it enacted the law here involved. (See the sections of the act¹ set forth in the margin.)

*But it is contended that though the words are so plain that they cannot be misapprehended when given their usual and ordinary interpretation, and although the sections in which they appear do not in terms limit the offense defined and punished to acts of "commercialized vice," or the furnishing or procuring of transportation of women for debauchery, prostitution, or immoral practices for hire, such limited purpose is to be attributed to Congress and engrafted upon the act in view of the language of § 8 and the report which ac-

¹ Sections 2, 3, and 4 of the act are as follows:

"Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not

companied the law upon its introduction into and subsequent passage by the House of Representatives.

In this connection, it may be observed that while the title of an act cannot overcome the meaning of plain and unambiguous words used in its body (*United States v. Fisher*, 2 Cranch, 358, 386, 2 L. ed. 304, 313; *Goodlett v. Louisville & N. R. Co.* 122 U. S. 391, 408, 30 L. ed. 1230, 1233, 7 Sup. Ct. Rep. 1254; *Patterson v. The Eudora*, 190 U. S. 169, 172, 47 L. ed. 1002, 1003, 23 Sup. Ct. Rep. 821; *Cornell v. Coyne*, 192 U. S. 418, 430, 48 L. ed. 504, 509, 24 Sup. Ct. Rep. 383; *Lapina v. Williams*, 232 U. S. 78, 92, 58 L. ed. 515, 520, 34 Sup. Ct. Rep. 196), the title of this act embraces the regulation of interstate commerce "by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes." It is true that § 8 of the act provides that it shall be known and referred to as the "White Slave Traffic Act," and the report accompanying the introduction of the same into the House of Representatives set forth the fact that a material portion of the legislation suggested was to meet conditions which had arisen in the past few years, and that the legislation was needed to put a stop to a villainous interstate and international traffic in women and girls. Still, the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.

more than five years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall

Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation (*Blake v. National City Bank*, 23 Wall. 307, 319, 23 L. ed. 119, 120; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 42, 39 L. ed. 601, 613, 15 Sup. Ct. Rep. 508; *Chesapeake & P. Teleph. Co. v. Manning*, 186 U. S. 238, 246, 46 L. ed. 1144, 1147, 22 Sup. Ct. Rep. 881; *Binns v. United States*, 194 U. S. 486, 495, 48 L. ed. 1087, 1090, 24 Sup. Ct. Rep. 816). But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *Mackenzie v. Hare*, 239 U. S. 299, 308, 60 L. ed. 297, 300, 36 Sup. Ct. Rep. 106.

The fact, if it be so, that the act as it is written opens the door to blackmailing operations upon a large scale, is no reason why the courts should refuse to enforce it according to its terms, if within the constitutional authority of Congress. Such considerations are more appropriately addressed to the legislative branch of the government, which alone had authority to enact and may, if it sees fit, amend the law. *Lake County v. Rollins*, 130 U. S. 673, 32 L. ed. 1064, 9 Sup. Ct. Rep. 651.

be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 4. That any person who shall knowingly persuade, induce, entice or coerce any woman or girl under the age of eighteen years, from any state or territory or the District of Columbia, to any other state or territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court."

It is further insisted that a different construction of the act than is to be gathered from reading it is necessary in order to save it from constitutional objections, fatal to its validity. The act has its constitutional sanction in the power of Congress over interstate commerce. The broad character of that authority was declared once for all in the judgment pronounced by this court, speaking by Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, and has since been steadily adhered to and applied to a variety of new conditions as they have arisen.

It may be conceded, for the purpose of the argument, that Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey. But this act is not concerned with such instances. It seeks to reach and punish the movement in interstate commerce of women and girls with a view to the accomplishment of the unlawful purposes prohibited.

The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

Moreover, this act has been sustained against objections affecting its constitutionality of the character now urged. *Hoke v. United States*, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A. (N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; *Athanasaw v. United States*, 227 U. S. 326, 57 L. ed. 528, 33 Sup. Ct. Rep. 285, Ann. Cas. 1913E, 911; *Wilson v. United States*, 232 U. S. 563, 58 L. ed. 728, 34 Sup. Ct. Rep. 347. In the *Hoke* Case, the constitutional objections were given consideration and denied upon grounds fully stated in the opinion (pages 308 et seq.). It is true that the particular case arose from a prosecution of one charged with transporting a woman for the purposes of prostitution in violation of the act. But, holding as we do, that the purposes and practices for which the transportation in these cases was procured are equally within the denunciation of the act, what was said in the *Hoke* Case as to the power of Congress over the subject is as applicable now as it was then.

After reviewing the *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 357, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561, and other cases in this court decided since the decision of that

case, it was said in the *Hoke* Case (page 323):

"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several states;' that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Cooley*, Const. Lim. 7th ed. 856. We have no hesitation, therefore, in pronouncing the act of June 25, 1910, a legal exercise of the power of Congress."

Notwithstanding this disposition of the questions concerning the construction and constitutionality of the act, certain of the questions made are of sufficient gravity to require further consideration.

In the *Diggs* Case, after referring to the fact that the defendant had taken the stand in his own behalf, and that his testimony differed somewhat from that of the girls who had testified in the case, and instructing the jury that it was their province to ascertain the truth of the matter, the court further said: "After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with which that trip was taken, contenting himself by merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so, no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that

the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

This instruction, it is contended, was error in that it permitted the jury to draw inferences against the accused from failure to explain incriminating circumstances when it was within his power to do so, and thus operated to his prejudice and virtually made him a witness against himself, in derogation of rights secured by the 5th Amendment to the Federal Constitution.

There is a difference of opinion expressed in the cases upon this subject, the circuit court of appeals in the eighth circuit holding a contrary view, as also did the circuit court of appeals in the first circuit. See *Balliet v. United States*, 64 C. C. A. 201, 129 Fed. 689; *Myrick v. United States*, 134 C. C. A. 619, 219 Fed. 1. We think the better reasoning supports the view sustained in the court of appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself (Act of March 16, 1878, 20 Stat. at L. 30, chap. 37, Comp. Stat. 1913, § 1465), he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

The accused, of all persons, had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him. The instruction to the jury concerning the failure of the accused to explain acts of an incriminating nature which the evidence for the prosecution tended to establish against him, and the inference to be drawn from his silence, must be read in connection with the statement made in this part of the charge which clearly shows that

the court was speaking with reference to the defendant's silence as to the trip to Reno with the girls named in the indictment, and as to the facts, circumstances, and intent with which that trip was taken; and the jury was told that it had a right to take into consideration that omission.

The court did not put upon the defendant the burden* of explaining every inculpatory fact shown or claimed to be established by the prosecution. The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his own behalf. We agree with the circuit court of appeals that it was the privilege of the trial court to call the attention of the jury in such manner as it did to this omission of the accused when he took the stand in his own behalf.

See, in this connection, *Brown v. Walker*, 161 U. S. 591, 597, 40 L. ed. 819, 821, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *Sawyer v. United States*, 202 U. S. 150, 165; 50 L. ed. 972, 979, 26 Sup. Ct. Rep. 575, 6 Ann. Cas. 269; *Powers v. United States*, 223 U. S. 303, 314, 56 L. ed. 448, 452, 32 Sup. Ct. Rep. 281.

It is urged as a further ground of reversal of the judgments below that the trial court did not instruct the jury that the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case. We agree with the circuit court of appeals that the requests in the form made should not have been given. In *Holmgren v. United States*, 217 U. S. 509, 54 L. ed. 861, 30 Sup. Ct. Rep. 588, 19 Ann. Cas. 778, this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them. 1 Bishop, *Crim. Proc.* 2d ed. § 1081, and cases cited in the note.

Much is said about the character of the testimony adduced and as to certain facts tending to establish the guilt or innocence of the accused. This court does not weigh the evidence in a proceeding of this character, and it is enough to say that there was substantial testimony tending to support the verdicts rendered in the trial courts. Other objections are urged upon

our attention, but we find in none of them a sufficient reason for reversing the judgments of the Circuit Courts of Appeals in these cases.

The judgment in each of the cases is affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of these cases.

Mr. Justice McKenna, dissenting:

Undoubtedly, in the investigation of the meaning of a statute we resort first to its words, and, when clear, they are decisive. The principle has attractive and seemingly disposing simplicity, but that it is not easy of application, or, at least, encounters other principles, many cases demonstrate. The words of a statute may be uncertain in their signification or in their application. If the words be ambiguous, the problem they present is to be resolved by their definition; the subject matter and the lexicons become our guides. But here, even, we are not exempt from putting ourselves in the place of the legislators. If the words be clear in meaning, but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty. And for this a realization of conditions that provoked the statute must inform our judgment. Let us apply these observations to the present case.

The transportation which is made unlawful is of a woman or girl "to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice." Our present concern is with the words "any other immoral practice," which, it is asserted, have a special office. The words are clear enough as general descriptions; they fail in particular designation; they are class words, not specifications. *Are they controlled by those which precede them? If not, they are broader in generalization and include those that precede them, making them unnecessary and confusing. To what conclusion would this lead us? "Immoral" is a very comprehensive word. It means a dereliction of morals. In such sense it covers every form of vice, every form of conduct that is contrary to good order. It will hardly be contended that in this sweeping sense it is used in the statute. But, if not used in such sense, to what is it limited and by what limited? If it be admitted that it is limited at all, that ends the imperative effect assigned to it in the opinion of the court. But not insisting quite on that, we ask again, By what is it limited? By its context, necessarily, and the purpose of the statute.

For the context I must refer to the stat-

ute; of the purpose of the statute Congress itself has given us illumination. It devotes a section to the declaration that the "act shall be known and referred to as the 'White Slave Traffic Act.'" And its prominence gives it prevalence in the construction of the statute. It cannot be pushed aside or subordinated by indefinite words in other sentences, limited even there by the context. It is a peremptory rule of construction that all parts of a statute must be taken into account in ascertaining its meaning, and it cannot be said that § 8 has no object. Even if it gives only a title to the act, it has especial weight. *United States v. Union P. R. Co.* 91 U. S. 72, 82, 23 L. ed. 224, 229. But it gives more than a title; it makes distinctive the purpose of the statute. The designation "white slave traffic" has the sufficiency of an axiom. If apprehended, there is no uncertainty as to the conduct it describes. It is commercialized vice, immoralities having a mercenary purpose, and this is confirmed by other circumstances.

The author of the bill was Mr. Mann, and in reporting it from the House committee on interstate and foreign commerce he declared for the committee that it was not*the purpose of the bill to interfere with or usurp in any way the police power of the states, and further, that it was not the intention of the bill to regulate prostitution or the places where prostitution or immorality was practised, which were said to be matters wholly within the power of the states, and over which the Federal government had no jurisdiction. And further explaining the bill, it was said that the sections of the act had been "so drawn that they are limited to the cases in which there is an act of transportation in interstate commerce of women for the purposes of prostitution." And again:

"The White Slave Trade.—A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the states in the exercise of their police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panders and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution." *Cong. Rec.* vol. 50, pp. 3368, 3370.

In other words, it is vice as a business at which the law is directed, using inter-

state commerce as a facility to procure or distribute its victims.

In 1912 the sense of the Department of Justice was taken of the act in a case where a woman of twenty-four years went from Illinois, where she lived, to Minnesota, at the solicitation and expense of a man. She was there met by him and engaged with him in immoral practices like those for which petitioners were convicted. The assistant district attorney forwarded her statement to the Attorney General, with the comment that the element of traffic was absent from the transaction and that therefore, in his opinion, it was not "within the spirit and intent of the Mann Act."² Replying, the Attorney General expressed his concurrence in the view of his subordinate.³

Of course, neither the declarations of the report of the committee on interstate commerce of the House nor the opinion of the Attorney General are conclusive of the meaning of the law, but they are highly persuasive. The opinion was by one skilled in the rules and methods employed in the interpretation or construction of laws, and informed, besides, of the conditions to which the act was addressed. The report was by the committee charged with the duty of investigating the necessity for the act, and to inform the House of the results of that investigation, both of evil and remedy. The report of the committee has, therefore, a higher quality than debates on the floor of the House. The representations of the latter may indeed be ascribed to the exaggerations of advocacy or opposition. The report of a committee is the execution of a duty and has the sanction of duty. There is a presumption, therefore, that the

² "Careful consideration of the facts and circumstances as related by Miss Cox fails to convince me that her case came within the spirit and intent of the Mann act. The element of traffic is entirely absent from this transaction. It is not a case of prostitution or debauchery and the general words 'or other immoral practice' should be qualified by the particular preceding words and be read in the light of the rule of ejusdem generis. This view of the statute is the more reasonable when considered in connection with § 8, where Congress employs the terms 'slave' and 'traffic' as indicative of its purpose to suppress certain forms of abominable practice connected with the degradation of women for gain."

³ "I agree with your conclusion that the facts and circumstances set forth in your letter and its inclosure do not bring the matter within the true intent of the White Slave Traffic Act, and that no prosecution against Edwards should be instituted in the Federal courts unless other and different facts are presented to you."

measure it recommends has the purpose it declares and will accomplish it as declared.

* This being the purpose, the words of the statute should be construed to execute it, and they may be so construed even if their literal meaning be otherwise. In *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511, there came to this court for construction an act of Congress which made it unlawful for anyone in any of the United States "to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . under contract or agreement . . . to perform labor or service of any kind [italics mine] in the United States, its territories or the District of Columbia." The Trinity Church made a contract with one E. W. Warren, a resident of England, to remove to the city of New York and enter its service as rector and pastor. The church was proceeded against under the act and the circuit court held that it applied, and rendered judgment accordingly. 36 Fed. 303.

It will be observed that the language of the statute is very comprehensive,—fully as much so as the language of the act under review,—having no limitation whatever from the context; and the circuit court, in submission to what the court considered its imperative quality, rendered judgment against the church. This court reversed the judgment, and, in an elaborate opinion by Mr. Justice Brewer, declared that "it is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." And the learned justice further said: "This has been often asserted, and the reports are full of cases illustrating its application."

It is hardly necessary to say that the application of the rule does not depend upon the objects of the legislation, to be applied or not applied as it may exclude or include good things or bad things. Its principle is the simple one that the words of a statute will be extended or restricted to execute its purpose.

* Another pertinent illustration of the rule is *Reiche v. Smythe*, 13 Wall. 162, 20 L. ed. 566, in which the court declared that if at times it was its duty to regard the words of a statute, at times it was also its duty to disregard them, limit or extend them, in order to execute the purpose of the statute. And applying the principle, it decided that in a tariff act the provision that a duty should be imposed on horses, etc., and other live ani-

mals imported from foreign countries should not include canary birds, ignoring the classification of nature. And so again in *Silver v. Ladd*, 7 Wall. 219, 19 L. ed. 138, where the benefit of the Oregon Donation Act was extended by making the words "single man" used in the statute mean an unmarried woman, disregarding a difference of genders clearly expressed in the law.

The rule that these cases illustrate is a valuable one and in varying degrees has daily practice. It not only rescues legislation from absurdity (so far the opinion of the court admits its application), but it often rescues it from invalidity,—a useful result in our dual form of governments and conflicting jurisdictions. It is the dictate of common sense. Language, even when most masterfully used, may miss sufficiency and give room for dispute. Is it a wonder, therefore, that when used in the haste of legislation, in view of conditions perhaps only partly seen or not seen at all, the consequences, it may be, beyond present foresight, it often becomes necessary to apply the rule? And it is a rule of prudence and highest sense. It rescues from crudities, excesses, and deficiencies, making legislation adequate to its special purpose, rendering unnecessary repeated qualifications, and leaving the simple and best exposition of a law the mischief it was intended to redress. Nor is this judicial legislation. It is seeking and enforcing the true sense of a law notwithstanding its imperfection or generality of expression.

There is much in the present case to tempt to a violation of the rule. Any measure that protects the purity of women from assault or enticement to degradation finds an instant advocate in our best emotions; but the judicial function cannot yield to emotion—it must, with poise of mind, consider and decide. It should not shut its eyes to the facts of the world and assume not to know what everybody else knows. And everybody knows that there is a difference between the occasional immoralities of men and women and that systematized and mercenary immorality epitomized in the statute's graphic phrase "white slave traffic." And it was such immorality that was in the legislative mind, and not the other. The other is occasional, not habitual,—inconspicuous,—does not offensively obtrude upon public notice. Interstate commerce is not its instrument as it is of the other, nor is prostitution its object or its end. It may, indeed, in instances, find a convenience in crossing state lines, but this is its accident, not its aid.

There is danger in extending a statute beyond its purpose, even if justified by a strict adherence to its words. The pur-

pose is studied, all effects measured, not left at random,—one evil practice prevented, opportunity given to another. The present case warns against ascribing such improvidence to the statute under review. Blackmailers of both sexes have arisen, using the terrors of the construction now sanctioned by this court as a help—indeed, the means—for their brigandage. The result is grave and should give us pause. It certainly will not be denied that legal authority justifies the rejection of a construction which leads to mischievous consequences, if the statute be susceptible of another construction.

United States v. Bitty, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396, is not in opposition. The statute passed upon was a prohibition against the importation of alien women or girls,—a statute, therefore, of broader purpose than the one under review. Besides, the statute finally passed upon was an amendment to a prior statute, and the words construed were an addition to the* prior statute, and necessarily, there-^{fore}, had an added effect. The first statute prohibited the importation of any alien woman or girl into the United States *for the purpose of prostitution* [italics mine]. The second statute repeated the words and added "or for any other immoral purpose." Necessarily there was an enlargement of purpose, and besides, the act was directed against the importation of foreign corruption, and was construed accordingly. The case, therefore, does not contradict the rule; it is an example of it.

For these reasons I dissent from the opinion and judgment of the court, expressing no opinion of the other propositions in the cases.

I am authorized to say that the CHIEF JUSTICE and Mr. Justice Clarke concur in this dissent.

(242 U. S. 503)

FRED VON BAUMBACH, Collector of Internal Revenue, Petitioner,

v.

SARGENT LAND COMPANY. (No. 286.)

FRED VON BAUMBACH, Collector of Internal Revenue, Petitioner,

v.

SUTTON LAND COMPANY. (No. 287.)

FRED VON BAUMBACH, Collector of Internal Revenue, Petitioner,

v.

KEARSARGE LAND COMPANY. (No. 288.)

INTERNAL REVENUE —9— EXCISE ON CORPORATIONS—"ORGANIZED FOR PROFIT."

1. Corporations formed by the owners

of lands for the purpose of handling the property and distributing the proceeds of its disposition are organized for profit, within the meaning of the Act of August 5, 1909 (36 Stat. at L. 112, chap. 6), § 38,¹ imposing an excise tax measured by annual net income upon the carrying on or the doing of business by corporations, joint stock companies, or associations organized for profit, and having a capital stock represented by shares.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. ☞9.]

INTERNAL REVENUE ☞9—EXCISE ON CORPORATION — DOING BUSINESS — REALTY COMPANIES—"ENGAGED IN BUSINESS."

2. Realty corporations organized for and actually engaged in such activities as handling large tracts of land owned by such corporations, leasing and selling parcels thereof, disposing of stumpage, seeing that their lessees under mining leases lived up to their contracts, and distributing the proceeds of such activities among the stockholders,—are engaged in business within the meaning of the Act of August 5, 1909 (36 Stat. at L. 112, chap. 6), § 38, imposing an excise tax measured by annual net income upon the doing or carrying on of business in a corporate or quasi corporate capacity.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. ☞9.]

For other definitions, see Words and Phrases, First and Second Series, Engaged.]

INTERNAL REVENUE ☞9—EXCISE ON CORPORATION—"INCOME"—ROYALTIES FROM MINING LEASES.

3. The so-called royalties received by the corporate owners of lands leased for long terms for the purpose of exploring for, and mining and removing, the merchantable iron ore therein, to persons who agreed to pay monthly a specified sum per ton for all ore mined and shipped the previous month, and to mine and ship a specified quantity of ore each year, and in default of this to pay for the minimum amount specified and take credit therefor, and apply such sums upon ore mined and shipped thereafter in excess of such minimum,—are income, within the meaning of the act of August 5, 1909 (36 Stat. at L. 112, chap. 6), § 38, imposing a tax measured by annual income upon the doing of business in a corporate or quasi corporate capacity.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. ☞9.]

For other definitions, see Words and Phrases, First and Second Series, Income.]

INTERNAL REVENUE ☞9—EXCISE ON CORPORATION—"DEPRECIATION" — EXHAUSTION OF MINE.

4. Exhaustion of the ore body resulting from the process of mining is not an element to be considered in determining the reasonable "depreciation" which, under the Act of August 5, 1909 (36 Stat. at L. 112, chap. 6), § 38, is to be deducted from the net annual income of the corporate mine owner when assessing the excise imposed by that act upon the doing of business in a corporate or quasi corporate capacity.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. ☞9.]

For other definitions, see Words and Phrases, First and Second Series, Depreciate.]

[Nos. 286, 287, 288.]

Argued December 13 and 14, 1916. Decided January 15, 1917.

THREE WRITS of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review judgments which affirmed judgments of the District Court for the District of Minnesota in favor of plaintiffs in actions to recover back certain taxes assessed under the Federal corporation tax law. Reversed.

The facts are stated in the opinion.

See same case below, 134 C. C. A. 649, 219 Fed. 31.

Assistant Attorney General Wallace for petitioner.

Messrs. John R. Van Derlip, Burt F. Lum, and Kenneth Taylor for respondents.

*Mr. Justice Day delivered the opinion of the court:

These three cases were argued and submitted together and involve practically the same facts. Suits were brought by the corporations named in the United States district court for the district of Minnesota against the collector of internal revenue, to recover certain taxes, paid under protest, assessed under the Corporation Tax Law of 1909 (36 Stat. at L. 11, 112, chap. 6), for the years 1909, 1910, and 1911. The judgments in the district court were for the respondents (207 Fed. 423), which judgments were affirmed in the circuit court of appeals (134 C. C. A. 649, 219 Fed. 31).

In 1890, John S. Pillsbury, George A. Pillsbury, and Charles A. Pillsbury, doing business together as John S. Pillsbury & Company, were the owners of large tracts of lands in northern Minnesota, which had been acquired for the timber and from which the timber had been cut, being valuable after such severance of the timber for the mineral deposits contained therein. In the year named, the Pillsburys entered into an arrangement with John M. Longyear and Russell M. Bennett, authorizing the latter two to explore the lands for iron deposits. In 1892, Longyear and Bennett having discovered valuable deposits of iron ore, a half interest in something over 10,000 acres of the lands was conveyed to them, the lands thereafter being owned by the Pillsburys, John, George, and Charles, each an undivided sixth, and John M. Longyear and Russell M. Bennett each an undivided fourth. In the year 1901, the Pillsburys having died, these corporations were formed under the laws of Minnesota. In 1906, the ownership of these leased lands was vested in the three corporations named as respondents in the proceedings. As originally organized, the nature of the business was stated to be "the buying, own-

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ing, exploring, and developing, leasing, improving, selling, and dealing in lands, tenements, and hereditaments, and the doing of all things* incidental to the things above specified." In December, 1909, the articles of incorporation were amended to read as follows: "The general purpose of the corporation is to unite in one ownership the undivided, fractional interests of its various stockholders in lands, tenements, and hereditaments, and to own such property, and, for the convenience of its stockholders, to receive and distribute to them the proceeds of any disposition of such property, at such times, in such amounts, and in such manner as the board of directors may determine."

All of the mining leases hereinafter mentioned, with the exception of a contract with the Van Buren Mining Company, were executed before the organization of the corporations. Each of these instruments provided that the owners of the property demised to the lessees, exclusively, all the lands covered by the descriptions, for the purpose of exploring for, mining and removing, the merchantable iron ore which might be found therein for and during the period named, usually fifty years. The lessees were given exclusive right to occupy and control the demised premises and to erect all necessary buildings, structures, and improvements thereon. Right was reserved to the lessors to enter for the purpose of measuring the amount of ore mined and removed and making observations of the operations in the mines. The lessees agreed to pay, in most cases, 25 cents per ton for all ore mined and removed, and to make such payments monthly for ore mined and shipped during the preceding month. The lessees agreed to mine and ship a specified quantity of ore in each year, and, in default of this, to pay the lessors for the minimum amount specified, and take credit therefor and apply such sums upon ore mined and shipped thereafter in excess of such minimum. The lessees were to pay the taxes and to keep the property free from encumbrances and liens. Right was reserved to* terminate the contract upon the failure of the lessees to comply with the terms thereof.

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The form of the leases is shown in exhibits 15 and 16, which were not in the printed record, owing to their length, but copies of which, pursuant to stipulation, have been sent to this court. An examination of exhibit 16 shows that the lessees had the right to terminate and surrender the lease by giving the lessors, or those having their estate in the premises, sixty days' written notice, and executing sufficient conveyances releasing all interest and right of

the lessees in the premises with any improvements thereon, and surrendering the same in good order and condition, etc., and that thereupon all liability of the lessees to taxes subsequently assessed on the demised premises or for rent thereof thereafter to accrue, or royalty on ores therefrom, except on account of ores removed, should cease and determine; the lessees to be liable for all ores removed from the premises not theretofore paid for, and to pay for the premises rent or royalty for the year in which termination should be made, or the portion thereof which should have expired, at the rate of \$12,500 per annum.

Since their organization the corporations have disposed of certain lands and have also disposed of the stumpage on some timber lands. Certain parcels were rented and leased, and a village was allowed to use part of the land for schoolhouse purposes, as well as another part for a public park.

To insure the proper carrying on of the mining operations, the companies employed another corporation, engaged in engineering and inspection of ore properties, to provide supervision and inspection of the work upon the respondents' properties, for which the inspecting company was paid from month to month, as statements were rendered.

The companies were assessed upon their gross income,* being the entire receipts* of the companies from royalties on the leases collected in the years 1909, 1910, and 1911, and some sums received from the sales of lots, lands, and stumpage, from which expenses and taxes were deducted, but no deduction was made upon account of the depletion of the ore in the properties, or on account of such sales.

The brief for the respondents states that these cases present for consideration four questions, which are:

"1. Are the respondents corporations organized for profit?

"2. Were the respondents carrying on or doing business during the years 1909, 1910, 1911?

"3. Were moneys received by the respondents during those years in payment for iron ore, under the contracts covering their mineral lands, gross income, or did they represent, in whole or in part, the conversion of the investment of the corporations from ore into money?

"4. If such moneys were gross income, are the respondents entitled to make any deduction therefrom on account of the depletion of their capital investment?"

As to the first question, whether these corporations were organized for profit, there can be no difficulty. They certainly do not come within the exceptional character of charitable or eleemosynary organizations

excepted from the operation of the act. We need not dwell upon the obvious purpose of these corporations, organized under the provisions of the Minnesota statute concerning companies organized for profit, to pursue gain and to profit because of their operations.

As to the second question: Were the respondents carrying on business, within the meaning of the Corporation Tax Act? This question was dealt with by this court in the first of the Corporation Tax Cases, *Flint v. Stone Tracy Co.* 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312. As the tax was there held to be assessed upon the privilege of doing business in a corporate capacity, it became necessary to inquire what it was to do business, and this court adopted with approval the definition, judicially approved in other cases, which included within the comprehensive term "business" "that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit."

In that case a number of realty and mining companies were dealt with, and the Park Realty Company, organized to deal in real estate, and engaged at the time in the management and leasing of a certain hotel, was held to be engaged in business. It was also held that the Clark Iron Company, organized under the laws of Minnesota, and owning and leasing ore lands for the purpose of carrying on mining operations, and receiving a royalty depending upon the quantity of ore mined, was engaged in business.

At the same time, and decided with the main corporation tax case, this court held, in the case of *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361, that a corporation which owned a piece of real estate which had been leased for one hundred and thirty years, at an annual rental of \$61,000, and which had amended its articles of incorporation so as to limit its purposes to holding the title to the property mentioned, and, for the convenience of its stockholders, to receiving and distributing from time to time the rentals that accrued under the lease and the proceeds of any disposition of the land, was not engaged in doing business within the meaning of the act, by reason of the fact that the corporation had practically gone out of business and had disqualified itself from any activity in respect thereto.

The act next came before this court in the case of *McCoach v. Minehill & S. H. R. Co.* 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419, in which it was held, distinguishing the case of the Park Realty Company, *supra*, and applying the case of *Zonne v. Minneapolis Syndicate*, *supra*, to the facts

before the court, that a corporation which had leased all its property to another, and was doing only what was necessary to receive and distribute the income therefrom among stockholders, was not doing business within the meaning of the act.

In *United States v. Emery, B. T. Realty Co.* 237 U. S. 28, 59 L. ed. 825, 35 Sup. Ct. Rep. 499, this court held that a corporation which merely kept up its organization, distributing rent received from a single lessee, was not doing business within the meaning of the act.

It is evident, from what this court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the court. The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails, and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain, and such activities as are essential to those purposes.

From the facts clearly established in these cases, we think these corporations were doing business, within the meaning of the act. They were organized for the purposes stated, and their activities included something more than the mere holding of property and the distribution of the receipts thereof. As was found by the district court, the evidence shows that these three companies sold, during each of the years named, quantities of real estate, and the same were not small. They sold stumpage from some of the properties which had been burned over, leased certain properties in the village of Hibbing, and granted leases to squatters. One of the companies made explorations and incurred expenses in the matter of test pits. They employed another company to see that the mining operations were properly carried on, and that the lessees lived up to the engagements of their contracts. "All these things indicate," said the learned district judge, "the doing of and engaging in business. It [the corporation] was doing the business of handling a large property, selling lots, and seeing that the lessees lived up to their contracts. If that is not engaging in business, I do not know what is." We agree that it certainly was doing business, and, as the Corporation Tax Act requires no particular amount of business in order to bring a company within its terms, we think these activities brought the corporations in question within that line of decisions in this court which have held such

corporations were doing business in a corporate capacity within the meaning of the law.

Next, is it true, as contended by the government, that the payments for ore mined, under the contracts covering the mineral lands, are income, within the meaning of the act; or do they represent the conversion of the investment of the corporations from ore into money?

The nature of these mining leases has been the subject of some difference of opinion in the courts. The circuit court of appeals in this case took the view announced in some of the earlier cases, notably in Pennsylvania, that the leases were such in name only, and were in fact conveyances of the ore in place as part of the realty, and that the so-called royalties merely represented payments for so much of the land, and were in no just sense income, but mere conversions of the capital.

These lands are situated in Minnesota, and this character of lease has long been familiar in that state, as a means of securing the development and operation of mining properties. Some years before the passage of the Corporation Tax Act, the supreme court of Minnesota had dealt with the character of such instruments. In the case of *State v. Evans*, 99 Minn. 220, 108 N. W. 958, 9 Ann. Cas. 520, that court, after a review of the English and American cases, said (page 227):

"The propriety of a lease for the purpose of developing and working mines is recognized by all of the cases, and the rule established by the great weight of authority that such leases do not constitute a sale of any part of the land," and, further, that iron or other materials derived from the usual operation of open mines or quarries constitute the rents and profits of the land, and belong to the tenant for life or years, and to the mortgagor after sale on foreclosure, and before the expiration of the time for redemption. The rule, however, has no application to unopened mines, in the absence of a contract, express or implied, for opening and leasing them."

The same doctrine was held in *Boeing v. Owsley*, 122 Minn. 190, 142 N. W. 129, and in the late case of *State v. Royal Mineral Asso.* 132 Minn. 232, 156 N. W. 128, in which the decision of the circuit court of appeals in this case, that such leases were merely conveyances of the ore in place, was brought to the attention of the court, and that conclusion expressly denied, the supreme court of Minnesota saying:

"We adhere to the doctrine of the *Evans* and *Boeing* Cases, and hold these instruments leases. It follows logically that the amounts stipulated to be paid by the lessees are rents, and they were expressly held by

this court to be rents in the *Boeing Case*, supra,—a case which involved a construction of the very leases now before the court. They are 'the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows.' Lord Dennison, in *Reg. v. Westbrook*, 10 Q. B. 178, 205, 2 New Sess. Cas. 599, 16 L. J. Mag. Cas. N. S. 87, 11 Jur. 515, 22 Eng. Rul. Cas. 623."

These conclusions of the supreme court of Minnesota are not only made concerning contracts in that state, such as are here involved, but are supported by many authorities.¹ Ordinarily, and as between private parties, there* is no question of the duty of the Federal court to follow these decisions of the Minnesota supreme court, as a rule of real property long established by state decisions. *Kuhn v. Fairmont Coal Co.* 215 U. S. 349, 360, 54 L. ed. 228, 234, 30 Sup. Ct. Rep. 140. Whether, in considering this Federal statute, we should be constrained to follow the established law of the state, as is contended by the government, we do not need to determine. The decisive question in this case is whether the payments made as so-called royalties amount to income so as to bring such payments within the scope of the Corporation Tax Act of 1909. The prior decisions of this court in *Stratton's Independence v. Howbert*, 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136, and *Stanton v. Baltic Min. Co.* 240 U. S. 103, 60 L. ed. 546, 36 Sup. Ct. Rep. 278, in which the *Stratton Case* was followed and approved, are decisive of this question. In the *Stratton Case*, certain questions were certified to this court from the circuit court of appeals for the eighth circuit. The case was tried upon an agreed statement of facts, from which it appeared, "as to the year 1909, that the company extracted from its lands during the year certain ores bearing gold and other precious metals, which were sold by it for sums largely in excess of

¹ *Raynolds v. Hanna*, 55 Fed. 783, 800, 801; *Tennessee Oil, Gas & Mineral Co. v. Brown*, 65 C. C. A. 524, 131 Fed. 696, 700 (opinion by Lurton, J.); *Browning v. Boswell*, 132 C. C. A. 168, 215 Fed. 826, 834; *Backer v. Penn Lubricating Co.* 89 C. C. A. 419, 162 Fed. 627; *Young v. Ellis*, 91 Va. 297, 21 S. E. 480; *Gartside v. Outley*, 58 Ill. 210, 11 Am. Rep. 59, 10 Mor. Min. Rep. 566; *Genet v. Delaware & H. Canal Co.* 136 N. Y. 602, 19 L.R.A. 127, 32 N. E. 1078; *Lacey v. Newcomb*, 95 Iowa, 287, 63 N. W. 704; *Austin v. Huntsville Coal & Min. Co.* 72 Mo. 535, 37 Am. Rep. 446, 9 Mor. Min. Rep. 115; *Brown v. Fowler*, 65 Ohio St. 507, 521, 63 N. E. 76; *Reg. v. Westbrook*, 10 Q. B. 178, 205, 2 New Sess. Cas. 599, 16 L. J. Mag. Cas. N. S. 87, 11 Jur. 515, 22 Eng. Rul. Cas. 623.

the cost of mining, extracting, and marketing the same; that the gross sales amounted to \$284,682.85, the cost of extracting, mining, and marketing amounted to \$190,939.42, and 'the value of said ores so extracted in the year 1909, when in place in said mine and before extraction thereof, was \$93,743.43.' With respect to the operations of the company for the year 1910, the agreed facts were practically the same, except as to dates and amounts. It does not appear that the so-called 'value of the ore in place,' or any other sum, was actually charged off upon the books of the company as depreciation." The circuit court of appeals certified three questions to this court: "I. Does § 38 of the act of Congress, entitled, 'An Act to Provide Revenue, Equalize Duties, and Encourage the Industries of the United States, and for Other Purposes,' approved August 5, 1909 (36 Stat. at L. p. 11, chap. 6), apply to mining corporations? II. Are the proceeds of ores mined by a corporation from its own premises income within the meaning of the aforementioned act of Congress? III. If the proceeds from ore sales are to be treated as income, is such a corporation entitled to deduct the value of such ore in place and before it is mined as depreciation within the meaning of § 38 of said act of Congress?" This court answered the first and second questions certified in the affirmative, and the third question in the negative. In that case, as here, it was contended that the proceeds of the mining operations resulting from a conversion of the capital represented by real estate into capital represented by cash are in no true sense income. As to this contention, this court said:

"The peculiar character of mining property is sufficiently obvious. Prior to development it may present to the naked eye a mere tract of land with barren surface, and of no practical value except for what may be found beneath. Then follow excavation, discovery, development, extraction of ores, resulting eventually, if the process be thorough, in the complete exhaustion of the mineral contents so far as they are worth removing. Theoretically, and according to the argument, the entire value of the mine, as ultimately developed, existed from the beginning. Practically, however, and from the commercial standpoint, the value—that is, the exchangeable or market value—depends upon different considerations. Beginning from little, when the existence, character, and extent of the ore deposits are problematical, it may increase steadily or rapidly so long as discovery and development outrun depletion, and the wiping out of the value by the practical exhaustion of the mine may be deferred for a

long term of years. While not ignoring the importance of such considerations, we do not think they afford the sole test for determining the legislative intent."

* This court held that it was not correct to say that a mining corporation was not engaged in business, but was merely occupied in converting its capital assets from one form to another, and that while a sale outright of a mining property might be fairly described as a conversion of the capital from land into money, the process of mining is, in a sense, equivalent to a manufacturing process, and however the operation shall be described, the transaction is indubitably "business" within the meaning of the Act of 1909, and the gains derived from it are properly the income from business, derived from capital, from labor, or from both combined. Further,

"as to the alleged inequality of operation between mining corporations and others, it is of course true that the revenues derived from the working of mines result to some extent in the exhaustion of the capital. But the same is true of the earnings of the human brain and hand when unaided by capital, yet such earnings are commonly dealt with in legislation as income. So it may be said of many manufacturing corporations that are clearly subject to the Act of 1909, especially of those that have to do with the production of patented articles; although it may be foretold from the beginning that the manufacture will be profitable only for a limited time, at the end of which the capital value of the plant must be subject to material depletion, the annual gains of such corporations are certainly to be taken as income for the purpose of measuring the amount of the tax."

It is contended that this case is inapplicable, because the facts disclose that the ores were being mined by a corporation upon its own premises. In our view, this makes no difference in the application of the principles upon which the case was decided. We think that the payments made by the lessees to the corporations now before the court were not in substance the proceeds of an outright sale of a mining property, but, in view of the terms of these instruments, were in fact rents or royalties to be paid upon entering into the premises and discovering, developing, and removing the mineral resources thereof, and as such must be held now, as then, to come fairly within the term "income" as intended to be reached and taxed under the terms of the Corporation Tax Act.

In *Stanton v. Baltic Min. Co.* 240 U. S. 103, 60 L. ed. 546, 36 Sup. Ct. Rep. 278, the Income Tax Law of 1913 [38 Stat. at L. 166, chap. 16, Comp. Stat. 1913, § 6319] was be-

fore the court, and it was contended that the clause in that act, limiting the mines to a maximum depreciation allowance of 5 per cent of their annual gross receipts or output of ore deposits, was unconstitutional; or, if that provision was inseparable from the rest of the act, the entire Income Tax Law, as applied to mining companies, was unconstitutional. Replying to the argument advanced by the mining company in that case, this court said that it rested upon the wholly fallacious assumption that, looked at from the point of view of substance, a tax on the product of a mine was necessarily a tax upon the property because of its ownership unless adequate allowance be made for the exhaustion of the ore body resulting from the working of the mine; and, further:

"We say wholly fallacious assumption because independently of the effect of the operation of the 16th Amendment, it was settled in *Stratton's Independence v. Howbert*, 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136, that such a tax is not a tax upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations."

We think it results from the principles announced in these decisions that in such cases as are now under consideration, the corporation being within the meaning of the act organized for profit and doing business, it is subject to the tax upon its income derived from the royalties under these leases.

This brings us to the fourth and last question in the case, as to whether allowance should be made for depreciation on account of the depletion of the property by removing the ores from the mines in question.

The contention of respondents in this behalf is, that if the court shall find that the moneys received by them under their mining contracts can be deemed gross income, in whole or in part, they are entitled to deduct therefrom, as a reasonable allowance for depreciation, the full amount of the money so received, for the reason that they represent a mere transmutation of capital assets, being, in legal effect, the selling price of their rights in the mineral deposits on or before January 1, 1909, and which, by virtue of the mining contracts then outstanding, had been previously sold for the exact amounts of such receipts.

The statement of facts in the case of *Stratton's Independence*, supra, as the court states on pages 418 and 419, developed from the certificate, was:

"From that certificate it appears that the case was submitted to the trial court and a verdict directed upon an agreed statement

of facts, and in that statement the gross proceeds of the sale of the ores during the year were diminished by the moneys expended in extracting, mining, and marketing the ores, and the precise difference was taken to be the value of the ores when in place in the mine. . . .

"It is clear that a definition of the 'value of the ore in place' has been intentionally adopted that excludes all allowances of profit upon the process of mining, and attributes the entire profit upon the mining operations to the mine itself. In short, the parties propose to estimate the depreciation of a mining property attributable to the extraction of ores according to principles that would be applicable if the ores had been removed by a trespasser."

It is true that in the case of *Stratton's Independence*, supra, the decision upon the question of depreciation was predicated upon the facts stated in the certificate presented to the court, and it was said, at page 422:

"It would, therefore, be improper for us at this time to enter into the question whether the clause, 'a reasonable allowance for depreciation of property, if any,' calls for an allowance on that account in making up the tax, where no depreciation is charged in practical bookkeeping; or the question whether depreciation, when allowable, may properly be based upon the depletion of the ore supply estimated otherwise than in the mode shown by the agreed statement of facts herein; for to do this would be to attribute a different meaning to the term 'value of the ore in place' than the parties have put upon it, and to instruct the circuit court of appeals respecting a question about which instruction has not been requested and concerning which it does not even appear that any issue is depending before that court."

It therefore follows that we have the question of depreciation in this case presented under somewhat different circumstances than were outlined in the opinion in the case of *Stratton's Independence*.

The statute permits deduction of "all losses sustained within the year . . . including a reasonable allowance for depreciation of property." What was here meant by "depreciation of property?" We think Congress used the expression in its ordinary and usual sense as understood by business men. It is common knowledge that business concerns usually keep a depreciation account, in which is charged off the annual losses for wear and tear, and obsolescence of structures, machinery, and personalty in use in the business. We do not think Congress intended to cover the necessary depreciation of a mine by exhaustion of the ores in de-

* 1526
termining the income to be assessed under the statute by including such exhaustion within the allowance made for depreciation. It would be a strained use of the term "depreciation" to say that, where ore is taken from a mine in the operation of the property, depreciation, as generally understood in business circles, follows. True, the value of the mine is lessened from the partial exhaustion of the property, and, owing to its peculiar character, cannot be replaced. But in no accurate sense can such exhaustion of the body of the ore be deemed depreciation. It is equally true that there seems to be a hardship in taxing such receipts as income, without some deduction arising from the fact that the mining property is being continually reduced by the removal of the minerals. But such consideration will not justify this court in attributing to depreciation a sense which we do not believe Congress intended to give to it in the Act of 1909.

It may be admitted that a fair argument arises from equitable considerations that, owing to the nature of mining property, an allowance in assessing taxes upon income should be made for the removal of the ore deposits from time to time. Congress recognized this fact in passing the income tax section of the Tariff Act of 1913 (§ II. 38 Stat. at L. 166, 167, chap. 16, Comp. Stat. 1913, §§ 6319-6322), when it permitted "a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business, not to exceed, in the case of mines, 5 per centum of the gross value at the mine of the output for the year for which the computation is made;" and in the Income Tax Law of September 8, 1916 (1915-1916 Stat. 756, 769), a reasonable allowance is made in the cases of mines for depletion thereof, "not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made." These provisions were not in the Act of 1909, and, as we have said, we think that Congress, in that act, used the term "depreciation" in its ordinary and usual significance. We therefore reach the conclusion that no allowance can be made of the character contended for as an item of depreciation.

* 1526
No contention is made in the brief for an allowance because of sales of stumpage, lots, and lands belonging to the companies, as an exhaustion of the capital assets, and evidently the case was brought for the purpose of testing the right of the companies to deduct the royalties agreed to be paid to them upon the removal of the minerals from the

lands from the sums for which they were severally assessed.

For the reasons stated, we think the Circuit Court of Appeals and the District Court erred in the judgments rendered, and the same will be reversed and the cases remanded to the District Court for further proceedings, if any are sought, upon claim of right to deduct the value of the lands, lots, and stumpage sold from the assessments made.

Judgments reversed.

Mr. Justice McReynolds took no part in the consideration and decision of these cases.

(242 U. S. 468)

WILLIAM H. BERRY, John E. Howe, and Davis C. Mott, Constituting the Board of Parol of Iowa, et al., Appts.,

v.

RUDOLPH DAVIS.

APPEAL AND ERROR 1107 — MOOT CASE—PROPER JUDGMENT — REVERSING FOR DISMISSAL OF BILL.

The moot character of the controversy presented by a bill to enjoin state officials from performing vasectomy upon the plaintiff, pursuant to a state statute, where, since the preliminary injunction appealed from was granted, the statute has been repealed and a new act passed which does not apply to the plaintiff, requires that the decree below be reversed and the case remanded with directions that the bill be dismissed without costs to either party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4399-4404; Dec. Dig. 1107.]

[No. 47.]

Submitted October 26, 1916. Decided January 15, 1917.

APPEAL from the District Court of the United States for the Southern District of Iowa to review a decree enjoining state officials from performing vasectomy pursuant to the provisions of a state statute. Reversed, with directions to dismiss the bill without costs to either party.

See same case below, 216 Fed. 413.

The facts are stated in the opinion.

Mr. George Cosson, Attorney General of Iowa, and Mr. Ross R. Mowry for appellants.

No appearance for appellee.

* Mr. Justice Holmes delivered the opinion of the court:

This is a bill to enjoin the State Board of Parol and the warden and physician of the state penitentiary at Fort Madison from performing vasectomy upon the plaintiff, the defendant in error, in pursuance of an Iowa statute approved April 19, 1913, 35 G. A. chap. 187, § 1. Supplement to

Code 1913, chap. 19-B, § 2600-p. This act, among other things, directed the operation to be performed upon convicts in the penitentiary who had been twice convicted of felony, and on February 14, 1914, the board had ordered it, upon the ground that the plaintiff had been twice so convicted. The bill was filed on March 11, 1914. On April 15, 1914, following an opinion of the Attorney General that both felonies must have been committed after the passage of the act, the order was laid on the table, and the warden and physician made affidavits, filed on April 22, that the operation would not be performed by them. Nevertheless, * three judges, disregarding the *foregoing opinion and action, proceeded to issue a preliminary injunction as prayed in the bill. 216 Fed. 413.

An appeal was taken to this court in 1914. In 1915 the Act of 1913 was repealed, and the substituted act does not apply to the plaintiff. Supplemental Sup-
37 S. C.—14.

plement to the Code of Iowa, 1915, chap. 19-B, § 2600-s1. All possibility or threat of the operation has disappeared now, if not before, by the act of the state. Therefore, upon the precedents we are not called upon to consider the propriety of the action of the district court, but the proper course is to reverse the decree and remand the cause, with directions that the bill be dismissed without costs to either party. *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, 478, 60 L. ed. 387, 391, 392, 36 Sup. Ct. Rep. 212; *Jones v. Montague*, 194 U. S. 147, 153, 48 L. ed. 913, 915, 24 Sup. Ct. Rep. 611; *Dinsmore v. Southern Exp. Co.* 183 U. S. 115, 120, 46 L. ed. 111, 113, 22 Sup. Ct. Rep. 45; *Mills v. Green*, 159 U. S. 651, 658, 40 L. ed. 293, 295, 16 Sup. Ct. Rep. 132.

Decree reversed. Bill to be dismissed without costs to either party.

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FOLLOWING ARE MEMORANDA

OF

CASES DISPOSED OF AT OCTOBER TERM, 1916,

WITHOUT OPINIONS AND NOT ELSEWHERE OR OTHERWISE DISPOSED OF IN THIS EDITION.

MARTIN HANSON, Plaintiff in Error, v. GREAT NORTHERN RAILWAY COMPANY. [No. 90.]

In Error to the Supreme Court of the State of Minnesota.

Messrs. William E. Rowe and Charles Loring for plaintiff in error.

Messrs. E. C. Lindley and A. L. Janes for defendant in error.

December 4, 1916. Per Curiam: Judgment affirmed with costs, upon the authority of *Chicago Junction R. Co. v. King*, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; *Seaboard Air Line R. Co. v. Padgett*, 236 U. S. 668, 673, 59 L. ed. 777, 781, 35 Sup. Ct. Rep. 481; *Great Northern R. Co. v. Knapp*, 240 U. S. 464, 60 L. ed. 745, 36 Sup. Ct. Rep. 399; *Baltimore & O. R. Co. v. Whitacre*, 242 U. S. 169, 61 L. ed. 228, 37 Sup. Ct. Rep. 33.

WILLIAM BRIGGS, Plaintiff in Error, v. STATE OF KANSAS. [No. 113.]

In Error to the Supreme Court of the State of Kansas.

Mr. A. M. Harvey for plaintiff in error.

Mr. James P. Coleman for defendant in error.

December 4, 1916. Per Curiam: Dismissed for want of jurisdiction upon the authority of: (1) *Dreyer v. Illinois*, 187 U. S. 71, 83, 84, 47 L. ed. 79, 85, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253; *Prentiss v. Atlantic Coast Line Co.* 211 U. S. 210, 225, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67; (2) *Baldwin v. Kansas*, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; *Jacobi v. Alabama*, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; (3) *Equitable Life Assur. Soc. v. Brown*, 187 U. S. 308, 311, 47 L. ed. 190, 192, 23 Sup. Ct. Rep. 123; *Consolidated Turnp. Co. v. Norfolk & O. V. R. Co.* 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609;

Manhattan L. Ins. Co. v. Cohen, 234 U. S. 123, 137, 58 L. ed. 1245, 1254, 34 Sup. Ct. Rep. 874; (4) *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389; *Graham v. West Virginia*, 224 U. S. 616, 56 L. ed. 917, 32 Sup. Ct. Rep. 583; *Carlesi v. New York*, 233 U. S. 51, 58 L. ed. 843, 34 Sup. Ct. Rep. 576.

GIDEON DIXON et al., Appellants, v. GEORGE W. GOETHALS et al. [No. 127.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Benjamin T. Waldo for appellants.

Mr. Solicitor General Davis for appellees.

December 4, 1916. Per Curiam: Judgment affirmed with costs upon the authority of *McCullum v. Eager*, 2 How. 61, 11 L. ed. 179; *Thomas v. Wooldridge*, 23 Wall. 283, 23 L. ed. 135; *Buffington v. Harvey*, 95 U. S. 99, 24 L. ed. 381; *Rexford v. Brunswick-Balke-Collender Co.* 228 U. S. 339, 346, 57 L. ed. 864, 867, 33 Sup. Ct. Rep. 515.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Plaintiff in Error, v. JOHN M. BOLCH. [No. 474.]

In Error to the Supreme Court of the State of Washington.

Mr. Heman H. Field for plaintiff in error.

Mr. Merritt J. Gordon for defendant in error.

December 4, 1916. Per Curiam: Dismissed for want of jurisdiction upon the authority of *Haseltine v. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; *Schlosser v. Hemphill*, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; *Louisiana Nav. Co. v. Oyster Commission*, 226 U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78; *Thompson v. St. Louis*, 241 U. S. 637, 60 L. ed. 1215, 36 Sup. Ct. Rep. 445.

PAUL SCHARRENBURG, Petitioner, v. DOLLAR STEAMSHIP COMPANY et al. [No. 524.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. J. H. Ralston and William E. Richardson for petitioner.

No appearance for respondents.

December 4, 1916. Granted.

GEORGE W. CALDWELL et al., Petitioners, v. NORTHWESTERN TERRA COTTA COMPANY. [No. 759.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. J. H. Ralston and W. E. Richardson for petitioners.

Mr. Edgar H. Scott for respondent.

December 4, 1916. Denied.

VICTOR-AMERICAN FUEL COMPANY, Petitioner, v. PAUL TOMLIJANOVICH, per pro. ami. [No. 761.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Mr. Caldwell Geaman for petitioner.

Mr. George S. Klock for respondent.

December 4, 1916. Denied.

VANDALIA RAILROAD COMPANY, Plaintiff in Error, v. JOHN A. HOLLAND. [No. 209.]

In Error to the Supreme Court of the State of Indiana.

Messrs. Samuel O. Pickens and Frederic D. McKenney for plaintiff in error.

Messrs. Martin M. Hugg and Wymond J. Beckett for defendant in error.

December 4, 1916. Dismissed with costs, on motion of counsel for plaintiff in error.

FRED E. BARNEY, Plaintiff in Error, v. CHARLES M. WAY, as Receiver, etc. [No. 174.]

In Error to the Supreme Court of the State of Minnesota.

Mr. H. V. Mercer for plaintiff in error.

Mr. James E. Trask for defendant in error.

December 4, 1916. Dismissed per stipulation.

JORGE DARD Y TEILLARD et al., Heirs at Law of Eugenia Teillard, Deceased, et al., Appellants, v. ENRIQUE GREEN et al. [No. 182.]

Appeal from the District Court of the United States for Porto Rico.

Mr. Francis H. Dexter for appellants.

Mr. Edward S. Paine for appellees.

December 4, 1916. Dismissed with costs, on motion of counsel for the appellants.

NEW YORK ELECTRIC LINES COMPANY, Petitioner, v. WILLIAM J. GAYNOR et al., Board of Estimate and Apportionment of the City of New York, et al. [No. —, Original.]

On Application for a Writ of Error to the Supreme Court of the State of New York for the County of New York.

Mr. Alexander S. Bacon for petitioner.

Messrs. Edmund L. Mooney, Charles T. Russell, Frederick A. Card, Lamar Hardy, and Samuel J. Rosensohn for respondents.

December 11, 1916. Per Curiam: The writ of error prayed for is denied upon the authority of: (1) *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Leathe v. Thomas*, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *Holden Land & Live Stock Co. v. Interstate Trading Co.* 233 U. S. 536, 541, 58 L. ed. 1083, 1086, 34 Sup. Ct. Rep. 661; *Mellon Co. v. McCafferty*, 239 U. S. 134, 60 L. ed. 181, 36 Sup. Ct. Rep. 94; (2) *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 26, 45 L. ed. 408, 21 Sup. Ct. Rep. 282; *Beals v. Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275; *Wood v. Chesborough*, 228 U. S. 672, 57 L. ed. 1018, 33 Sup. Ct. Rep. 706; (3) *Equitable Life Assur. Soc. v. Brown*, 187 U. S. 308, 314, 47 L. ed. 190, 193, 23 Sup. Ct. Rep. 123; *Consolidated Turnp. Co. v. Norfolk & O. V. R. Co.* 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; *Easterling Lumber Co. v. Pierce*, 235 U. S. 380, 382, 59 L. ed. 279, 281, 35 Sup. Ct. Rep. 133. See *New York Electric Lines Co. v. Empire City Subway Co.* 235 U. S. 179, 59 L. ed. 184, L.R.A.—, —, 35 Sup. Ct. Rep. 72, Ann. Cas. 1915A, 72.

EIGHTEEN PACKAGES OF DENTAL INSTRUMENTS, etc., Appellant and Plaintiff in Error, v. UNITED STATES. [No. 586.]

Appeal from and In Error to the United States Circuit Court of Appeals for the Third Circuit.

Mr. John A. Kratz for appellant and plaintiff in error.

Mr. Solicitor General Davis for appellee and defendant in error.

December 11, 1916. Per Curiam: Dismissed for want of jurisdiction upon the authority of the United States v. Krall, 174 U. S. 385, 391, 43 L. ed. 1017, 1019, 19 Sup. Ct. Rep. 712; Macfarland v. Brown, 187 U. S. 239, 47 L. ed. 159, 23 Sup. Ct. Rep. 105; United States v. Beatty, 232 U. S. 463, 466, 58 L. ed. 686, 687, 34 Sup. Ct. Rep. 392.

JOHN T. BEECROFT, Plaintiff in Error, v. GREAT NORTHERN RAILWAY COMPANY. [No. 699.]

In Error to the District Court of Lyon County, State of Minnesota.

Mr. Tom Davis for plaintiff in error.

Mr. M. L. Countryman for defendant in error.

December 11, 1916. Per Curiam: Judgment affirmed with costs on the authority of Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 673, 59 L. ed. 777, 781, 35 Sup. Ct. Rep. 481; Great Northern R. Co. v. Knapp, 240 U. S. 464, 60 L. ed. 745, 36 Sup. Ct. Rep. 399; Baltimore & O. R. Co. v. Whitacre, 242 U. S. 169, 61 L. ed. 228, 37 Sup. Ct. Rep. 33.

S. A. HAYS, Collector, etc., Petitioner, v. GAULEY MOUNTAIN COAL COMPANY. [No. 790.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Solicitor General Davis for petitioner. No counsel appeared for respondent.

December 11, 1916. Granted.

H. H. HAINES, Receiver, etc., Petitioner, v. BUCKEYE WHEEL COMPANY et al. [No. 567.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Harry L. Gordon and John D. Ellis for petitioner.

Messrs. Province M. Pogue and Joseph W. O'Hara for respondents.

December 11, 1916. Denied.

NATIONAL BANK OF COMMERCE OF ROCHESTER v. WILBUR B. GRANDISON, Trustee, etc. [No. 609.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Eugene Van Voorhis and James M. E. O'Grady for petitioner.

Mr. Thomas C. Burke for respondent.

December 11, 1916. Denied.

Q. BROOM et al., Petitioners, v. J. R. CHAPMAN et al. [No. 753.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. William D. Gordon for petitioners.

Messrs. J. W. Terry, H. M. Garwood, Alex. Britton, and Evans Browne for respondents.

December 11, 1916. Denied.

UNITED STATES, Plaintiff in Error, v. WILLIAM SKINNER et al. [No. 146.]

In Error to the District Court of the United States for the Southern District of New York.

The Attorney General for plaintiff in error.

No counsel appeared for defendants in error.

December 11, 1916. Dismissed on motion of counsel for the plaintiff in error.

UNITED STATES, Plaintiff in Error, v. JOHN L. BILLARD. [No. 181.]

In Error to the District Court of the United States for the Southern District of New York.

The Attorney General for plaintiff in error.

No counsel appeared for defendant in error.

December 11, 1916. Dismissed on motion of counsel for the plaintiff in error.

ARMOUR PACKING COMPANY et al., Plaintiffs in Error, v. STATE OF MISSOURI, ON THE RELATION OF JOHN T. BARKER, Attorney General. [No. 141.]

In Error to the Supreme Court of the State of Missouri.

Mr. Frank Hagerman for plaintiffs in error.

Mr. John T. Barker for defendant in error.

December 12, 1916. Dismissed with costs, on motion of counsel for the plaintiffs in error.

MANUFACTURERS LIGHT & HEAT COMPANY et al., Appellants, v. LEE OTT et al., Public Service Commission of the State of West Virginia. [No. 114.]

Appeal from the District Court of the United States for the Northern District of West Virginia.

Messrs. Charles McCamic, A. Leo Weil, J. M. Clarke, Geo. E. Price, B. M. Ambler, P. C. Knox, Frederick De C. Faust, Charles F. Wilson, for appellants.

Messrs. S. B. Avis, A. A. Lilly, and L. B. Sommerville for appellees.

December 15, 1916. Dismissed with costs, on motion of counsel for the appellants.

CHARLES SCHWEINLER PRESS, Plaintiff in Error, v. PEOPLE OF THE STATE OF NEW YORK. [No. 120.]

In Error to the Court of Special Sessions, First District, New York City, State of New York.

Mr. Alfred E. Ommen for plaintiff in error.

Messrs. Robert S. Johnstone and Leonard J. Obermeier for defendant in error.

December 18, 1916. Per Curiam: Dismissed for want of jurisdiction upon the authority of *Haseltine v. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; *Schlosser v. Hemphill*, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; *Missouri & K. I. R. Co. v. Olathe*, 222 U. S. 185, 56 L. ed. 155, 32 Sup. Ct. Rep. 46; *Louisiana Nav. Co. v. Oyster Commission*, 226 U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78; *Thompson v. St. Louis*, 241 U. S. 637, 60 L. ed. 1215, 36 Sup. Ct. Rep. 445.

WICHITA FALLS & NORTHWESTERN RAILWAY COMPANY, Plaintiff in Error, v. J. H. PUCKETT. [No. 535.]

In Error to the Supreme Court of the State of Oklahoma.

Messrs. Joseph M. Bryson, Alex. Britton, and Evans Browne for plaintiff in error.

Messrs. C. B. Stuart, A. C. Cruce, M. K. Cruce, and Weldon M. Bailey for defendant in error.

December 18, 1916. Per Curiam: Dismissed for want of jurisdiction upon the authority of: (1) *Dower v. Richards*, 151 U. S. 658, 668, 38 L. ed. 305, 309, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; *Thayer v. Spratt*, 189 U. S. 346, 353, 47 L. ed. 845, 849, 23 Sup. Ct. Rep. 576; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220; *Kerfoot v. Farmers & M. Bank*, 218 U. S. 281, 288, 54 L. ed. 1042, 1043, 31 Sup. Ct. Rep. 14; (2) *Deming v. Carlisle Packing Co.* 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; *Consolidated Turnp. Co. v. Norfolk & O. V. R. Co.* 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; *Ennis Waterworks v. Ennis*, 233 U. S. 652, 658, 58 L. ed. 1139, 1141, 34 Sup. Ct. Rep. 767; *Parker v. McLain*, 237 U. S. 469, 471, 472, 59 L. ed. 1051, 1053, 1054, 35 Sup. Ct. Rep. 632.

JOHN SCHROEDER LUMBER COMPANY, Petitioner, v. RAMEY LUMBER COMPANY, Limited. [No. 782.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Nathan Pereles, Jr., and Frank M. Hoyt for petitioner.

No counsel appeared for respondent.

December 18, 1916. Denied.

Lo PONG alias Lo Bong, Petitioner, v. JAMES R. DUNN, Inspector, etc. [No. 803.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. John H. Brickenstein for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

December 18, 1916. Denied.

W. H. WATLINGTON, Petitioner, v. UNITED STATES. [No. 809.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. S. W. Hayes and Carlos Bee for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

December 18, 1916. Denied.

MEMPHIS STREET RAILWAY COMPANY, Petitioner, v. J. W. BOBO, Administrator, etc. [No. 622.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Luke E. Wright and Roane Waring for petitioner.

Messrs. Caruthers Ewing and Ike W. Crabtree for respondent.

December 19, 1916. Dismissed with costs on motion of counsel for the petitioner.

(242 U. S. 595)

BOARD OF TRUSTEES OF THE SEVILLETA DE LA JOYA GRANT, etc.,
Plff. in Err.,

v.

BOARD OF TRUSTEES OF THE BELEN LAND GRANT.

PUBLIC LANDS — 220 — COURT OF PRIVATE LAND CLAIMS — JURISDICTION — EFFECT OF CONGRESSIONAL CONFIRMATION — BOUNDARIES.

1. Jurisdiction to establish as a common boundary between two Mexican grants, a line which reduced the area of that one of such grants which had been confirmed by Congress and patented long before the enactment of the Act of March 3, 1891 (26 Stat. at L. 854, chap. 539), creating the court of private land claims, was denied to that court by the provisions of §§ 8, 13, of that act, that confirmation by that court shall not include any land "that shall have been disposed of by the United States," nor have "any effect other or further than as a release of all claim of title by the United States," and that "no private right of any person as between himself and other claimants or persons" shall be "in any manner affected thereby," and that all proceedings and rights shall be conducted and decided subject to the restrictions that no claim shall be allowed for any land, the right to which has been acted upon and decided by Congress, and that no proceedings, decree, or act shall conclude or affect the private rights of persons as between each other, but shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. — 220.]

COURTS — 23 — PRIVATE LAND CLAIMS — JURISDICTION — CONSENT.

2. Consent on the part of the owners of a Mexican grant confirmed by Congress could confer no jurisdiction upon the court of private land claims, in contravention of the prohibitions of the Act of March 3, 1891 (26 Stat. at L. 854, chap. 539), §§ 8, 13, to reduce the area of such grant, or to make any decision respecting its boundaries that would affect private rights in such grant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 75, 75½, 81; Dec. Dig. — 23.]

[No. 129.]

Argued December 22, 1916. Decided January 22, 1917.

IN ERROR to the Supreme Court of the State of New Mexico to review a judgment which affirmed a judgment of the District Court of Socorro County, in that state, in favor of defendant in an action in ejectment. Affirmed.

See same case below, 20 N. M. 145, 146 Pac. 959.

The facts are stated in the opinion.

Mr. Neill B. Field for plaintiff in error.

Messrs. Samuel Herrick, R. P. Barnes, and J. L. Nicholas for defendant in error.

* Mr. Justice Van Devanter delivered the opinion of the court:

This is an action in ejectment to recover the area in conflict between two land grants in New Mexico respectively known as the La Joya and the Belen, the plaintiff being the owner of the former and the defendant of the latter. The defendant prevailed and the judgment was affirmed. 20 N. M. 145, 146 Pac. 959.

The facts are these: Both grants were complete and perfect at the time of the Mexican cession and both were subsequently confirmed, the Belen in 1858 by an act of Congress (chap. 5, 11 Stat. at L. 374) and the La Joya in 1893 by a decree of the court of private land claims under the Act of March 3, 1891, chap. 539, 26 Stat. at L. 854. The Belen was the older grant and was patented in 1871, long before the proceeding for the confirmation of the La Joya grant was begun. Shortly after the decree confirming it was rendered, the La Joya grant was surveyed preparatory to issuing a patent for it. Objections to the survey were made by two persons interested in the Belen grant, and the survey, with the objections, was laid before the court of private land claims, as was required by the Act of 1891. The objections were to the effect that the survey erroneously placed the northern boundary of the La Joya grant within the Belen grant, and thereby wrongly brought the two largely in conflict. After a hearing the court found the objections well grounded, ordered a resurvey of the La Joya grant, and particularly designated what should be deemed its northern boundary. A resurvey conforming to that direction received the court's approval, and a patent for that grant was then issued. While the resurvey greatly reduced the area in conflict, it still left the northern boundary of the La Joya grant within the Belen grant, and a conflict of about 11,000 acres remained.

Without questioning the superiority which otherwise would result from the seniority of the Belen grant, the plaintiff insisted that the action of the court of private land claims in directing what should be deemed the northern boundary of the La Joya grant, and in approving the resurvey wherein that direction was followed, amounted to an adjudication of the true location of the common boundary between the grants, and was conclusive upon the owners of the Belen grant. But the state courts held the contention untenable in view of the provisions of the Act of 1891,

and that ruling is the only one called in question here.

The court of private land claims derived all of its powers from the Act of 1891, the express purpose of which was to provide for and secure the adjudication of Spanish and Mexican land claims as between the claimants and the United States. The act divided the claims into two principal classes. One class, particularly described in § 6, embraced those which were "not already complete and perfect," and the other, particularly described in § 8, embraced those which were "complete and perfect" at the time of the Mexican cession. The La Joya grant belonged to the latter class, respecting which it was specially provided in § 8 that the court's confirmation should not include any land "that shall have been disposed of by the United States," nor have "any effect other or further than as a release of all claims of title by the United States," and that "no private right of any person as between himself and other claimants or persons" should be "in any manner affected thereby." And in § 13 it was generally provided in respect of both classes of claims that all the proceedings in the court should be conducted and decided subject to certain enumerated restrictions, among which were the following: "Fourth. No claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress, or under its authority. Fifth. No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands."

In view of these provisions it is very plain that the court of private land claims was without any power to revise the action of Congress in confirming a particular grant, or to confirm another grant for the same lands or any part of them, or to determine the rights of private persons, as between themselves, to such lands. This court has frequently so held and has pointed out that a decision by that court sustaining a claim for lands, as to which Congress already had confirmed another claim, would not conclude anyone, but would be void, because in excess of the court's power. *United States v. Conway*, 175 U. S. 60, 44 L. ed. 72, 20 Sup. Ct. Rep. 13; *Ainsa v. New Mexico & A. R. Co.* 175 U. S. 76, 90, 44 L. ed. 78, 84, 20 Sup. Ct. Rep. 28; *Las Animas Land Grant Co. v. United States*, 179 U. S.

201, 205, 206, 45 L. ed. 153-155, 21 Sup. Ct. Rep. 92; *United States v. Baca*, 184 U. S. 653, 659, 46 L. ed. 733, 735, 22 Sup. Ct. Rep. 541. In the last case it was said:

"The manifest intent of Congress appears to have been that with any land, of the right to which Congress, in the exercise of its lawful discretion, had itself assumed the decision, the court of private land claims should have nothing to do. The whole jurisdiction conferred upon that court is to confirm or reject claims presented to it, coming within the act. All the powers conferred upon it are incident to the exercise of that jurisdiction. When it has no jurisdiction to confirm or reject, it has no authority to inquire into or pass upon the case, beyond the decision of the question of jurisdiction. The peremptory declaration of Congress, that 'no claim shall be allowed for any land, the right to which has hitherto been lawfully acted upon and decided by Congress,' necessarily prohibits the court from passing upon the merits of any such claim."

In confirming the La Joya grant and supervising its survey the court proceeded in evident contravention of that prohibition, for it extended the confirmation and survey to about 11,000 acres of lands within the Belen grant which had been confirmed by Congress and patented long before the Act of 1891 was passed. In this respect, therefore, the court overstepped its jurisdiction and its action was void.

As making for a different conclusion the plaintiff contends, first, that, consistently with the limitations imposed, it was quite admissible for the court to determine and establish the common boundary between the two grants, and, second, that, by protesting against the original survey, the owners of the Belen grant invited the court to act in the matter, and therefore were bound by its decision. But neither contention can be sustained. The court of private land claims was bound to respect the Belen grant as confirmed by Congress and described in the patent. It was not given any power to reduce the area of that grant, or to make any decisions respecting its boundaries that would affect private rights in the grant. On the contrary, it was prohibited from doing so. And, of course, the owners of the grant could not, by any act or consent of theirs, enlarge the power of the court as defined in the act creating it.

It follows that the state courts rightly refused to regard the action of the court of private land claims as in any way conclusive of the rights of the owners of the Belen grant in the area in conflict.

Whether the persons who appeared in the La Joya proceeding and objected to the

original survey were authorized to represent or speak for all who were interested in the Belen grant seems to have been a disputed question, but as its decision would not affect the result here, it requires no further notice.

Judgment affirmed.

(242 U. S. 539)

HARRY T. HALL, Superintendent of Banks and Banking of the State of Ohio, Appt.,
v.

GEIGER-JONES COMPANY. (No. 438.)

HARRY T. HALL, Superintendent of Banks and Banking of the State of Ohio, Appt.,
v.

DON C. COULTRAP. (No. 439.)

HARRY T. HALL, Superintendent of Banks and Banking of the State of Ohio, Appt.,
v.

WILLIAM R. ROSE and the Richard Auto Manufacturing Company. (No. 440.)

CONSTITUTIONAL LAW $\S$ 296(1) — POLICE POWER—DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS—"BLUE SKY" LAW.

1. Dealing in corporate or quasi corporate securities without first securing a license from a specified state official, obtainable only upon an application setting out certain information respecting the applicant's business, with references establishing good repute, may be forbidden by a state, in the exercise of its police power, as is done by Ohio Gen. Code, $\S$ 6373-1 to 6373-24, notwithstanding the declarations of U. S. Const. 14th Amend., that no person shall be deprived of his life, liberty, or property without due process of law, or denied the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. $\S$ 831, 843; Dec. Dig. $\S$ 296(1).]

CONSTITUTIONAL LAW $\S$ 296(1) — DUE PROCESS OF LAW—CONFERRING ARBITRARY POWER ON STATE OFFICIAL—"BLUE SKY" LAW.

2. Arbitrary power is not unconstitutionally conferred upon the state superintendent of banks and banking, contrary to U. S. Const. 14th Amend., by the provisions of Ohio Gen. Code, $\S$ 6373-1 to 6373-24, which require that official, as a condition of granting the license that such statute makes a condition precedent to dealing in corporate or quasi corporate securities, to be satisfied of the good repute in business of the applicant and its selling agents, and empower him to revoke the license or to refuse to renew it upon ascertaining that the licensee "is of bad business repute, has violated any provision of the act, or has engaged, or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions," since there is a presumption against wanton action on his part, and the statute also affords judicial

review of his action in cases where there may be a dispute of fact.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. $\S$ 831, 843; Dec. Dig. $\S$ 296(1).]

CONSTITUTIONAL LAW $\S$ 89(1)—FREEDOM TO CONTRACT—"BLUE SKY" LAW—WHO MAY CHALLENGE VALIDITY.

3. Dealers in corporate securities cannot successfully urge against the validity of the provisions of Ohio Gen. Code, $\S$ 6373-1 to 6373-24, making a license a condition precedent to dealing in corporate or quasi corporate securities, that while the statute in form prohibits sales, it at the same time necessarily prevents purchases, and thereby shields contemplating purchasers from the loss of property by the exercise of their own defective judgment, and puts them, as well as the sellers, under guardianship.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. $\S$ 157; Dec. Dig. $\S$ 89(1).]

CONSTITUTIONAL LAW $\S$ 240(1)—LICENSES $\S$ 7(1) — EQUAL PROTECTION OF THE LAWS—DISCRIMINATION — "BLUE SKY" LAW.

4. The equal protection of the laws is not denied by the provisions of Ohio Gen. Code, $\S$ 6373-1 to 6373-24, forbidding dealing in corporate or quasi corporate securities without a license, by reason of the fact that the statute discriminates between cases where more or less than 50 per cent of an issue of bonds is included in a sale to one person; between securities which have and those which have not been authorized by the State Public Service Commission; between securities issued by certain corporations organized under the state laws and those which are not; between an owner who sells his securities in a single transaction and one who disposes of them in successive transactions; between a bank or trust company that sells at a commission of not more than 2 per cent and one which sells at a higher commission; between securities which have and those which have not been published in regular market reports; between single sales of \$5,000 or more and smaller transactions; between securities upon which there has and has not been a default as to principal or interest; between cases where the information required is or is not contained in a standard approved manual; between cases in which the vendor proposes to sell securities for which he has and those for which he has not paid 90 per cent of his selling price; and discriminates against securities when any part of the proceeds is to be applied in payment for patents, services, good will, or for property outside of the state; against securities issued by taxing subdivisions of other states; against securities which have not from time to time for six months been published in the regular market reports or the news columns of a daily newspaper of general circulation in the state; and discriminates where the securities are or are not of manufacturing or transportation companies in the hands of bona fide purchasers on a specified date if such companies were on that date and at the time of sale going

concerns; where the disposal is or is not made for a commission of less than 1 per cent by a licensee who is a member of a stock exchange and who is conducting an established and lawful business in the state, regularly open for public patronage; where the securities are or are not those of a common carrier or of a company organized under the state laws and engaged principally in the business of manufacturing, transportation, etc., and the whole or a part of the property upon which securities are based is located within the state: and provides for such delays in the issue of a license and in the subsequent conduct of business thereunder as to hinder substantially, and in many cases to prevent, sales.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 693, 697, 698; Dec. Dig. § 240(1); Licenses, Cent. Dig. §§ 7, 19; Dec. Dig. § 7(1).]

COMMERCE — 10 — STATE REGULATION —
—“BLUE SKY” LAW — CONGRESSIONAL
INACTION.

5. Congressional inaction leaves the state free to impose such an indirect or incidental burden upon interstate commerce as may result from the provisions of Ohio Gen. Code, §§ 6373-1 to 6373-24, forbidding dealers from disposing or offering to dispose of corporate or quasi corporate securities “within the state” without first having obtained a license from a specified state official.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. § 10.]

[Nos. 438, 439, and 440.]

Argued October 16 and 17, 1916. Decided January 22, 1917.

THREE APPEALS from the District Court of the United States for the Southern District of Ohio to review decrees enjoining the enforcement of the so-called “Blue Sky” law of that state. Reversed and remanded for further proceedings.

See same case below, 230 Fed. 233.

* Statement by Mr. Justice McKenna:

These cases were heard together in the district court and there disposed of in one opinion. They were argued and submitted together here. The bills of complaint attacked from different angles the so-called Blue Sky Law of the state of Ohio, which provides:

“Sec. 6373-1. Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed ‘securities’) evidencing title to or interest in property, issued or executed by any private or quasi public corporation, copartnership or association *(except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided.”

“Sec. 6373-2. . . . The term ‘dealer,’ as used in this act shall be deemed to include any person or company, except national banks, disposing or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters or any stock promotion scheme whatsoever, except:

“(a) An owner, not the issuer of the security, who disposes of his own property, for his own account; when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner; or a natural person, other than the underwriter of the security, who is a bona fide owner of the security and disposes of his own property for his own account; . . .

“As used in this act, the term ‘company’ shall include any corporation, copartnership or association, incorporated or unincorporated, and whenever and wherever organized; . . .” [Laws 1914, p. 110.]

The Geiger-Jones Company is an Ohio corporation, licensed to do the business of buying and selling investment securities, and of buying and selling the stocks and bonds of industrial corporations. It has a regularly established clientage, it alleges, of about 11,000 persons residing in the state of Ohio and other states, and has sold and there are now outstanding in the hands of persons to whom it has sold, securities of about twenty to twenty-five million dollars, par value, and has stockholders in Ohio and other states. That the securities above referred to consist of securities of over twenty corporations of Ohio and other states and foreign countries. That it is still selling such securities and is and has been engaged in intrastate, interstate, and foreign commerce.

The appellee, Don C. Coultrap, in No. 439, repeats the allegations made by Geiger-Jones Company, with enumeration of some of the companies in whose stocks and securities that corporation is engaged in dealing, and alleges that he is the owner and holder of its stocks and of the stocks of other companies, and is engaged in buying and selling and offering to sell such stocks in the state of Ohio and in the state of Pennsylvania, and in the course of such transactions travels back and forth between those states and conducts a correspondence from Pennsylvania to Ohio, and receives certificates evidencing the ownership of stock from the state of Ohio, and sends them from Pennsylvania to Ohio.

William R. Rose, one of the appellees in No. 440, alleges himself to be a citizen of Ohio and engaged in that state in the busi-

ness of buying and selling investment securities, and particularly the stocks and bonds of industrial corporations, and that he has built up and maintained a large and profitable business and an enviable reputation.

The RiChard Auto Manufacturing Company, the other appellee, is a corporation of West Virginia, but has its principal place of business in Cleveland, Ohio, and has a contract to manufacture and is ready to manufacture automobiles under certain patents obtained by François RiChard as soon as and not until the stock of the company can be put upon the market and a sufficient amount realized therefrom for such purposes.

That on September 25, 1914, and prior thereto, Rose was actively engaged in buying and selling stocks and bonds of industrial corporations and investment securities in general, and particularly the stock of the RiChard Auto Manufacturing Company, of which company he was the secretary, and for which business he had unusual aptitude and was able to prosecute more successfully "than any" other man whose services were available to said corporation."

That on September 25th he was arrested upon an affidavit filed by one H. R. Young, a subordinate and deputy of the state superintendent of banks and banking for the state of Ohio, under whose immediate direction and control he was then acting. Rose, upon being taken before a magistrate, waived examination and was "bound over to the grand jury" of Cuyahoga county, which jury subsequently returned an indictment against him for violation of the law.

The grievance alleged in Nos. 438 and 439 is that, under the laws of the state, the attorney general is threatening to give an opinion to Hall, the superintendent of banks and banking, that the law is valid, and that it is the duty of Hall to cancel appellees' license, and that this will result in irreparable injury to appellees and to their security holders from the publicity they will obtain. And it is apprehended that Hall will act on such advice, believing that he is bound by the opinion of the attorney general.

The statute is attached to the bills, and is asserted to be unconstitutional, invalid, and void, and the particulars are enumerated to be that it will deprive appellees of their property without due process of law, deny them the equal protection of the laws, impose burdens on interstate commerce, confer executive powers, delegate such powers and legislative powers, in violation of

the Constitution of Ohio. Appellees consider themselves remediless except in equity, and pray injunctions interlocutory and permanent

The complaint of Rose and the Auto Company is that Hall, superintendent of banks and banking, is actively engaged in the prosecution of the proceedings against Rose, and has, together with the prosecuting attorney, interfered with, interrupted, and completely prevented Rose from carrying on his business in the state of Ohio, and especially in attempting upon his part to dispose of and* sell the stock of the Auto Company, and that the prosecuting attorney and the sheriff of Cuyahoga county, unless restrained, will assist and actively cooperate with Hall, to the great and irreparable injury of both Rose and the Auto Company.

The charge is amplified by details which it is unnecessary to give, and the law is charged to be unconstitutional in the same particulars as those enumerated by the Geiger-Jones Company.

Injunctions temporary and perpetual are prayed.

The district court in the Geiger-Jones Case considered that it was without power to enjoin the attorney general, but decided that it could and should, under the charges of the bill, restrain Hall from further action under the law, the restraint to continue until the hearing and determination of the applications of the respective complainants for interlocutory injunctions.

The applications subsequently came to be heard before three judges, and Hall and all of his employees and subordinates were enjoined from attempting to enforce the provisions of the law. There was an exception in No. 440, as follows: ". . . except such proceedings as may be deemed proper in any criminal action pending against said complainants or either of them when the complaint in this cause was filed." The injunctions in all the cases were to continue until final decision or further order of the court. The court declared the law to be obnoxious to all of the charges made by the respective complainants against it. 230 Fed. 233.

Mr. Edward C. Turner, Attorney General of Ohio, for appellant.

Messrs. John A. Shauck, Timothy S. Hogan, A. M. McCarty, E. N. Huggins, M. B. Johnson, H. H. Johnson, and Francis R. Marvin for appellees.

Messrs. Robert R. Reed, George W. Wickersham, and Charles K. Allen as amici curiæ.

* **Mr. Justice McKenna**, after stating the case as above, delivered the opinion of the court:

It will be observed that these cases bring here for judgment an asserted conflict between national power and state power, and bring, besides, power of the state as limited or forbidden by the national Constitution.

The assertion of such conflict and limitation is an ever-recurring one; and yet it is approached as if it were a new thing under the sun. The primary postulate of the state is that the law under review is an exercise of the police power of the state, and that power, we have said, is the least limitable of the exercises of government. *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. ed. 835, 35 Sup. Ct. Rep. 501. We get no accurate idea of its limitations by opposing to it the declarations of the 14th Amendment that no person shall be deprived of his life, liberty, or property without due process of law, or denied the equal protection of the laws. *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 55 L. ed. 112, 116, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487. A stricter inquiry is necessary, and we must consider what it is of life, liberty, and property that the Constitution protects.

What life is and what may or may not affect it, we have quite accurate tests; and what liberty is in its outside sense, and, in like sense, what property is. We know that it is of the essence of liberty—indeed, we may say, of life—that there shall be freedom of conduct, and yet there may be limitations upon such freedom. We know that, in the concept of property, there are the rights of its acquisition, disposition, and enjoyment,—in a word, dominion over it. Yet all of these rights may be regulated. Such are the declarations of the cases, become platitudes by frequent repetition and many instances of application.

The question, then, is, Is the statute of Ohio within the principles declared? The statute is a restraint upon the disposition of certain property, and requires dealers in securities evidencing title to or interest in such property to obtain a license,—a requirement simple enough in itself, and yet of itself asserted to be an illegal control of a private business, made especially so by the conditions which are imposed. These conditions, summarized, are as follows:

To obtain the license there must be filed with the superintendent of banks and banking (termed in the act "commissioner") application for such license, together with information in such form as the commissioner shall determine, setting forth:

"(a) The names and addresses of the directors and officers if such applicant be a

corporation or association, and of all partners if it be a partnership, and of the person if the applicant be an individual, together with names and addresses of all agents of such applicant assisting in the disposal of such securities;

"(b) Location of the applicant's principal office and of his principal office in the state, if any;

"(c) The general plan and character of the business of said applicant, together with references which the 'commissioner' shall confirm by such investigation as he may deem necessary, establishing the good repute in business of such applicant, directors, officers, partners, and agents.

"If the applicant be a corporation organized under the laws of any other state, territory, or government, or have its principal place of business therein, it shall also file a copy of its articles of incorporation, certified by the proper officer of such state, territory, or government, and of its regulations and by-laws; and if it be an unincorporated association, a certified copy of its articles of association, or deed of settlement."

The applicant is also required to file a written instrument irrevocably consenting to be sued in a particular county, and, if personal service there cannot be had, consenting to service upon the sheriff of the county.

It is also provided that all of the applications shall be published in a daily newspaper, and if the commissioner be satisfied that the applicant is of good repute, he shall, upon payment of certain fees, register the applicant as a licensed dealer in securities. Pending disposition of the application, temporary permission to transact business may be given. Yearly renewals of the licenses are provided for.

The commissioner may revoke a license upon ascertaining that the licensee: (a) Is of bad repute; (b) has violated any provision of the act; or (c) has engaged, or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions.

It will be observed, therefore, that the law is a regulation of business, constrains conduct only to that end, the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties or other repressive measures. The name that is given to the law indicates the evil at which it is aimed; that is, to use the language of a cited case, "speculative schemes which have no more basis

than so many feet of 'blue sky;' or, as stated by counsel in another case, "to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations." Even if the descriptions be regarded as rhetorical, the existence of evil is indicated, and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government, and that the appreciation of the consequences of it is not open for our review. *Trading Stamp Cases*, *Rast v. Van Deman & L. Co.* 240 U. S. 342, 60 L. ed. 679, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370; *Tanner v. Little*, 240 U. S. 369, 60 L. ed. 691, 36 Sup. Ct. Rep. 379; *Pitney v. Washington*, 240 U. S. 387, 391, 60 L. ed. 703, 706, 36 Sup. Ct. Rep. 385. Therefore, the purpose being legal, the question only remains whether the manner in which it is accomplished is illegal. This is contended, and the provisions which render the law void are found, it is stated, in: (1) Power conferred upon the commissioner to grant or refuse licenses; (2) the authority given the commissioner to place forbidden restrictions and burdens on the conduct of the business of one who has obtained a license.

The basis of these contentions is that the law confers arbitrary power upon the commissioner. In considering the contentions we must keep in mind that the law is addressed to a complex situation. Its purpose is, as we have seen, to give a basis for judgment of the securities offered the purchasing public; assure credit where it is deserved and confidence to investment and trading; prevent deception and save credulity and ignorance from imposition, as far as this can be done by the approved reputation of the seller of the securities and authoritative information.

It may, however, be said that character establishes itself, and neither needs nor can be compelled to accept the stamp of government; and it is asserted that the "normal investment business of the country" and its "individual transactions" are not subject to "executive control,"—the broad contention being made that, as such business cannot be prohibited, it cannot be regulated. This, indeed, is the basic principle of the opposition to the statute. It is expressed in many ways, and the various provisions of the statute—those that are explicit in direction to the commissioner and those that commit discretion to him—are said to so burden and complicate "normal business as to make it difficult, if not impossible, to carry it on in a normal way, if at all."

As broadly made, we cannot assent to

these propositions. The reason and extent of the law we have indicated and the control to which individual transactions are subjected, and we think both are within the competency of the state. It is to be remembered that the value of securities consists in what they represent, and to determine such value is a complex problem even to the most skilful and informed.

We have very lately decided a case upon the principle of the power of the state to prevent frauds and impositions. *Hutchinson Ice Cream Co. v. Iowa*, 242 U. S. 153, 61 L. ed. 217, 37 Sup. Ct. Rep. 28. The principle applies as well to securities as to material products, the provisions of the law necessarily varying with the objects. As to material products the purpose may be accomplished by a requirement of inherent purity. The intangibility of securities, they being representatives or purporting to be representatives of something else, of property, it may be, in distant states and countries, schemes of plausible pretensions, requires a difference of provision, and the integrity of the securities can only be assured by the probity of the dealers in them and the information which may be given of them. This assurance the state has deemed necessary for its welfare to require; and the requirement is not unreasonable or inappropriate. It extends to the general market something of the safeguards that are given to trading upon the exchanges and stock boards of the country,—safeguards that experience has adopted as advantageous. Inconvenience may be caused and supervision and surveillance, but this must yield to the public welfare; and against counsel's alarm of consequences, we set the judgment of the state.

We turn back, therefore, to consider the more specific objections to the law. The basis of them is, as we have seen, the power conferred upon the commissioner, which is asserted to be arbitrary. The objection is somewhat difficult to handle. It centers in the provision that requires the commissioner, as a condition of a license, "to be satisfied of the good repute in business of such applicant and named agents," and in the power given him to revoke the license or refuse to renew it upon ascertaining that the licensee "is of bad business repute, has violated any provision of the act, or has engaged or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions." It is especially objected that, as to these requirements, no standard is given to guide or determine the decision of the commissioner. Therefore, it is contended that the discretion thus vested in the commissioner leaves "room for the

play and action of purely personal and arbitrary power."

We are a little surprised that it should be implied that there is anything recondite in a business reputation or its existence as a fact which should require much investigation. If in special cases there may be controversy, those cases the statute takes care of; an adverse judgment by the commissioner is reviewable by the courts. § 6373-8. So also as to the other judgments.

Besides, it is certainly apparent that, if the conditions are within the power of the state to impose, they can only be ascertained by an executive officer. Reputation and character are quite tangible attributes, but there can be no legislative definition of them that can automatically attach to or identify individuals possessing them, and necessarily the aid of some executive agency must be invoked. The contention of appellees would take from government one of its most essential instrumentalities, of which the various national and state commissions are instances. But the contention may be answered by authority. In *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, an ordinance of the city of Chicago was passed on which required a license of dealers in cigarettes, and, as a condition of the license, that the applicant, if a single individual, all of the members of the firm, if a copartnership, and any person or persons in charge of the business, if a corporation, should be of good character and reputation, and the duty was delegated to the mayor of the city to determine the existence of the conditions. The ordinance was sustained. To this case may be added *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 394, 56 L. ed. 240, 245, 32 Sup. Ct. Rep. 152, and cases cited; *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 230, 59 L. ed. 552, 35 Sup. Ct. Rep. 387, Ann. Cas. 1916C, 296; *Brazee v. Michigan*, 241 U. S. 340, 341, 60 L. ed. 1034, 1035, 36 Sup. Ct. Rep. 561. See also *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *New York ex rel. Lieberman v. Van De Carr*, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144.

The discretion of the commissioner is qualified by his duty, and besides, as we have seen, the statute gives judicial review of his action. Pending such review, we must accord to the commissioner a proper sense of duty and the presumption that the functions intrusted to him will be executed in the public interest, not wantonly or arbitrarily to deny a license to or take one away from a reputable dealer. (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 545, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359); and, as we have said, in cases where

there can be a dispute of fact, the statute provides for judicial review, and we see no legal objection to the designation of a particular court for such review.

We are not disposed to give serious attention to the contention that while the statute in form prohibits sales, "it at the same time necessarily prevents purchases, and thereby shields contemplated purchasers from loss of property by the exercise of their own "defective judgment," and puts them as well as the sellers under guardianship. If we may suppose that such purchasers would assert a liberty to form a "defective judgment," and resent means of information as a limitation of their freedom, we must wait until they themselves appear to do so. Besides, there are examples in legislation of unsolicited protection, and there is much in the business we are considering which urges to an imitation of the examples. It is not wise to put out of view the tendencies of the business, and that it tempts to and facilitates speculative judgments, if the purpose be trading, improvident judgments, if the purpose be investment. Whatever detriment may come from such judgments the law may be powerless to prevent; but against counterfeits of value the law can give protection, and such is the purpose of the statute under review. It must be judged of upon that consideration, not upon the assertion of an absolute liberty of conduct which does not exist.

Discriminations are asserted against the statute which extend, it is contended, to denying appellees the equal protection of the laws. Counsel enumerates them as follows:

"Prominent among such discriminations are between the cases where more or less than 50 per cent of an issue of bonds is included in the sale to one person; between securities which have and which have not been authorized by the Public Service Commission of this state; between the securities issued by a bank, trust company, a building and loan association organized under the laws of this state and those which are not; between an owner who sells his securities in a single transaction and one who disposes of them in successive transactions; between a bank or trust company who sells at a commission of not more than 2 per cent and one which sells at a higher commission; against securities when any part of the proceeds to be derived from the sale are to be applied in payment for patents, services, good will, or for property not located in this state; in providing for such delays in the issuance of a license and in the subsequent conduct of business thereunder as to substantially hinder, and in many cases naturally arising, to utterly prevent sales; in discriminating between

securities which have and which have not been published in regular market reports; between sales where, in a single transaction, the sale is for \$5,000 or more; in discriminations against securities issued by taxing subdivisions of other states; between securities upon which there has and has not been a default as to principal or interest; against securities which have not from time to time for six months been published in the regular market reports or the news columns of a daily newspaper of general circulation in the state; where the securities are or are not of manufacturing or transportation companies in the hands of bona fide purchasers prior to March 1st, 1914, where such companies were on that date, and shall be at the time of the proposed sale, going concerns; between cases where the information contemplated is or is not contained in a standard manual of information approved by the commissioner; where the disposal is or is not made for a commission of less than 1 per cent of the par value thereof by a licensee who is a member of a regularly organized and recognized stock exchange and who has an established and lawfully conducted business in this state, regularly open for public patronage as such; between cases in which the vendor proposes to sell securities for which he has and those for which he has not paid 90 per cent of the price at which they are to be sold by him; where the securities are or are not those of a common carrier or of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, etc., and the whole or a part of the property upon which such securities are predicated are located within this state."

We cannot give separate attention to the asserted discriminations. It is enough to say that they are within the power of classification which a state has. A state "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. . . . If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the 14th Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law." *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66. The cases were cited from which those propositions were deduced. To the same effect is *Armour & Co. v. North Dakota*, 240 U. S. 517, 60 L. ed. 776, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548.

The next contention of appellees is that the law under review is a burden on interstate commerce, and therefore contravenes the commerce clause of the Constitution of the United States. There is no doubt of the supremacy of the national power over interstate commerce. Its inaction, it is true, may imply prohibition of state legislation, but it may imply permission of such legislation. In other words, the burden of the legislation, if it be a burden, may be indirect and valid in the absence of the assertion of the national power. So much is a truism; there can only be controversy about its application. The language of the statute is: "Except as otherwise provided in this act, no dealer shall, *within this state*, dispose" of certain securities "issued or executed by any private or quasi public corporation, copartnership or association (except corporations not for profit) . . . without first being licensed so to do as hereinafter provided."

The provisions of the law, it will be observed, apply to dispositions of securities *within* the state, and while information of those issued in other states and foreign countries is required to be filed (§ 6373-9), they are only affected by the requirement of a license of one who deals in them *within* the state. Upon their transportation into the state there is no impediment,—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so, and this only that they may not appear in false character and impose an appearance of a value which they may not possess,—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the state. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally. *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; *Ware & Leland v. Mobile County*, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031; *Engel v. O'Malley*, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; *Brodnax v. Missouri*, 219 U. S. 285, 55 L. ed. 219, 31 Sup. Ct. Rep. 238; *Banker Bros. Co. v. Pennsylvania*, 222 U. S. 210, 56 L. ed. 168, 32 Sup. Ct. Rep. 38; *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; *Standard Stock Food Co. v.*

Wright, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; Trading Stamp Cases, *supra*. With these cases International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 57 L. ed. 189, 33 Sup. Ct. Rep. 41, and the Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 402, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561, are not in discordance.

We might, indeed, ask, When do the designated securities cease migration in interstate commerce and settle to the jurisdiction of the state? Material things, choses in possession, pass out of interstate commerce when they emerge from the original package. Do choses in action have a longer immunity? It is to be remembered that though they may differ in manner of transfer, they are in the same form in the hands of the purchaser as they are in the hands of the seller, and in the hands of both as they are brought into the state. We ask again, Do they never pass out of interstate commerce? Have they always the freedom of the state? Is there no point of time at which the state can expose the evil that they may mask? Is anything more necessary for the supremacy of the national power than that they be kept free when in actual transportation, subjected to the jurisdiction of the state only when they are attempted to be sold to the individual purchaser? The questions are pertinent, the answer to them one way or the other, of consequence; but we may pass them, for, regarding the securities as still in interstate commerce after their transportation to the state is ended and they have reached the hands of dealers in them, their interstate character is only incidentally affected by the statute.

Decree reversed and the cause remanded for further proceedings in conformity with this opinion.

Mr. Justice McReynolds dissents.

(242 U. S. 559)

CLARENCE C. CALDWELL, as Attorney General for the State of South Dakota and ex officio Member of the State Securities Commission of the State of South Dakota, et al., Appts.,

v.

SIOUX FALLS STOCK YARDS COMPANY, William Morley, and Harry Morley.

COURTS $\hookrightarrow$ 282(1), 303(2) — ENJOINING STATE OFFICERS — CIVIL OR CRIMINAL PROCEEDINGS.

1. The jurisdiction of a Federal district

court to enjoin the threatened enforcement, by state officials, through civil or criminal proceedings, of the provisions of S. D. Laws 1915, chap. 275, prohibiting dealing in corporate securities without state sanction, which are assailed as repugnant to the Federal Constitution, may not be successfully challenged on the grounds that complainants have a plain, speedy, and adequate remedy at law; that the suit is one against the state; and that the plea of the unconstitutionality of the statute was made in certain pending criminal actions,—where six informations for violations of the statute have already been filed against complainants, and as many more may be brought as there may be violations of the statute, and a conviction of each may bear a fine of \$1,000 or imprisonment, or both, and where the decree does not enjoin criminal actions commenced before the filing of the bill.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820, 824, 844½; Dec. Dig. $\hookrightarrow$ 282(1), 303(2).]

CONSTITUTIONAL LAW $\hookrightarrow$ 296(1) — POLICE POWER—DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS—"BLUE SKY" LAW.

2. There is nothing in the 14th Amendment to the Federal Constitution which prevents a state from enacting, in the exercise of its police power, such a statute as S. D. Laws 1915, chap. 275, which forbids (with certain exceptions and exemptions) the sale of corporate or quasi corporate securities that have not first received the approval of the State Securities Commission, obtainable only after certain prescribed data have been filed with the Commission, and requires dealers in such securities to obtain a license from the Commission, and forbids them to deal in any other than approved securities, or to transact business on any other plan than that set forth in the statements and papers which they have filed with such Commission.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 831, 843; Dec. Dig. $\hookrightarrow$ 296(1).]

COMMERCE $\hookrightarrow$ 10—STATE REGULATION—"BLUE SKY" LAW—CONGRESSIONAL INACTION.

3. Until Congress acts the state is free to impose such an incidental or indirect burden on interstate commerce as may result from the provisions of S. D. Laws 1915, chap. 275, which forbid (with certain exceptions and exemptions) the sale or disposition of corporate or quasi corporate securities within the state without state sanction.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. $\hookrightarrow$ 10.]

[No. 386.]

Argued October 16 and 17, 1916. Decided January 22, 1917.

APPEAL from the District Court of the United States for the District of South Dakota to review a decree enjoining the enforcement of the so-called "Blue Sky" law

of that state. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. Clarence C. Caldwell, Attorney General of South Dakota, in propria persona, and Mr. Byron S. Payne for appellees.

Messrs. George J. Danforth, Hugh S. Gamble, Frank McLaughlin, and Edward E. Wagner for appellees.

* Mr. Justice McKenna delivered the opinion of the court:

This case was argued and submitted with Nos. 438, 439, and 440, just decided [242 U. S. 539, 61 L. ed. 480, 37 Sup. Ct. Rep. 217], and with No. 413 [242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227], which concerns a statute of Michigan of like kind, the opinion in which is to follow. It involves the same general questions as those cases, and is presented to review a decree of the district court enjoining appellants from enforcing a statute of the state of South Dakota relating to the sale of securities. The act ([Sess. Laws 1915, chap. 275] § 23) makes violations of its provisions a misdemeanor, and criminal prosecutions under the act were the particular actions of the officers of the state that the appellees prayed to be enjoined.

After a consideration of the pleadings and argument the court, consisting of three judges, expressed the view that the statute violated the Constitution of the United States, and cited in confirmation *Alabama & N. O. Transp. Co. v. Doyle*, 210 Fed. 173; *William R. Compton Co. v. Allen*, 216 Fed. 537; and *Bracey v. Darst*, 218 Fed. 482.

The court decreed that the appellants be enjoined from instituting and prosecuting any actions, civil or criminal, against complainants (appellees) under the statute for alleged violations thereof, and from taking any proceedings for its enforcement except such as might be deemed proper by them in the criminal actions already pending.

The Sioux Falls Stock Yards Company is a Colorado corporation, having its principal place of business at the city of Denver, and the Morleys are residents and citizens of Iowa.

The Stock Yards Company was at the times mentioned in the bill engaged in building and constructing a stock yard in Sioux Falls, South Dakota, and in selling a certain amount of its capital stock for raising sufficient capital for that purpose. The Morleys, at such time, were engaged in the buying and selling of stock and especially in selling the stock of the Stock Yards Company to various farmers and other purchasers, such sales being necessary to complete the construction of the stock yard,

and also necessary to enable the Morleys to earn a livelihood.

Six informations were filed against appellees at the instigation of appellants for violations of the statute, and it is alleged that appellees will be prosecuted immediately under such informations and will be further prosecuted.

The statute, it is alleged, is an infraction of the 14th Amendment of the Constitution of the United States, and imposes a burden upon and practically amounts to a prohibition of interstate commerce, and hence offends the commerce clause of the Constitution of the United States; and "that it attempts to vest in and delegate to the State Securities Commission judicial powers unauthorized by law."

Against the bill appellants urge, besides asserting the validity of the statute, three defenses: (1) That complainants have a plain, speedy, and adequate remedy at law; (2) the suit is one against the state; (3) that the plea of the unconstitutionality of the statute was made in the criminal actions.

The three defenses are without merit. Six informations have already been filed against appellees and as many more may be brought as there may be violations of the statute, and a conviction of each may bear a fine of \$1,000 or imprisonment, or both.

The suit manifestly is not one against the state, and the decree appealed from does not enjoin criminal actions commenced before the filing of the bill. We therefore pass to the merits.

A summary of the statute is all that is necessary. Its purpose as declared in its title is to prevent fraud in the sale and disposition of stocks, bonds, or other securities sold or offered for sale within the state. It creates a commission, called the State Securities Commission, of which the appellants—except Hanson, who is prosecuting attorney of Turner county—are members.

Those dealing in securities—and they may be persons, corporations, copartnerships, companies, or associations, incorporated or unincorporated—shall be known, it is provided, "as a domestic investment company." Those resident of or organized in any other state, territory, or government shall be known "as a foreign investment company."

Certain securities are exempt from the provisions of the act, and information as to those to which it applies must be furnished to the Commission as follows: If the securities are of the dealer's own issue, a statement must be filed with the Commission, showing in full detail (1) the plan upon which it proposes to transact business; (2) a copy of all contracts, stocks, and bonds which it proposes to make with

* SEC. 12 or sell to contributors or customers, together with a copy of its prospectus and of the proposed advertisements of its securities; which statement shall also show the names and location of its main office; (3) the names and addresses of its officers and an itemized account of its financial condition and the amount of its assets and liabilities; (4) such other information as the Commission may require; (5) if a foreign corporation, a copy of the law under which it was incorporated; (6) a copy of its charter and certain other papers relating to its constitution and organization. A filing fee is provided for of not less than \$10 nor more than \$100. The described papers are to be verified, and, if of record, certified to. If a foreign corporation, the applicant must file its irrevocable consent to suits against it by service of summons upon the public examiner.

The Commission is authorized to require further information than that mentioned above, and to make an appraisal of the property of the applicant at the expense of the applicant.

If the Commission find from the statements filed and the reports of the investigations conducted by it that the securities or investment contracts offered for sale would, in its opinion, work a fraud upon the purchaser, the Commission shall disapprove of their sale and notify the company by registered mail of its findings and disapproval, and it shall be unlawful for the company to sell such securities, and they shall not be sold in the state. If, however, the proposed plan of business and the securities are not of that character their sale shall be approved and a certificate issued of permission to sell.

* SEC. 13 The person who is authorized to sell the securities designated in the act is termed a "dealer" in them, and he shall not sell or offer them for sale until he shall have filed a list of the same in the office of the Commission. The term "dealer," it is provided, shall not include an owner nor issuer of securities when the sale of them is not made in the course of continued and successive transactions of a similar nature, nor one who, in a trust capacity created by law, lawfully sells securities "impressed with such trust." A "dealer" is required to furnish practically the same information as that required of corporations. All authorized agents of a "dealer" or investment company shall be registered with the Commission, and if the "dealer" be a nonresident or a corporation other than a domestic corporation, he shall, at the time he registers with the Commission, file with it a written, duly authenticated appointment of the public examiner of the state as his or

its agent in the state upon whom process or pleadings may be served for or on behalf of the "dealer," which appointment shall be irrevocable. Upon compliance with the terms of the act, the Commission shall issue to such "dealer" a license which shall be good until revoked by the Commission for good cause upon notice to the "dealer," and after a hearing duly had.

There is a provision for keeping accounts, payment of fines, and other details, and it is provided that if, after permission has been issued authorizing the sale of the designated securities, it shall be made to appear to the Commission, from an examination of an investment company, that the further sale of the securities would work a fraud upon the purchaser, the Commission may make an order revoking the license of the company, and, pending the hearing, suspend the right of the company.

It is unlawful for a dealer or investment company to sell or offer for sale securities other than those approved by the Commission, or to transact business on any other plan than that set forth in the statements and papers required to be filed with the Commission; or to circulate advertisements or other documents in the state differing in any way from the copy filed with the Commission; or until the same has been approved by the Commission. And no dealer shall sell or offer for sale securities of an investment company until such company has complied with the act. He may, however, if such investment company has not itself complied with the act, make application for a license.

Records of the Commission shall be public records, and they shall be so arranged and preserved as to facilitate their examination, except that the Commission may, in its discretion, withhold information relating to the private affairs of persons or corporations when, in its judgment, the same shall not be required for the public welfare, or any information relative to any matter that may be at issue in any court, unless upon an order of the court. Except as so provided, the Commission may furnish to those who may apply therefor any information regarding any investment company or its affairs.

Annual statements are required to be filed by investment companies, domestic or foreign, in such form and containing such information as the Commission may demand; and failure to do so forfeits its permit.

The supreme court of the state, upon petition of any person aggrieved, may review by certiorari any final order or determination of the Commission. The issue of the writ shall not, however, unless specifically

ordered by the court, operate as a stay of proceedings.

Violations of the act are made misdemeanors punishable by a fine of not more than \$1,000 or imprisonment for not more than one year, or both fine and imprisonment. And it is provided that if any section of the act be declared unconstitutional or unauthorized, the other sections shall not be vacated thereby.

The statute of South Dakota differs in some details from the statute of Ohio, but in its purpose and general provisions it is the same. There is urged against it, as was urged against the Ohio statute, that it violates the 14th Amendment and the commerce clause of the Constitution of the United States. The argument to support these contentions, while affluent in citation of cases, is not so circumstantial as that which is presented against the Michigan statute. Therefore, we shall rest this case upon our opinion in Nos. 438, 439, and 440 [242 U. S. 539, 61 L. ed. 480, 37 Sup. Ct. Rep. 217], reserving to the Michigan case our reply to the more specific objections.

Decree reversed and cause remanded for further proceedings in conformity with this opinion.

Mr. Justice McReynolds dissents.

(242 U. S. 563)

FRANK W. MERRICK, John W. Haarer,
and Grant Fellows, Appts.,
v.

N. W. HALSEY & COMPANY et al., and
the Weis Fibre Container Corporation.

CONSTITUTIONAL LAW §296(1)—POLICE
POWER—DUE PROCESS OF LAW—EQUAL
PROTECTION OF THE LAWS—"BLUE SKY"
LAW.

1. The police power of the state justifies, notwithstanding the limitations of U. S. Const. 14th Amend., the enactment of Mich. Pub. Acts 1915, Act No. 46, which forbids (with certain exceptions and exemptions) the sale of corporate or quasi corporate securities that have not first received the approval of the State Securities Commission, obtainable only after certain prescribed data have been filed with the Commission, and requires dealers in such securities to obtain a license from the Commission, and forbids them to deal in any other than approved securities, or to transact business on any other plan than that set forth in the statements and papers which they have filed with such Commission.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 831, 843; Dec. Dig. §296(1).]

CONSTITUTIONAL LAW §240(1)—EQUAL
PROTECTION OF THE LAWS—"BLUE SKY"
LAW.

2. There is no denial of the equal protection of the laws in the exemption of se-

curities which are listed in any standard manual of information approved by the State Securities Commission, which was made by Mich. Pub. Acts 1915, Act No. 46, forbidding (with certain exceptions and exemptions) the dealing in, or the sale and disposition of, corporate or quasi corporate securities without the approval of that Commission, nor in the provisions of that statute which empower the Commission to call for additional information other than that contained in the manuals, and, pending the filing of such information, to suspend the sale of such securities, and to suspend, either temporarily or permanently, the sale of any securities listed in such manuals after a hearing upon notice, if the Commission shall find that the sale of such securities will work a fraud upon purchasers.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 638, 693, 697, 698; Dec. Dig. §240(1).]

CONSTITUTIONAL LAW §296(1) — DUE
PROCESS OF LAW—CONFERRING ARBITRARY
POWER ON STATE COMMISSION—"BLUE
SKY" LAW.

3. The pursuit of a lawful business was not made the subject of arbitrary executive discretion, contrary to U. S. Const. 14th Amend., by the provisions of Mich. Pub. Acts 1915, Act No. 46, which forbid (with certain exceptions and exemptions) the sale of corporate or quasi corporate securities that have not first received the approval of the State Securities Commission, obtainable only after certain prescribed data have been filed with the Commission, and require dealers in such securities to obtain a license from the Commission, and forbid them to deal in any other than approved securities, or to transact business on any other plan than that set forth in the statements and papers which they have filed with such Commission, since there is a presumption against wanton action by the Commission, and if there should be such disregard of duty a remedy in the courts is expressly given, and if it were not given it would necessarily be implied.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 831, 843; Dec. Dig. §296(1).]

STATUTES §121(1)—EXPRESSION OF SUB-
JECT IN TITLE—"BLUE SKY" LAW.

4. The title, "An Act to Prevent Fraud in the Sale and Disposition of Stocks, Bonds, or Other Securities Sold or Offered for Sale," etc., sufficiently indicates the contents of Mich. Pub. Acts 1915, Act No. 46, which forbids (with certain exceptions and exemptions) the sale of corporate or quasi corporate securities that have not first received the approval of the State Securities Commission, obtainable only after certain prescribed data have been filed with the Commission, and requires dealers in such securities to obtain a license from the Commission, and forbids them to deal in any other than approved securities, or to transact business on any other plan than that set forth in the statements and papers which they have filed with such Commission.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 146, 173; Dec. Dig. §121(1).]

COMMERCE §10 — STATE REGULATION—
"BLUE SKY" LAW—CONGRESSIONAL IN-
ACTION.

5. Until Congress acts the state is free to impose such an incidental or indirect burden on interstate commerce as may result from the provisions of Mich. Pub. Acts 1915, Act No. 46, which forbid (with certain exceptions and exemptions) the sale or disposition of corporate or quasi corporate securities within the state without state sanction.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. §10.]

[No. 413.]

Argued October 16 and 17, 1916. Decided January 22, 1917.

APPEAL from the District Court of the United States for the Eastern District of Michigan to review a decree enjoining the enforcement of the so-called "Blue Sky" law of that state. Reversed and remanded for further proceedings.

See same case below, 228 Fed. 805.

Statement by Mr. Justice McKenna:

*The question in the case is the validity of the Blue Sky Law (using this designation for convenience) of the state of Michigan. The law is almost identical with that of South Dakota, which is the subject of the decision in No. 386 [242 U. S. 559, 61 L. ed. 493, 37 Sup. Ct. Rep. 224].

The pleadings are elaborate and practically defy synopsis. There are direct complainants and intervening complainants, expressing the grievances of dealers in the state and outside of the state, and of persons who would like to be dealers in the state, but are deterred, they allege, by the expense of the undertaking. The law, therefore, is assailed from all points and in all aspects.

The original bill includes in it as parties corporations, individuals, copartnerships, residents, and citizens of different states, all engaged in the investment banking business and in the business of buying and selling stocks, bonds, and other securities, and offering them for sale in Michigan, and who have contracted from time to time to sell such securities for the owners thereof and for the issuers thereof. They have expended large sums of money in advertising their business and have a valuable good will and an extensive clientele, and have acquired valuable information as to the conduct of their business and as to the names and addresses of persons, firms, and corporations who buy the designated securities in Michigan. They send into the state their agents and employees, who there* solicit orders for the securities and transmit such orders to complainants, at Chicago, Illinois, which orders are accepted, and the

securities so purchased are transmitted to Michigan. Their representations of the securities are true representations, they allege, and that they have been solicited to sell and have contracted to sell them, but have been informed that they cannot be permitted to sell them without complying with the Michigan statute.

The various provisions of the statute are set out, with details as to the manner of its operation; the irrelevancy of it is asserted, the useless labor of it,—in some cases the impossibility of it,—and in other cases its unreasonableness; and it is further asserted that its exaction of matters of confidence and its requirements invade and destroy property rights, curtail freedom of contract, and otherwise seriously damage complainants' business and property. All of this is alleged with industrious and elaborate detail.

The other charges of invalidity against the act are: (1) It is in violation of the Constitution of Michigan, which provides that no law shall embrace more than one object, which shall be expressed in its title, with specifications. (2) It offends against the 14th Amendment of the Constitution of the United States, especial stress being put upon the exceptions of the statute, which are asserted to be discriminations in violation of the equal protection of the laws guaranteed by that Amendment. (3) It imposes a burden on interstate commerce in violation of § 8, article 1, of the Constitution of the United States.

Under the latter objection there is elaborate specification of particulars which exhibit, with the specifications under the other objections, every shade of meaning, purpose, or effect that ingenuity can ascribe to the statute,—indeed, every provision of the statute is reviewed and charged with some form of illegality. However, the attacks may be condensed in the charge that the statute is a violation of the prohibitions of the 14th* Amendment of state action because of its restrictions or prohibitions of a lawful business; and a violation of the commerce clause of the Constitution because the designated securities are articles of commerce, and, as such, entitled to unmolested transportation between the states, and that the statute is a direct burden upon them in many cases, prohibitive in others,—with the addition that the statute delegates legislative power to the commission created by it, inflicts cruel and unusual punishments, and imposes penalties whose object is to deter from a test of its validity; and inflicts cruel and unusual punishments, in violation of the Constitution of Michigan.

It is also alleged that in a suit entitled Alabama & N. O. Transp. Co. v. Doyle, in

*For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the district court for the eastern district of Michigan, the statute, of which the statute under review is an amendment, was declared unconstitutional and void, the opinion in which case is reported in 210 Fed. 173, and that the statute there passed upon is similar in all illegal particulars to the present statute. A remedy in equity is asserted because of alleged irreparable injury and on account of the penalties imposed, and an injunction is prayed against the enforcement of the act.

At the same time that the bill outlined above was filed another bill was filed by the Weis Fibre Container Corporation, a corporation of South Dakota, whose purpose is to manufacture, buy, and sell paper or fiber containers and similar products. It is not an investment company, but a manufacturing company. Its securities are not supervised or regulated by any public service board or commission, and the proceeds from the sale of its stocks and securities are employed in the prosecution of its business, and are not otherwise invested. The corporation is duly authorized to do business in Michigan; its stock is valuable, and it has offered it for sale in Michigan directly and through agents and employees; and it is alleged that the representations made in regard thereto are true. It has solicited various persons in Michigan to offer its stock for sale, and they have informed it that its stocks cannot be sold in Michigan unless full compliance is made with the statute.

The bill attacks the statute for the illegalities detailed in the other bill, and, considering that the only remedy is in equity, prays an injunction against the enforcement of the act.

A restraining order was issued entitled in both cases. Subsequently, on September 16, 1915, a partnership, organized and existing under the laws of the state of Ohio, having the name of Otis & Company, and composed of citizens of Colorado and Ohio, filed a petition in intervention.

That company is a dealer in bonds and other securities in Michigan, and such bonds and securities are of the kind which the statute of the state regulates. It also sends agents into the state to solicit orders for such securities and transmits orders to its offices in Cleveland, Ohio.

It asserts identity of situation with the complainants in the other bills, and adopts their charges against the statute, and prays to be made a party complainant to the cause, and for the benefit of the restraining order issued therein, and for such other relief as the court may deem meet.

A demurrer was filed to the bills and a motion made for injunction. The company was given the benefit of the restraining order and a like benefit was given to all others who might petition to intervene, the restraining order to continue until the disposition of the motion which had been made for injunction. The injunction was subsequently granted (228 Fed. 805), and to review it this appeal is prosecuted.

There was a partnership under the name of Remick, Hodges, & Company, Remick and Hodges being residents of New York and March a resident of New Jersey, having their office at the city of New York and engaged in buying* and selling stocks, bonds,¹² and other securities. Their business is known as investment banking and is carried on in New York and by their agents there and elsewhere, and by mail with various corporations, associations, and persons throughout the United States and in the state of Michigan. They own many of such securities which they have offered and are offering for sale, and desire to continue to offer to their customers in the state of Michigan. They have no place of business in the state and are not at the present time sending agents into the state, but are endeavoring to sell securities there; but the volume of such business is not sufficient to justify them to attempt to comply with the statute of the state, and the statute, if enforced against them, will have the effect of preventing them from making any further offers in the state, and from attempting to establish or develop any business therein, and they are excluded thereby from interstate commerce in such securities which they have heretofore enjoyed.

They allege themselves to be in like situation with complainants and adopt the allegations of complainants' bills, and especially complain of the penalties which may be enforced against them and their agents, and pray to come into the suit as parties.

The causes were subsequently consolidated by a nunc pro tunc order.

The injunctions restrained the defendants from enforcing the act and from beginning or instituting any action, civil or criminal, against complainants, "based upon or pursuant to such act."

Mr. Grant Fellows, Attorney General of Michigan, in propria persona, for appellants.

Messrs. George W. Wickersham, Robert R. Reed, Hal H. Smith, and Charles K. Allen for appellees.

Mr. George Cosson, Attorney General of Iowa, and Mr. Walter C. Owen, Attorney General of Wisconsin, as amici curiæ.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The statute of Michigan is the same as the statutes of South Dakota and Ohio, and our reply to the attacks made upon it might be rested upon our discussion of those statutes.

But in the present case, as we have said elsewhere, the arguments, while fundamentally the same, are in some respects more circumstantial. All the supposed consequences of the law are dilated upon—wherein, as it is contended, it meddles with or burdens a business asserted to be legitimate, wherein it prohibits or gives power to an executive officer to arbitrarily prohibit such business, and wherein it confuses legislative and executive powers, and in these ways and other ways, as it is further contended, transgresses the Constitution of the United States. Many cases are cited to support the contentions and publicists are avouched to the same end. In our discussion we cannot be as elaborate in details as counsel, nor is it necessary. There are certain outside propositions upon which all others may be regarded as dependent. These propositions were considered in the other cases and we need now only supplement what was there said.

The appellants justify the law by the police power of the state and its comprehensive reach. Replying, appellees urge against it the limitations of the 14th Amendment and the national supremacy over interstate commerce; and applying the 14th Amendment, assert in many ways (we select one and upon it the changes are rung) that the issue of the securities "is in effect the making of contracts 'proper and necessary and essential' to the pursuit of lawful livelihoods or avocations," and cannot be "made the subject of discretionary executive license," controlling thereby individual transactions.

an assertion encounters immediately many cases in which laws have been sustained limiting the making of contracts and regulating business through executive agencies and necessarily controlling individual transactions. Indeed, there are too many for even marginal citation. They, however, are attempted to be distinguished or restricted. It is said by counsel that they "deal with administrative control over matters of public right or public grant or existing at public sufferance." And it is admitted that "the legislature may deal drastically with many matters of private right, to prevent or redress individual wrongs." It is further admitted that "drastic remedies may be prescribed by law [*italics ours*] for evils deemed by the legislature to re-

quire them." Excluding the proposition so expressed from application to the Michigan law, it is insisted that the business to which it applies "neither requires nor justifies, nor is susceptible of, administrative or executive control for the purpose of preventing a wrong or injury by one individual to another." Of course, the implication, if not the direct assertion, is that the business of dealing in securities has not that character. Neither the principle nor the assertion is very tangible. The first incidence of any evil from a business or conduct is upon some individual, and through the individual (let us say individuals, for necessarily there are more than one) upon the community; nor can it be affected in any other way. Besides, it is for the state to judge in such circumstances, and the judgment and its execution would have to be palpably arbitrary to justify the interference of the courts. Counsel, indeed, frankly concedes the evil of "get-rich-quick" schemes and quotes the banking commissioner of the state of Kansas for the statement that the "Blue Sky" law of that state had saved the people of the state \$6,000,000 since its enactment, and that between 1,400 and 1,500 companies had been investigated by the department and less than 400 of the number granted permits to sell securities in the state. Counsel also quotes the confidence of the commissioner in the efficacy of the law, and that it will "eventually result in the regulation and supervision of all kinds of companies in the same manner as banks are now regulated and supervised."

Against this statement, however, counsel cites the view expressed by the British Board of Trade of the inexpediency of an official investigation "into the soundness, good faith, and prospects" of companies. Upon this difference in views we are not called upon to express an opinion, for, as we have said, the judgment is for the state to make, and in the belief of evils and the necessity for their remedy and the manner of their remedy the state has determined that the business of dealing in securities shall have administrative supervision, and twenty-six states have expressed like judgments.

Much may be said against these judgments, as much has been said, and decisions of the courts have been cited against them. We are not insensible to the strength of both, but we cannot stay the hands of government upon a consideration of the impolicy of its legislation. Every new regulation of business or conduct meets challenge, and, of course, must sustain itself against challenge and the limitations that the Constitution imposes. But it is to be borne in mind that the policy of a state and its ex-

pression in laws must vary with circumstances. And this capacity for growth and adaptation we said, through Mr. Justice Matthews, in *Hurtado v. California*, 110 U. S. 516, 530, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292, is the "peculiar boast and excellence of the common law." It may be that constitutional law must have a more fixed quality than customary law, or, as was said by Mr. Justice Brewer, in *Muller v. Oregon*, 208 U. S. 412, 420, 52 L. ed. 551, 555, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957, that "it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action." This, however, does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion except by amendments to the organic law. We may feel the difficulties of the new applications which are invoked, the strength of the contentions and the arguments which support or oppose them, but our surest recourse is in what has been done, and in the pending case we have analogies if not exact examples to guide us. So guided and so informed, we think the statute under review is within the power of the state. It burdens honest business, it is true, but burdens it only that, under its forms, dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the state by such considerations would make it impotent to discharge its function. It costs something to be governed.

But counsel say that the conditions imposed either are not adequate to such purpose or transcend what is necessary for it. Indeed, it is asserted that the statute has not that purpose, "but rather to prevent financial loss." The assertion is against the declaration of the title of the statute and against the words of its body, and cannot be justified by assigning to it the purpose of the law which it amends; nor can we assent to the contention that such purpose must be inferred from § 8 or other provisions which point, it is said, to the probability of financial loss, not fraud. The act must be considered from its declared purpose and as a whole, not from detached portions which can be easily overwhelmed when assigned a false character.

It is, however, said that, assuming the statute have such purpose, the fraud referred to is not a proper object for the police power, and it is asked, "Can the occasional fraud, that fraud which arises in the individual transaction, justify a law

regulating the business of which the single transaction is a part? Or must it be fraud which is incidental to the business,—a fraud which the business itself, from its character and the manner in which it is generally conducted, invites and encourages?" And, quoting from *People ex rel. Tyroler v. Warden*, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006: "It is a novel legislation, indeed, that attempts to take away from all the people the right to conduct a business because there are wrongdoers in it." To the latter we say the right to do business is not taken away; the other we have already answered and need only add that we cannot, upon such considerations, limit the power of the state. The state must adopt its legislation to evils as they appear, and is not helpless because of their forms.

Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190, was not decided because fraud was incidental to the business of banking by individuals or partnerships, but because fraud could be practised in it, and that hence it could be licensed. Nor was it decided in *Allen v. Riley*, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95, 8 Ann. Cas. 137, that the transfer of patent rights was of itself illegal, or that any particular transfer would be deceptive, but that some transfers might be; and so a statute of Kansas which required any person selling or offering to sell such rights to conform to certain requirements was declared valid. Nor did we hesitate to hold valid the regulation of the business of employment agencies. It was a lawful business and would not in instances be injuriously conducted; but in instances it might be, and because it might be, with injurious consequences, its regulation was provided. This court sustained the regulation and the condition that it was to be enforced according to the legal discretion of a commissioner. *Brazee v. Michigan*, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561. See also *Brodnax v. Missouri*, 219 U. S. 285, 55 L. ed. 219, 31 Sup. Ct. Rep. 238. Other cases might be cited of similar import.

It may be that there are better ways to meet the evils at which the statute is directed, and counsel have felt it incumbent upon them to suggest a better way. We can only reply that it is not our function to decide between measures, and, upon a comparison of their utility and adequacy, determine their legality.

The contentions upon the discriminations of the statute we rest upon the comment made on like contentions in the other cases. A special emphasis, however, is put by appellees upon the adoption by the Commis-

sion of "so-called 'standard manuals of investment.'" The adoption of these manuals, it is said, is justified by the Commission under § 3, which enumerates the securities that are exempt from the law, among others, "(h) securities which are listed in any standard manual of information approved by said Commission." The provision is attacked as "the Michigan idea" of providing an easy way out of the act at all times." And further: "It is not so much an exemption of existing standard securities as a working exemption available for new offerings to be listed as issued." And again: "It is to be a permanent means of exempting new securities from the act." Even this, it is asserted, is not all of the power that is given for discrimination, for it is pointed out that the Commission may call for additional information than that contained in the manuals, and may, pending the filing of the information, suspend the sale of the securities, and may also suspend, either temporarily or permanently, the sale of any securities listed in such manuals after a hearing upon notice, if the Commission shall find that the sale of such securities would work a fraud upon the purchasers thereof.

*The exemption and the provision are declared to be unconstitutional, and it seems to be intimated that in the flexibility of what is considered their subterfuge a vicious character is not only given to the act, but constituted its inducement, and therefore brings the act down with it, for without it, it is insisted, the statute would not have been enacted. We cannot agree either to the characterization of the provision or its effect. The first would attribute a sinister purpose to the legislation of which there is no indication; the second would give too much importance to a subordinate provision, one that is only ancillary or convenient to the main purpose.

The contentions based on the exemption and provision are a part of that which accuses the law of conferring arbitrary discretion upon the Commission, and committing to its will the existence or extinction of the business. The accusation is formidable in words, but it is the same that has been made many times. It is answered by the comment and the cases cited in the opinion in the other cases. Besides, we repeat, there is a presumption against wanton action by the Commission, and if there should be such disregard of duty, a remedy in the courts is explicitly given, and if it were not given it would necessarily be implied.

Objection is made that the title of the act does not indicate its provisions, and that the act hence violates the Constitution of

Michigan. The objection is untenable and does not call for particular notice.

Answer to the contention that the statute is an interference with interstate commerce we leave to our opinion in Nos. 438, 439, and 440 [242 U. S. 539, 61 L. ed. 480, 37 Sup. Ct. Rep. 217].

Decree reversed and cause remanded for further proceedings in conformity with this opinion.

Mr. Justice McReynolds dissents.

(242 U. S. 591)

VICTOR HERBERT, Harry B. Smith, et al., Petitioners,

v.

SHANLEY COMPANY. (No. 427.)

JOHN CHURCH COMPANY, Petitioner,

v.

HILLIARD HOTEL COMPANY and Henri de Martini. (No. 433.)

COPYRIGHTS ~~©~~66—IN MUSICAL COMPOSITION—INFRINGEMENT—“PERFORMANCE FOR PROFIT.”

The performance in a restaurant or hotel dining room, by persons employed by the proprietor, of a copyrighted musical compositions, for the entertainment of patrons, without charge for admission to hear it, infringes the exclusive right of the owner of the copyright, under the Act of March 4, 1909 (35 Stat. at L. 1075, chap. 320, Comp. Stat. 1913, § 9517), § 1 (e), to perform the work publicly for profit.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 63; Dec. Dig. ~~©~~66.]

[Nos. 427 and 433.]

Argued January 10, 1917. Decided January 22, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York, dismissing the bill in a suit for the alleged infringement of a copyright. Reversed; Also

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which, on a second appeal, affirmed a decree of the District Court for the Southern District of New York, dismissing the bill in a suit for the alleged infringement of a copyright. Reversed.

See same case below, in No. 427, 143 C. C. A. 460, 229 Fed. 340; in No. 433, on first appeal, 136 C. C. A. 639, 221 Fed. 229,

on second appeal, 142 C. C. A. 667, 228 Fed. 1021.

The facts are stated in the opinion.

Messrs. Nathan Burkan and William J. Hughes for petitioner in No. 427.

Messrs. Levi Cooke, Abraham S. Gilbert, and Francis Gilbert for respondent in No. 427.

Messrs. Louis J. Vorhaus, Moses H. Grossman, and William Grossman for petitioner in No. 433.

Messrs. Charles J. Campbell, Frank A. K. Boland, and Levi Cooke for respondents in No. 433.

*Mr. Justice Holmes delivered the opinion of the court:

These two cases present the same question: whether the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it infringes the exclusive right of the owner of the copyright to perform the work publicly for profit. Act of March 4, 1909, chap. 320, § 1 (e), 35 Stat. at L. 1075, Comp. Stat. 1913, § 9517. The last-numbered case was decided before the other and may be stated first. The plaintiff owns the copyright of a lyric comedy in which is a march called "From Maine to Oregon." It took out a separate copyright for the march and published it separately. The defendant hotel company caused this march to be performed in the dining room of the Vanderbilt Hotel for the entertainment of guests during meal times, in the way now common, by an orchestra employed and paid by the company. It was held by the circuit court of appeals, reversing the decision of the district court, that this was not a performance for profit within the meaning of the act. 136 C. C. A. 639, 221 Fed. 229.

The other case is similar so far as the present discussion is concerned. The plaintiffs were the composers and owners of a comic opera entitled "Sweethearts," containing a song of the same title as a leading feature in the performance. There is a copyright for the opera and also one for the song, which is published and sold separately. This the Shanley Company caused to be sung by professional singers, upon a stage in its restaurant on Broadway, accompanied by an orchestra. The district court, after holding that by the separate publication the plaintiffs' rights were limited to those conferred by the separate copyright,—a matter that it will not be necessary to discuss,—followed the decision in 136 C. C. A. 639, 221 Fed. 229, as to public performance for profit. 222 Fed. 344. The decree was affirmed by the circuit court of appeals. 143 C. C. A. 400, 229 Fed. 340.

If the rights under the copyright are in-

fringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.

Decree reversed.

(242 U. S. 537)

UNITED STATES, Appt.,

v.

AMERICAN-ASIATIC STEAMSHIP COMPANY et al. (No. 138.)

UNITED STATES, Appt.,

v.

PRINCE LINE, Limited, Paul F. Gerhard, Charles Z. Gerhard, Francis J. Zimmerman, et al. (No. 169.)

APPEAL AND ERROR —DISMISSAL — MOOT CASE.

1. The moot character of the controversy, by reason of the existence of the European War, prevents the Federal Supreme Court from deciding on the merits an appeal from a decree presenting the question whether the provisions of the Anti-trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), are violated by a combination of steamship companies to monopolize ocean carriage.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80; Dec. Dig. 

APPEAL AND ERROR —JUDGMENT —REVERSING WITHOUT PREJUDICE.

2. The Federal Supreme Court, instead of dismissing an appeal from a decree of a Federal district court adverse to the government's contention that a combination of steamship companies to monopolize ocean carriage violates the Anti-trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), where the controversy has become a moot one in view of the Euro-

pean War, will reverse the decree and remand the case with directions to dismiss the bill without prejudice to the right of the government in the future to assail any actual contract or combination deemed to offend against the Anti-trust Act.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4595, 4596; Dec. Dig. § 1176(6).]

[Nos. 138 and 169.]

Submitted December 2, 1916. Decided January 22, 1917.

TWO APPEALS from the District Court of the United States for the Southern District of New York to review decrees granting a portion only of the relief sought by the United States in a suit under the Anti-trust Act against ocean carriers. Reversed and remanded with directions to dismiss the bills without prejudice.

See same case below, 220 Fed. 230.

Solicitor General Davis and Mr. Carroll G. Todd filed a motion to reverse and remand with instructions to dismiss the petition without prejudice.

No counsel opposed.

Memorandum opinion by Mr. Chief Justice White, by direction of the court:

The United States sued to restrain the carrying out of agreements between British, German, and American steamship companies who were defendants, on the ground that they were in violation of the Anti-trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820). Overruling the contention that that act did not relate to contracts concerning ocean carriage, the court entered decrees against the United States in both cases, dismissing the bills for want of equity, on the ground that the assailed agreements were not in conflict with the Anti-trust Act except as to a particular discrimination found to have been practised in one of the cases which was provided against. 220 Fed. 230. At the time this action was taken by the court below, as the result of the European War, the assailed agreements had been dissolved and the questions raised by the bills were therefore purely moot, as directly decided to be the case as to a similar situation in *United States v. Hamburg Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 60 L. ed. 387, 36 Sup. Ct. Rep. 212.

Under these circumstances the request now made by the United States that the doctrine announced in the *Hamburg-Amerikanische Case* be applied to both of these cases, and the relief afforded in that case be awarded, is well founded and must be granted. It follows, therefore, that the decrees below must be reversed and the cases be remanded to the court below with direc-

tions to dismiss the bills without prejudice to the right of the United States in the future to assail any actual contract or combination deemed to offend against the Anti-trust Act.

And it is so ordered.

(242 U. S. 603)

CHESAPEAKE & OHIO RAILWAY COMPANY, Plff. in Err.,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA.

CONSTITUTIONAL LAW § 241, 297 — DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS—ORDERING PASSENGER SERVICE ON BRANCH LINE.

An order of the State Public Service Commission requiring the installation and maintenance of a passenger service upon a branch railway line which has hitherto been used for freight traffic only is not repugnant to the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., although the passenger service so ordered, if separately considered, may entail some pecuniary loss, where, under the local law (W. Va. Acts 1881, chap. 17, §§ 69, 71, Code 1913, chap. 54, §§ 2983, 2995), such branch line was, in legal contemplation, devoted to the transportation of passengers as well as of freight, even though actually used only for the latter, and it does not appear either that the railway company's intrastate passenger business will not yield a reasonable return if the new service is installed, or that the traffic, freight and passenger, passing over the branch line to and from points on the main line, will not do so.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 700, 701, 832-834; Dec. Dig. § 241, 297.]

[No. 64.]

Argued and submitted November 3, 1916.
Decided February 5, 1917.

IN ERROR to the Supreme Court of Appeals of the State of West Virginia to review a decree refusing to suspend and vacate an order of the Public Service Commission of that state, requiring the installation and maintenance of a passenger service upon a branch railway line. Affirmed.

See same case below, 75 W. Va. 100, L.R.A.—, —, 83 S. E. 286.

The facts are stated in the opinion.

Messrs. F. B. Enslow and H. Fitzpatrick for plaintiff in error.

Messrs. S. B. Avis and F. C. Pifer for defendant in error.

*Mr. Justice Van Devanter delivered the opinion of the court:

This was a proceeding under the laws of

West Virginia (Acts 1913, chap. 9, § 16) to suspend and vacate an order of the Public Service Commission of that state, requiring the Chesapeake & Ohio Railway Company to install and maintain upon a branch line in that state a passenger service consisting of two passenger trains daily each way. The order was assailed on several grounds, one of these being that it was violative of the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

The supreme court of appeals of the state held that none of the objections was tenable (75*W. Va. 100, L.R.A.—, —, 83 S. E. 286), and the railway company brought the case here.

In so far as the decision turned upon questions of state law it is controlling, our power of review being restricted to the Federal question. *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 75, 55 L. ed. 369, 376, Ann. Cas. 1912C, 160, 31 Sup. Ct. Rep. 337.

The order was made after a full hearing wherein the railway company was permitted to present all the evidence which it regarded as helpful. There was but little conflict in the evidence, and the facts, which must here be regarded as proved, are these: The railway company is a Virginia corporation and owns and operates several lines of railroad in West Virginia, including a main line along the Kanawha river. This line consists of two tracks, one on the north side of the river for west-bound trains and one on the south side for trains that are east-bound. Among the stations on the north side is one called Hawks Nest, and across the river is another called MacDougal, the two being connected by a railroad bridge. The main line and these stations are used for both freight and passenger traffic. The company also owns and operates a standard gauge branch line extending from MacDougal and Hawks Nest to the town of Ansted, a little more than 2 miles, and thence another mile to some extensively operated coal mines. This is the branch line to which the order in question relates. Ansted has a population of twelve hundred or more and is the trading center for a population of six thousand. The branch line was constructed in 1890, and has been used for freight traffic only; that is to say, for hauling empty cars to the coal mines and loaded cars from the mines to the main line, and for carrying other freight between the main line and Ansted. The railway company has a freight station at Ansted in charge of an agent and helper, and also maintains a telegraph

service there. There is no other railroad at that place and the nearest passenger stations are Hawks Nest and MacDougal. In the year preceding the order the number of passengers taking the main-line passenger trains at these stations was 12,714, and of this number 90 per cent came from Ansted. In the same year the shipments of coal and other freight over the branch line aggregated 242,280 tons.

From an operating standpoint there is no serious obstacle to installing upon the branch line the service which the order requires, but the curves and grades are such that particular attention must be given to making the roadbed secure and to providing suitable devices for controlling the trains. Isolatedly considered, such a passenger service would not presently be remunerative, but would entail a pecuniary loss, and how long this would continue to be true can only be conjectured. But beyond this, the effect from a revenue standpoint of installing such a service is not shown. It does not appear either that the company's intra-state passenger business in that state would not yield a reasonable return, or that the traffic, freight and passenger, passing over the branch line to and from points on the main line, would not do so.

In support of its position that the order is essentially unreasonable and arbitrary, and therefore repugnant to the due process and equal protection clauses of the 14th Amendment, the railway company contends that the order requires a passenger service to be installed and maintained upon the branch line when that line never has been devoted to anything other than the transportation of freight, and when the service ordered, if separately considered, cannot be rendered without pecuniary loss.

It well may be that the power of regulation which a state possesses over private property devoted to public use gives no warrant for requiring that an existing line of railroad, lawfully devoted to a particular public use, such as carrying freight, shall be devoted to a further public use, such as carrying passengers (*Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 595, 59 L. ed. 735, 741, L.R.A. —, —, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 301), but, even if this be so, it has no bearing on the validity of the order in question.

As the opinion of the state court shows, the act whereby the railway company was granted the right to construct and operate the branch line did not leave the company free to devote it to freight service only or to passenger service only, but declared that it should be a public highway and "free to

all persons for the transportation of their persons and property," subject to the payment of the lawful charges for such transportation. Acts 1881, chap. 17, §§ 69, 71; Code 1913, chap. 54, §§ 2983, 2995. True, the section containing this declaration speaks of "railroads" without particularly mentioning branch lines, but that it embraces the latter is shown by the state court's opinion, which says that this branch line, when constructed, "became an integral part of the extensive Chesapeake & Ohio system, and must be treated and controlled as such, and not merely as a segregated part of it." Thus, in legal contemplation, the branch line was devoted to the transportation of passengers as well as of freight, even though actually used only for the latter. An obligation to use it for both was imposed by law, and so could not be thrown off or extinguished by any act or omission of the railway company. It follows that the order, instead of enlarging the public purpose to which the line was devoted, does no more than to prevent a part of that purpose from being neglected.

One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the state, and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. Atlantic Coast Line R. Co.

v. North Carolina Corp. Commission, 206 U. S. 1, 26, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Missouri P. R. Co. v. Kansas, 216 U. S. 262, 279, 54 L. ed. 472, 479, 30 Sup. Ct. Rep. 330; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 529, 56 L. ed. 863, 870, 32 Sup. Ct. Rep. 535; Chicago, B. & Q. R. Co. v. Railroad Commission, 237 U. S. 220, 229, 59 L. ed. 926, 931, P.U.R.1915C, 309, 35 Sup. Ct. Rep. 560. That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are also to be considered. Cases supra. Applying these criteria to the order in question, we think it is not shown to be unreasonable.

Judgment affirmed.

SECOND NATIONAL BANK OF CINCINNATI, OHIO, Plff. in Err.,

v.

FIRST NATIONAL BANK OF OKEANA, OHIO.

COURTS ⇐392—ERROR TO STATE COURT—TO WHAT COURT DIRECTED — HIGHEST STATE COURT.

A writ of error directed to the superior court of Cincinnati, Ohio, must be dismissed where the judgment of that court in the case had been affirmed by the appropriate court of appeals of that state, and the latter court, after a general judgment of affirmance, had ordered "that a special mandate be sent to the superior court of Cincinnati to carry this judgment into execution." The writ should have been directed to the court of appeals, as the highest court in which a judgment could be rendered in the case, in view of the refusal of the supreme court of the state to grant a motion to require the court of appeals to certify its record to the supreme court for review.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1046, 1047; Dec. Dig. ⇐392.]

[No. 491.]

Argued January 25, 1917. Decided February 5, 1917.

IN ERROR to the Superior Court of Cincinnati, Ohio, to review a judgment affirmed by the Court of Appeals of Hamilton County, in that state, in favor of plaintiff in an action to recover a sum of money claimed to have been deposited with defendant bank for the purpose of being loaned by it on collateral security. Writ of error dismissed because directed to the wrong court.

Messrs. Landon L. Forchheimer and Ferdinand Jelke, Jr., for plaintiff in error.

Mr. Edward P. Moulinier for defendant in error.

*Memorandum opinion by Mr. Justice Day:

This writ of error must be dismissed. It appears from the record that the action was commenced in the superior court of Cincinnati to recover the sum of \$5,000 for money which, it was alleged, the Cincinnati Bank was to loan for the First National Bank of Okeana. Issues were made up and a trial had in the superior court, which resulted in a verdict and judgment against the Cincinnati Bank. Petition in error was filed and the case taken to the court of appeals, wherein it was heard upon the record, and the judgment of the superior court of Cincinnati was affirmed. After a general judgment of affirmance, the court of appeals ordered "that a special mandate be sent to

the superior court of Cincinnati to carry this judgment into execution." An application by motion was made to the supreme court of Ohio to direct the court of appeals to certify its record to the supreme court for review. That motion was overruled.

Thereupon a petition for the allowance of a writ of error from this court was presented, which recited that the Constitution and laws of the state of Ohio and the decision of the supreme court in *Akron v. Roth*, 88 Ohio St. 456, 103 N. E. 465, show that the supreme court of Ohio has no jurisdiction of the case, in view of its refusal to direct the court of appeals to certify its record to that court, and that on February 1, 1916, the record of the case was returned to the superior court of Cincinnati with the mandate of the court of appeals, affirming the judgment of the superior court of Cincinnati, and a writ of error was asked to bring up for review the order and judgment of the superior court. A writ of error was allowed and issued, running to the superior court of Cincinnati, reciting that it was the highest court of record in the state in which a decision in the cause could be had. In pursuance of that writ the record was certified from the superior court of Cincinnati to this court.

* The Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214], provides that a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, etc., may be re-examined and reversed or affirmed in this court upon writ of error.

We are of opinion that in this case the writ of error should have been directed to the court of appeals, as that, under the Constitution and laws of the state of Ohio, is the highest court in which a final judgment could be rendered in this case, in view of the refusal of the supreme court of Ohio to grant the motion to certify to it the record of the court of appeals. *Stratton v. Stratton*, 239 U. S. 55, 60 L. ed. 142, 36 Sup. Ct. Rep. 26; *Valley S. S. Co. v. Wat-*

tawa, 241 U. S. 642, 60 L. ed. 1217, 36 Sup. Ct. Rep. 447.

By the new Constitution of Ohio and subsequent legislation, a system of courts of original and appellate jurisdiction was established in that state. Section 1576, General Code, as amended, 103 Ohio Laws, 415, provides, among other things, that "the superior court of Cincinnati, in respect to the form and manner of all pleadings therein, and the force and effect of its judgments, orders, or decrees, is a court of general jurisdiction." Section 12,247 provides that "a judgment rendered or final order made by a court of common pleas or by the superior court of Cincinnati, or by a judge of either of such courts, may be reversed, vacated or modified, by the court of appeals having jurisdiction in the county wherein the common pleas or superior court is located, for errors appearing on the record." Section 1684 provides that "the supreme court or the court of appeals may remand its final decrees, judgments, or orders, in cases brought before it on error or appeal, to the court below, for specific or general execution thereof, or to the inferior courts for further proceedings therein."

*Reference to the record in this case⁶⁰² shows that the court of appeals ordered "that a special mandate be sent to the superior court of Cincinnati to carry this judgment into execution;" that is, to carry into effect the judgment of the court of appeals. There was no direction that the superior court enter any judgment in the case; on the contrary, its judgment was specifically affirmed upon the record sent to the court of appeals, and the only mandate directed was to carry into effect in the superior court, by execution, the judgment of the court of appeals.

In this state of the record, it is clear that the writ of error in this case, when allowed, should have been directed to the court of appeals, requiring it to certify to this court its proceeding and judgment for review here, that court being the highest court of the state in which a judgment in the case could be rendered.

It follows that the writ of error in this case must be dismissed.

Dismissed.

FOLLOWING ARE MEMORANDA

OF

CASES DISPOSED OF AT OCTOBER TERM, 1916.

WITHOUT OPINIONS AND NOT ELSEWHERE OR OTHERWISE DISPOSED OF IN THIS EDITION.

U. S. JOINES, Plaintiff in Error, v. W. S. COMBS et al. [No. 130.]

In Error to the Supreme Court of the State of Oklahoma.

Messrs. C. B. Stuart, A. C. Cruce, W. I. Cruce, M. K. Cruce, and W. R. Bleakmore for plaintiff in error.

Messrs. J. H. Everest and R. M. Campbell for defendants in error.

January 8, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Leathe v. Thomas*, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *Holden Land & Live Stock Co. v. Inter-State Trading Co.* 233 U. S. 536, 541, 58 L. ed. 1083, 1086, 34 Sup. Ct. Rep. 661; *Mellon Co. v. McCafferty*, 239 U. S. 134, 60 L. ed. 181, 36 Sup. Ct. Rep. 94.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Plaintiff in Error, v. EMMA F. NASH, as Administratrix of the Estate of John Everett Nash, Deceased. [No. 421.]

In Error to the Supreme Court of the State of Minnesota.

Mr. Frederick M. Miner for plaintiff in error.

Mr. Humphrey Barton for defendant in error.

January 8, 1917. Per Curiam: Judgment reversed with costs upon the authority of *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; *Shanks v. Delaware, L. & W. R. Co.* 239 U. S. 556, 60 L. ed. 436, L.R.A. 1916C, 797, 36 Sup. Ct. Rep. 188; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 180, 60 L. ed. 941, 942, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992. See *Illinois C. R. Co. v. Cousins*, 241 U. S. 641, 60 L. ed. 1216, 36 Sup. Ct. Rep. 446.

UNITED STATES v. BESSIE WILDCAT, a Minor, et al. [No. 741.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to bring up the entire record and cause.

Messrs. Charles B. Stuart, John J. Shee, and Joseph C. Stone for Wildcat.

No brief filed on this motion by United States.

January 8, 1917. Granted.

ROBERT F. WERK et al., Petitioners, v. F. THOMAS PARKER et al., etc. [No. 784.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. T. Hart Anderson for petitioners.

No brief filed for respondents.

January 8, 1917. Granted.

UNION FISH COMPANY, Petitioner, v. JOHN W. ERICKSON. [No. 789.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. G. S. Arnold for petitioner.

No brief filed for respondent.

January 8, 1917. Granted.

ALEXANDER M. EMERSON, Petitioner, v. WARREN E. SWEETSER. [No. 791.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Mr. Henry Wheeler for petitioner.

No brief filed for respondent.

January 8, 1917. Granted.

ALFRED P. LOWELL, Petitioner, v. WARREN E. SWEETSER. [No. 792.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Mr. Henry Wheeler for petitioner.

No brief filed for respondent.

January 8, 1917. Granted.

PENNSYLVANIA RAILROAD COMPANY, Petitioner, v. ALICE FRANCIS BROWN et al. [No. 771.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Francis I. Gowen and Frederic D. McKenney for petitioner.

Messrs. Thomas Raeburn White and W. C. Dennis for respondents.

January 8, 1917. Denied.

CAROLINE F. HOGG, Petitioner, v. LASCELLES C. MAXWELL et al., etc. [No. 817.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. William G. Cooke and Louis A. Seitz for petitioner.

Mr. William A. W. Stewart for respondents.

January 8, 1917. Denied.

WILLIAM J. CREEKMORE, Petitioner, v. UNITED STATES. [No. 818.]

Petitioner for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. C. B. Stuart, A. C. Cruce, M. K. Cruce, J. C. Denton, Frank Lee, E. G. McAdams, and Norman R. Haskell for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

January 8, 1917. Denied.

C. C. SAMSON et al., Petitioners, v. WILLIAM GARLAND. [No. 824.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Arthur R. Moore and William H. Oppenheimer for petitioners.

Messrs. William D. Mitchell and Pierce Butler for respondent.

January 8, 1917. Denied.

JUAN GATMAITAN, Plaintiff in Error, v. UNITED STATES. [No. 853.]

In Error to the Supreme Court of the Philippine Islands.

No appearance for plaintiff in error.

Mr. Solicitor General Davis for defendant in error.

January 8, 1917. Docketed and dismissed, on motion of counsel for the defendant in error, and mandate granted.

LORENZO SONG CHONGCO, Plaintiff in Error, v. UNITED STATES. [No. 854.]

In Error to the Supreme Court of the Philippine Islands.

No appearance for plaintiff in error.

Mr. Solicitor General Davis for defendant in error.

January 8, 1917. Docketed and dismissed, on motion of counsel for the defendant in error, and mandate granted.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT et al., Appellants, v. EAST TENNESSEE TELEPHONE COMPANY. [No. 332.]

Appeal from the District Court of the United States for the Eastern District of Kentucky.

Mr. F. M. Dailey for appellants.

Mr. Alexander Pope Humphrey for appellee.

January 8, 1917. Dismissed per stipulation of counsel.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant, v. WESTERN UNION TELEGRAPH COMPANY. [No. 380.]

Appeal from the District Court of the United States for the Eastern District of Kentucky.

Messrs. Henry L. Stone, Edward S. Jouett, and James B. Wright for appellant.

Messrs. A. E. Richards, Rush Taggart, and Alexander Pope Humphrey for appellee.

January 8, 1917. Dismissed with costs, on motion of counsel for the appellant.

WILLIE HOPE, Plaintiff in Error, v. W. F. FOLEY et al. [No. 613.]

In Error to the Supreme Court of the State of Oklahoma.

Messrs. George S. Ramsey, Edgar A. de Meules, and Malcolm E. Rosser for plaintiff in error.

No appearance for defendants in error.

January 8, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error.

ST. LOUIS UNION TRUST COMPANY, Petitioner, v. MARY E. MELLON et al. [No. 304.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. W. F. Wilson and Enoch A. Chase for petitioner.

Messrs. J. H. Everest and R. M. Campbell for respondents.

January 12, 1917. Dismissed, at costs of respondent, per stipulation.

ATLANTIC COAST LINE RAILROAD COMPANY, Plaintiff in Error, v. ELIZABETH A. MULLIGAN, as Administratrix of the Estate of W. E. Mulligan, Deceased. [No. 564.] In Error to the Supreme Court of the State of South Carolina.

Messrs. P. A. Willcox and Frederic D. McKenney for plaintiff in error.

Mr. Benjamin E. Pierce for defendant in error.

January 15, 1917. Per Curiam: Judgment affirmed with costs upon the authority of Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; Great Northern R. Co. v. Knapp, 240 U. S. 464, 60 L. ed. 745, 36 Sup. Ct. Rep. 399; Baltimore & O. R. Co. v. Whitacre, 242 U. S. 169, 61 L. ed. 228, 37 Sup. Ct. Rep. 33.

J. FRED KATZMAIER, Trustee in Bankruptcy of Harmon Brothers, Appellant, v. MUNSEY TRUST COMPANY, Receiver; Illinois Surety Company, and William G. McAdoo, Secretary of the Treasury. [No. 218.]

Appeal from the Supreme Court of the District of Columbia.

Mr. Mortimer C. Rhone for appellant.

Mr. Assistant Attorney General Warren and Mr. Bynum E. Hinton for appellees.

January 15, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of Coder v. Arts, 213 U. S. 223, 234, 235, 53 L. ed. 772, 777, 778, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Tefft, W. & Co. v. Munsuri, 222 U. S. 114, 118, et seq., 56 L. ed. 118, 119, 32 Sup. Ct. Rep. 67; James v. Stone, 227 U. S. 410, 57 L. ed. 573, 33 Sup. Ct. Rep. 351; Swift & Co. v. Hoover, 242 U. S. 107, 61 L. ed. 175, 37 Sup. Ct. Rep. 56.

37 S. C.—16

ARIZONA EASTERN RAILROAD COMPANY and Epes Randolph and L. H. Manning, its Sureties, Plaintiffs in Error, v. W. N. BRYAN. [No. 651.]

In Error to the Supreme Court of the State of Arizona.

Mr. Eugene S. Ives for plaintiffs in error.

Messrs. Thomas Armstrong, Jr., Ernest W. Lewis, and G. P. Bullard for defendant in error.

January 15, 1917. Per Curiam: Judgment affirmed with costs upon the authority of (1) Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; Great Northern R. Co. v. Knapp, 240 U. S. 464, 60 L. ed. 745, 36 Sup. Ct. Rep. 399; Baltimore & O. R. Co. v. Whitacre, 242 U. S. 169, 61 L. ed. 228, 37 Sup. Ct. Rep. 33. (2) Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 121, 122, 57 L. ed. 1096, 1100, 1101, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172.

CHICAGO & ALTON RAILROAD COMPANY, Appellant, v. UNITED STATES [No. 30]; and YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Appellant, v. UNITED STATES [No. 58.]

Appeals from the Court of Claims.

Messrs. Jacob M. Dickinson and John G. Johnson for appellants.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Thompson for appellee.

January 15, 1917. Per Curiam: Judgments affirmed by an equally divided court.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error, v. MRS. MARSHALL LANIS, Administratrix, etc. [No. 780.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana.

Messrs. Hunter C. Leake, Gustave Lemle, Blewett Lee, and R. V. Fletcher for plaintiff in error.

No appearance for defendant in error.

January 15, 1917. Denied.

DR. PAUL OESTING, alias Paul Allen, Petitioner, v. UNITED STATES. [No. 783.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Charles J. Heggerty and James Raleigh Kelley for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

January 15, 1917. Denied.

J. E. WEIDEN, Petitioner, v. UNITED STATES. [No. 801.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. O. P. Stidger and David A. Baer for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

January 15, 1917. Denied.

ALASKA PACIFIC FISHERIES, Petitioner, v. TERRITORY OF ALASKA. [No. 810.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Harvey M. Friend for petitioner.

Mr. George B. Grigsby for respondent.

January 15, 1917. Denied.

ALASKA MEXICAN GOLD MINING COMPANY, Petitioner, v. TERRITORY OF ALASKA. [No. 811.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Harvey M. Friend for petitioner.

Mr. George B. Grigsby for respondent.

January 15, 1917. Denied.

ALASKA PACIFIC FISHERIES, Petitioner, v. TERRITORY OF ALASKA. [No. 812.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Harvey M. Friend for petitioner.

Mr. George B. Grigsby for respondent.

January 15, 1917. Denied.

ALASKA SALMON COMPANY, Petitioner, v. TERRITORY OF ALASKA. [No. 815.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Warren Gregory, George H. Whipple, E. S. McCord, and W. H. Boyle for petitioner.

Mr. George B. Grigsby for respondent.

January 15, 1917. Denied.

AMERICAN BANK OF ALASKA. Petitioner, v. EDWIN RICHARDS. [No. 819.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Charles J. Heggerty and James Raleigh Kelly for petitioner.

Mr. W. H. Metson for respondent.

January 15, 1917. Denied.

DETROIT IRON & STEEL COMPANY, Petitioner, v. JAMES D. CABEY. [No. 828.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. George B. Marty and Charles R. Miller for petitioner.

Mr. Albert Lynn Lawrence for respondent.

January 15, 1917. Denied.

OMAHA IRON STORE COMPANY, Petitioner, v. MOLINE PLOW COMPANY. [No. 831.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Otto Raymond for petitioner.

Messrs. Samuel Walker Banning and Thomas A. Banning for respondent.

January 15, 1917. Denied.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY, Petitioner, v. SOUND TRANSPORTATION COMPANY. [No. 838.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Louis Marshall, William S. Jenney, and Austin J. McMahon for petitioner.

Messrs. J. D. Carpenter and B. G. Paskus for respondent.

January 15, 1917. Denied.

ROBERT EDWARD BAKER et al., Trustees, etc., Petitioners, v. J. J. DUNLOP. [No. 843.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Conrad H. Syme, Edwin P. Cox, and Richard H. Mann for petitioners.

No appearance for respondent.

January 15, 1917. Denied.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Petitioner, v. T. D. DAVIS. [No. 851.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota. Messrs. W. H. Bremner and F. M. Miner for petitioner.

No appearance for respondent.

January 15, 1917. Denied.

PUBLIC SERVICE GAS COMPANY, Plaintiff in Error, v. BOARD OF PUBLIC UTILITIES COMMISSIONERS OF THE STATE OF NEW JERSEY et al. [No. 186.]

In Error to the Court of Errors and Appeals of the State of New Jersey.

Messrs. Frank Bergen and Thomas N. McCarter for plaintiff in error.

Messrs. L. Edward Herrmann, Edward F. Merrey, and Albert O. Miller, Jr., for defendants in error.

January 19, 1917. Dismissed with costs, per stipulation, on motion of counsel for the plaintiff in error.

PUBLIC SERVICE GAS COMPANY, Plaintiff in Error, v. CITY OF PATERSON et al. [No. 187.]

In Error to the Court of Errors and Appeals of the State of New Jersey.

Messrs. Frank Bergen and Thomas N. McCarter for plaintiff in error.

Messrs. L. Edward Herrmann and Edward F. Merrey for defendants in error.

January 19, 1917. Dismissed with costs, per stipulation, on motion of counsel for the plaintiff in error.

PUBLIC SERVICE GAS COMPANY, Plaintiff in Error, v. CITY OF PASSAIC et al. [No. 188.]

In Error to the Court of Errors and Appeals of the State of New Jersey.

Messrs. Frank Bergen and Thomas N. McCarter for plaintiff in error.

Messrs. L. Edward Herrmann and Edward F. Merrey for defendants in error.

January 19, 1917. Dismissed with costs, per stipulation, on motion of counsel for the plaintiff in error.

EX PARTE: IN THE MATTER OF ST. LOUIS, KANSAS CITY, & COLORADO RAILROAD COMPANY.

Motions for leave to file petitions for Writs of Prohibition and Mandamus.

Messrs. Paul E. Walker, Thomas P. Littlepage, James C. Jones, Lon O. Hocker, and Frank H. Sullivan for petitioner.

No appearance for respondent.

January 22, 1917. Denied without prejudice in any respect to relief on appeal or otherwise on the merits.

LAWRENCE MAXWELL et al., Petitioners, v. CHARLOTTE JANE ISABELLE McDONALD et al. [No. 821.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. Frederic D. McKenney, J. S. Flannery, Frederick de Courcy Faust, and Charles F. Wilson for petitioners.

Messrs. Benjamin S. Minor and Colley W. Bell for respondents.

January 22, 1917. Denied.

HEWITT COMPANY, Petitioner, v. UNITED STATES METALLIC PACKING COMPANY. [No. 822.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. James H. Peirce and George P. Fisher for petitioner.

Mr. Francis T. Chambers for respondent.

January 22, 1917. Denied.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, etc., Petitioner, v. STRATHALBYN STEAMSHIP COMPANY, LIMITED, etc., [No. 867.]

Motion for leave to present petition for Writ of Certiorari to the United States Circuit Courts of Appeals for the Ninth Circuit.

Messrs. W. H. Bogle and Carroll B. Graves for petitioner.

No appearance for respondent.

January 22, 1917. Granted and the petition denied on the merits, and the motion for delay to give further notice consequently denied.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error, v. E. R. LANGILL and G. A. Edmiston, as Langill & Edmiston. [No. 653.]

In Error to the Supreme Court of the State of Pennsylvania.

Messrs. Frederic D. McKenney and H. W. Bikle for plaintiff in error.

No appearance for defendants in error.

January 22, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error.

BALTIMORE & OHIO RAILROAD COMPANY, Plaintiff in Error, v. WILLIAM C. HAGEN. [No. 308.]

In Error to the Court of Appeals for the Fifth District, Licking County, State of Ohio.

Messrs. Alfred A. Frazier, George E. Hamilton, John W. Yerkes, John J. Hamilton, and Edward Kibler for plaintiff in error.

Messrs. F. S. Monnett and Rufus S. Day for defendant in error.

January 22, 1917. Dismissed, per stipulation of counsel.

JAY C. ZIEGLER et al., Appellants, v. CARNEGIE TRUST COMPANY et al. [No. 444.]
Appeal for the District Court of the United States for the Southern District of New York.

Mr. Donald C. Strachan for appellants.

Mr. Joseph A. Kellogg for appellees.

January 25, 1917. Dismissed, per stipulation.

SUN LIFE ASSURANCE COMPANY OF CANADA, Plaintiff in Error, v. LUISA RIVERA. [No. 27.]

In Error to the District Court of the United States for the District of Porto Rico.

Mr. Cay Coll Cuchi for plaintiff in error.

Mr. Willis Sweet for defendant in error.

January 29, 1917. Per Curiam: Judgment affirmed with costs upon the authority of rule 6, ¶ 5; *Nadal v. May*, 233 U. S. 447, 454, 58 L. ed. 1040, 1041, 34 Sup. Ct. Rep. 611; *Cardona v. Quiñones*, 240 U. S. 83, 88, 60 L. ed. 538, 540, 36 Sup. Ct. Rep. 346.

OLD DOMINION IRON & NAIL WORKS COMPANY, Plaintiff in Error, v. CHESAPEAKE & OHIO RAILWAY COMPANY and City of Richmond. [No. 378.]

In Error to the Supreme Court of Appeals of the State of Virginia.

Messrs. Eppa Hunton, Jr., E. Randolph Williams, and Henry W. Anderson for plaintiff in error.

Messrs. H. R. Pollard and Henry Taylor, Junior for defendants in error.

January 29, 1917. Per Curiam: Dismissed for the want of jurisdiction upon the authority of (1) *Eutis v. Booles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Leathe v. Thomas*, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *Mellon Co. v. McCafferty*, 239 U. S. 134, 60 L. ed. 181, 36 Sup. Ct. Rep. 94. (2) *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Preston v. Chicago*, 226 U. S. 447, 450, 57 L. ed. 293, 295, 33 Sup. Ct. Rep. 177; *Wood v. Chesborough*, 228 U. S. 672, 677, 57 L. ed. 1018, 1020, 33 Sup. Ct. Rep. 706. (3) *Moran v. Horsky*, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Plaintiff in Error, v. BERTHA L. THOMPSON, as Administratrix of the Estate of Charles E. Thompson, Deceased [No. 565.]

In Error to the Supreme Court of the State of Minnesota.

Mr. Frederick M. Miner for plaintiff in error.

Mr. Humphrey Barton for defendant in error.

January 29, 1917. Per Curiam: Judgment affirmed with costs upon the authority of *Chicago Junction R. Co. v. King*, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; *Seaboard Air Line R. Co. v. Padgett*, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; *Great Northern R. Co. v. Knapp*, 240 U. S. 464, 60 L. ed. 745, 36 Sup. Ct. Rep. 399; *Baltimore & O. R. Co. v. Whitacre*, 242 U. S. 169, 61 L. ed. 228, 37 Sup. Ct. Rep. 33.

BALTIMORE & OHIO RAILROAD COMPANY, Plaintiff in Error, v. DAVID BRANSON. [No. 631.]

In Error to the Court of Appeals of the State of Maryland.

Messrs. George A. Pearre, Duncan K. Brent, and A. Taylor Smith for plaintiff in error.

Messrs. Albert A. Doub, F. Brooke Whiting, and George Louis Eppler for defendant in error.

January 29, 1917. Per Curiam: Judgment reversed with costs upon the authority of *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct.

Rep. 902; *Shanks v. Delaware, L. & W. R. Co.* 239 U. S. 556, 60 L. ed. 436, L.R.A.1916C, 797, 36 Sup. Ct. Rep. 188; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 180, 60 L. ed. 941, 942, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 61 L. ed. 358, 37 Sup. Ct. Rep. 170.

T. COLEMAN DU PONT, Petitioner, v. GEORGE N. GARDNER, JR., et al., Executors, etc. [No. 862.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Julius F. Workum for petitioner.

Messrs. L. Laplin Kellogg and Alfred C. Petté for respondents.

January 29, 1917. Denied.

ADRIAN BAKKER, Petitioner, v. NETHERLANDS-AMERICAN STEAM NAVIGATION COMPANY, sued as Holland-American Line. [No. 869.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Roger Foster for petitioner.

Mr. Charles C. Burlingham for respondent.

January 29, 1917. Denied.

LASSWELL LAND & LUMBER COMPANY, Petitioner, v. LEE WILSON & COMPANY. [No. 871.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for Eighth Circuit.

Messrs. Charles B. Williams and J. P. Tribble for petitioner.

Messrs. Frank H. Sullivan and Allen Hughes for respondent.

January 29, 1917. Denied.

SAMUEL J. MASTERS et al., Petitioners, v. EDWARD W. MOLLOHAN, Trustee. [No. 887.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. Daniel W. Baker, Wilton J. Lambert, and E. L. Gies for petitioners.

Mr. W. Gwynn Gardiner for respondent. January 29, 1917. Denied.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Plaintiff in Error, v. ANNIE RODGERS, as Administratrix, etc. [No. 175.]

In Error to the Supreme Court of the State of Arkansas.

Messrs. E. B. Kinsworthy and R. E. Wiley for plaintiff in error.

Messrs. Thomas C. McRae and Wm. V. Tompkins for defendant in error.

February 1, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error, v. ANNA ROACH, as Administratrix, etc. [No. 695.]

In Error to the Supreme Court of the State of Minnesota.

Mr. A. L. Janes for plaintiff in error.

Mr. Ernest A. Michel for defendant in error.

February 5, 1917. Per Curiam: Judgment affirmed with costs upon the authority of *Chicago Junction R. Co. v. King*, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; *Seaboard Air Line R. Co. v. Padgett*, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; *Great Northern R. Co. v. Knapp*, 240 U. S. 464, 60 L. ed. 745, 36 Sup. Ct. Rep. 399; *Baltimore & O. R. Co. v. Whitacre*, 242 U. S. 169, 61 L. ed. 228, 37 Sup. Ct. Rep. 33.

EX PARTE: IN THE MATTER OF JOSEPH MARSHALL, Petitioner. [No. —.]

Motion for leave to file petition for Writ of Habeas Corpus and that petitioner be admitted to bail.

Mr. William C. Bowers, 2d, for petitioner. No appearance for respondent.

February 5, 1917. Denied.

EX PARTE: IN THE MATTER OF JOHN P. WHITE, as President, and William Green, as Secretary-Treasurer, of United Mine Workers of America, et al., Petitioners. [No. —.]

Motion for leave to file petition for Writ of Prohibition.

Messrs. Henry Warrum and George L. Grant for petitioners.

No appearance for respondent.

February 5, 1917. Denied.

ST. LOUIS MERCHANTS BRIDGE TERMINAL RAILWAY COMPANY, Petitioner, v. WILLIAM J. SCHUERMAN. [No. 842.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. T. M. Pierce and Walter M. Hezel for petitioner.

Mr. W. C. Marshall for respondent.

February 5, 1917. Denied.

STATE BANK OF CLEARWATER, NEBRASKA, Petitioner, v. J. Q. INGRAM, Trustee, etc. [No. 861.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

For opinion below, see 237 Fed. 76.

Messrs. Arthur F. Mullen and E. C. Brandenburg for petitioner.

Mr. R. E. Evans for respondent.

February 5, 1917. Denied.

SAMUEL BERNSTEIN, Petitioner, v. UNITED STATES. [No. 884.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Robert H. Talley for petitioner.

No appearance for respondent.

February 5, 1917. Denied.

ILLINOIS CENTRAL RAILROAD COMPANY et al., Petitioners, v. V. P. MESSINA. [No. 886.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi.

Messrs. H. D. Minor, Edward Mayes, Robert V. Fletcher, Blewett Lee, and Charles N. Burch for petitioners.

Messrs. William H. Watkins and Harry Peyton for respondent.

February 5, 1917. Denied.

UNITED MINE WORKERS OF AMERICA, Petitioner, v. A. S. DOWD, Receiver, etc., et al. [No. 888.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Henry Warrum, George L. Grant, and Webb Covington for petitioner.

Messrs. Roger B. Hull, Henry S. Drinker, Jr., and James B. McDonough for respondents.

February 5, 1917. Denied.

ERA BOND, Petitioner, v. OTTO S. LANGUM, Sheriff, etc. [No. 904.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota.

Mr. Ernest S. Carey for petitioner.

No appearance for respondent.

February 5, 1917. Denied.

(243 U. S. 188)

NEW YORK CENTRAL RAILROAD COMPANY, Plff. in Err.,
v.

SARAH WHITE.

COMMERCE $\S$ 27(8) — EMPLOYERS' LIABILITY—SERVANT ENGAGED IN "INTERSTATE COMMERCE."

1. A night watchman in the employ of a railway company, injured while in the performance of his duty to guard tools and materials intended to be used in the construction of a new railway station and new tracks, was not then engaged in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), although such station and tracks were designed for use, when finished, in interstate commerce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

CONSTITUTIONAL LAW $\S$ 275(2), 301—MASTER AND SERVANT $\S$ 347 — WORKMEN'S COMPENSATION—DUE PROCESS OF LAW—FREEDOM OF CONTRACT—POLICE POWER.

2. The compulsory compensation scheme of the New York Workmen's Compensation Act (N. Y. Laws 1913, chap. 816; Laws 1914, chaps. 41 and 316), which, in lieu of the common-law liability confined to cases of negligence, imposes a liability upon employers to make compensation for disabling or fatal accidental personal injuries received by employees in the course of their employment in certain gainful occupations denominated "hazardous employments," without regard to fault as a cause, except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty, graduating the compensation for disability according to a prescribed scale based upon loss of earning power, having regard to the previous wage and the character and duration of the disability, and measuring the death benefits according to the dependency of the surviving wife, husband, or infant children,—does not contravene U. S. Const. 14th Amend., as taking property without due process of law, or unwarrantably limiting freedom of contract, whether considered from the standpoint of employer or employee, but is a valid exercise of the police power of the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 835, 844-846, 848-850, 857.]

CONSTITUTIONAL LAW $\S$ 313—DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS—TRIAL BY JURY.

3. Trial by jury is not embraced in the rights secured by the 14th Amendment to the Federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 933.]

CONSTITUTIONAL LAW $\S$ 245—EQUAL PROTECTION OF THE LAWS—WORKMEN'S COMPENSATION ACT — CLASSIFICATION—EXEMPTION OF FARM LABORERS AND DOMESTIC SERVANTS.

4. The exclusion of farm laborers and domestic servants from the compulsory compensation scheme of the New York Work-

men's Compensation Act (N. Y. Laws 1913, chap. 816; Laws 1914, chaps. 41 and 316) is not such an arbitrary classification as to contravene the equal protection of the laws clause of U. S. Const. 14th Amend., since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702.]

CONSTITUTIONAL LAW $\S$ 245—DUE PROCESS OF LAW — WORKMEN'S COMPENSATION ACT—METHOD OF SECURING PAYMENT.

5. The requirement of the New York Workmen's Compensation Act (N. Y. Laws 1913, chap. 816; Laws 1914, chaps. 41 and 316), § 50, that the employer shall secure payment of the compulsory compensation prescribed by that act either by (a) state insurance, (b) insurance with an authorized insurance corporation or association, or (c) by furnishing satisfactory proof of his financial ability to pay the compensation, and depositing securities for that purpose, cannot be said to contravene U. S. Const. 14th Amend., since self-insurance under the third method presumably is open to all solvent employers on reasonable terms.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702.]

[No. 320.]

Argued February 29 and March 1, 1916.

Restored to docket for reargument November 13, 1916. Reargued February 1, 1917. Decided March 6, 1917.

IN ERROR to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, to review a judgment affirmed by the Court of Appeals of that state, which affirmed an award by the state Workmen's Compensation Commission. Affirmed.

See same case below, in appellate division, 169 App. Div. 903, 152 N. Y. Supp. 1149; in court of appeals, 216 N. Y. 653, 110 N. E. 1051.

The facts are stated in the opinion.

Messrs. William L. Visscher, Frank V. Whiting, Robert E. Whalen, and H. Leroy Austin for plaintiff in error.

Messrs. Harold J. Hinman and E. Clarence Aiken, and Mr. Egburt E. Woodbury, Attorney General of New York, for defendant in error.

*Mr. Justice Pitney delivered the opinion of the court:

A proceeding was commenced by defendant in error before the Workmen's Compensation Commission of the State of New York, established by the Workmen's Compensation Law of that state,¹ to recover

¹ Chap. 816, Laws 1913, as re-enacted and amended by chap. 41, Laws 1914, and amended by chap. 316, Laws 1914.

*191 compensation from the New York Central & Hudson River Railroad Company for the death of her husband, Jacob White, who lost his life September 2, 1914, through an accidental injury arising out of and in the course of his employment under that company. The Commission awarded compensation in accordance with the terms of the law; its award was affirmed, without opinion, by the appellate division of the supreme court for the third judicial department, whose order was affirmed by the court of appeals, without opinion. 169 App. Div. 903, 152 N. Y. Supp. 1149, 216 N. Y. 653, 110 N. E. 1051. Federal questions having been saved, the present writ of error was sued out by the New York Central Railroad Company, successor, through a consolidation of corporations, to the rights and liabilities of the employing company. The writ was directed to the appellate division, to which the record and proceedings had been remitted by the court of appeals. *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 200, 59 L. ed. 193, 196, 35 Sup. Ct. Rep. 57.

The errors specified are based upon these contentions: (1) that the liability, if any, of the railroad company for the death of Jacob White, is defined and limited exclusively by the provisions of the Federal Employers' Liability Act of April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657, and (2) that to award compensation to defendant in error under the provisions of the Workmen's Compensation Law would deprive plaintiff in error of its property without due process of law, and deny to it the equal protection of the laws, in contravention of the 14th Amendment.

The first point assumes that the deceased was employed in interstate commerce at the time he received the fatal injuries. According to the record, he was a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad. The Commission found, upon evidence fully warranting the finding, that he was on duty at the time, and at a place not outside of the limits prescribed for the performance of his duties; that he was not engaged in interstate commerce; and that the injury received by him and resulting in his death was an accidental injury arising out of and in the course of his employment.

*192 The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce, does not bring the case within the Federal act. The test is, "Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as

to be practically a part of it?" *Shanks v. Delaware, L. & W. R. Co.* 239 U. S. 556, 558, 60 L. ed. 436, 438, L.R.A.1916C, 797, 36 Sup. Ct. Rep. 188. Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work, which is clearly distinguishable, as was pointed out in *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 152, 57 L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779. And see *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 180, 60 L. ed. 941, 942, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; *Raymond v. Chicago, M. & St. P. R. Co.* this day decided [243 U. S. 43, 61 L. ed. 583, 37 Sup. Ct. Rep. 268]. The first point, therefore, is without basis in fact.

We turn to the constitutional question. The Workmen's Compensation Law of New York establishes forty-two groups of hazardous employments, defines "employee" as a person engaged in one of these employments upon the premises, or at the plant, or in the course of his employment away from the plant of his employer, but excluding farm laborers and domestic servants; defines "employment" as including employment only in a trade, business, or occupation carried on by the employer for pecuniary gain, "injury" and "personal injury" as meaning only accidental injuries arising out of and in the course of employment, and such disease or infection as naturally and unavoidably may result therefrom; and requires every employer subject to its provisions to pay or provide compensation according to a prescribed schedule for the disability or death of his employee resulting from an accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where it results solely from the intoxication of the injured employee while on duty, in which cases neither the injured employee nor any dependent shall receive compensation. By § 11 the prescribed liability is made exclusive, except that, if an employer fail to secure the payment of compensation as provided in § 50, an injured employee, or his legal representative, in case death results from the injury, may, at his option, elect to claim compensation under the act, or to maintain an action in the courts for damages, and in such an action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the

risk of his employment, or that the injury was due to contributory negligence. Compensation under the act is not regulated by the measure of damages applied in negligence suits, but, in addition to providing medical, surgical, or other like treatment, it is based solely on loss of earning power, being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent; while in case the injury causes death, the compensation is known as a death benefit, and includes funeral expenses, not exceeding \$100, payments to the surviving wife (or dependent husband) during widowhood (or dependent widowerhood) of a percentage of the average wages of the deceased, and if there be a surviving child or children under the age of eighteen years an additional percentage of such wages for each child until that age is reached. There are provisions invalidating agreements by employees to waive the right to compensation, prohibiting any assignment, release, or commutation of claims for compensation or benefits except as provided by the act, exempting them from the claims of creditors, and requiring that the compensation and benefits shall be paid only to employees or their dependents. Provision is made for the establishment of a Workmen's Compensation Commission² with administrative and judicial functions, including authority to pass upon claims to compensation on notice to the parties interested. The award or decision of the Commission is made subject to an appeal, on questions of law only, to the appellate division of the supreme court for the third department, with an ultimate appeal to the court of appeals in cases where such an appeal would lie in civil actions. A fund is created, known as "the state insurance fund," for the purpose of insuring employers against liability under the law, and assuring to the persons entitled the compensation thereby provided. The fund is made up primarily of premiums received from employers, at rates fixed by the Commission in view of the hazards of the different classes of employment, and the premiums are to be based upon the total pay roll and number of employees in each class at the lowest rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve. Elaborate provisions are laid down for the administration of this fund. By § 50, each employer is required to secure compensa-

tion to his employees in one of the following ways: (1) By insuring and keeping insured the payment of such compensation in the state fund; or (2) through any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or (3) "by furnishing satisfactory proof to the Commission of his financial ability to pay such compensation for himself, in which case the Commission may, in its discretion, require the deposit with the Commission of securities of the kind prescribed in § 13 of the Insurance Law, in an amount to be determined by the Commission, to secure his liability to pay the compensation provided in this chapter." If an employer fails to comply with this section, he is made liable to a penalty in an amount equal to the pro rata premium that would have been payable for insurance in the state fund during the period of noncompliance; besides which, his injured employees or their dependents are at liberty to maintain an action for damages in the courts, as prescribed by § 11.

In a previous year, the legislature enacted a compulsory compensation law applicable to a limited number of specially hazardous employments, and requiring the employer to pay compensation without regard to fault. Laws 1910, chap. 674. This was held by the court of appeals in *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517, to be invalid because in conflict with the due process of law provisions of the state Constitution and of the 14th Amendment. Thereafter, and in the year 1913, a constitutional amendment was adopted, effective January 1, 1914, declaring:

"Nothing contained in this Constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall

² By chap. 674, Laws 1915, §§ 2 and 8, this Commission was abolished and its functions were conferred upon the newly created Industrial Commission.

be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

In December, 1913, the legislature enacted the law now under consideration (Laws 1913, chap. 816), and in 1914 re-enacted it (Laws 1914, chap. 41) to take effect as to payment of compensation on July 1 in that year. The act was sustained by the court of appeals as not inconsistent with the 14th Amendment in *Jensen v. Southern P. Co.* 215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276; and that decision was followed in the case at bar.

The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (a) That the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; (b) that the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employee are deprived of their liberty to acquire property by being prevented from making such agreement as they choose respecting the terms of the employment.

In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger pro-

portion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that, under the present system, the injured workman is left to bear the greater part of industrial accident loss, which, because of his limited income, he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees.

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet, as pointed out by the court of appeals in the *Jensen Case* (215 N. Y. 526), the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer.

The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is, of course, recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit. *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. ed. 77, 87; *Hurtado v. California*, 110 U. S. 516, 532, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292; *Martin v. Pittsburg & L. E. R. Co.* 203 U. S. 234, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 50, 56 L. ed. 327, 346, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 59 L. ed. 1204, 1210, 35 Sup. Ct. Rep. 678. The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U.

S. 281, 295, 52 L. ed. 1061, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 39, 43, 60 L. ed. 874, 877, 878, 36 Sup. Ct. Rep. 482.

The fault may be that of the employer himself, or—most frequently—that of another for whose conduct he is made responsible according to the maxim *respondet superior*. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the alter ego, while acting within the scope of his duties, be negligent,—in disobedience, it may be, of the employer's positive and specific command,—the employer is answerable for the consequences. It cannot be that the rule embodied in the maxim is unalterable by legislation.

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's negligence is one of the natural and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are *Murray v. South Carolina R. Co.* (1841) 1 McMull. L. 385, 398, 36 Am. Dec. 268; *Farwell v. Boston & W. R. Corp.* (1842) 4 Met. 49, 57, 38 Am. Dec. 339, 15 Am. Neg. Cas. 407; *Hutchinson v. York, N. & B. R. Co.* (1850) L. R. 5 Exch. 343, 351, 19 L. J. Exch. N. S. 296, 299, 14 Jur. 837, 840, 6 Eng. Ry. & C. Cas. 580; *Wigmore v. Jay* (1850) L. R. 5 Exch. 354, 19 L. J. Exch. N. S. 300, 14 Jur. 838, 841; *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, 284, 295, 4 Jur. N. S. 767, 6 Week Rep. 664, 19 Eng. Rul. Cas. 107. And see *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 483, 27 L. ed. 1003, 1005, 3 Sup. Ct. Rep. 322; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 647, 29 L. ed. 755, 758, 6 Sup. Ct. Rep. 590. The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions respecting who should be deemed a fellow servant and who a vice principal or alter ego of the master, turning sometimes upon refined distinctions as to grades and departments in the employment. See *Knutter v. New York & N. J. Teleph. Co.* 67 N. J. L. 646, 650-653, 58 L.R.A. 808, 52 Atl. 565, 12 Am. Neg. Rep. 109. It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion.

The same may be said with respect to the general doctrine of assumption of risk. By the common law the employee assumes the

risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer's negligence he does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them; in either of which cases he does assume them, if he continues in the employment without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance, then, pending performance of the promise, the employee does not, in ordinary cases, assume the special risk. *Seaboard Air Line R. Co. v. Horton*, 233*U. S. 492, 504, 58 L. ed. 1062, 1070, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834, 239 U. S. 595, 599, 60 L. ed. 458, 461, 36 Sup. Ct. Rep. 180. Plainly, these rules, as guides of conduct and tests of liability, are subject to change in the exercise of the sovereign authority of the state.

So, also, with respect to contributory negligence. Aside from injuries intentionally self-inflicted, for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject, in their bearing upon the employer's responsibility, are subject to legislative change; for contributory negligence, again, involves a default in some duty resting on the employee, and his duties are subject to modification.

It may be added, by way of reminder, that the entire matter of liability for death caused by wrongful act, both within and without the relation of employer and employee, is a modern statutory innovation, in which the states differ as to who may sue, for whose benefit, and the measure of damages.

But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 208, 32 L. ed. 107, 108, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herriek*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 598, 50 L. ed. 322, 325, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 53, 54 L. ed. 921, 928, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581; *Wilmington Star Min. Co. v. Ful-*

ton, 205 U. S. 60, 73, 51 L. ed. 708, 715, 27 Sup. Ct. Rep. 412; Missouri P. R. Co. v. Castle, 224 U. S. 541, 544, 56 L. ed. 875, 878, 32 Sup. Ct. Rep. 606. A corresponding power on the part of Congress, when legislating within its appropriate sphere, was sustained in Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. And see El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 97, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 619, 55 L. ed. 878, 883, 31 Sup. Ct. Rep. 621.

* It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of "due process of law," suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast industrial organization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's as-

sumption of ordinary risks at common law is presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting the subject matter are not placed by the 14th Amendment beyond the reach of the lawmaking power of the state; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.

We will consider, first, the scheme of compensation, deferring for the present the question of the manner in which the employer is required to secure payment.

Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability; and measures the death benefits according to the dependency of the surviving wife, husband, or infant children. Perhaps we should add that it has no retrospective effect, and applies only to cases arising some months after its passage.

Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and, ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the prof-

its, if any there be, and, of necessity, bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal, but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power, —a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall,—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which, in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale.

Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent alto-

gether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 22, 41 L. ed. 611, 619, 17 Sup. Ct. Rep. 243; *Chicago, R. I. & P. R. Co. v. Zernecke*, 183 U. S. 582, 586, 46 L. ed. 339, 340, 22 Sup. Ct. Rep. 229.

We have referred to the maxim, respondent superior. In a well-known English case, *Hall v. Smith*, 2 Bing. 156, 160, 130 Eng. Reprint, 265, 9 J. B. Moore, 226, 2 L. J. C. P. 113, this maxim was said by Best, Ch. J., to be "bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." And this view has been adopted in *New York. Cardot v. Barney*, 63 N. Y. 281, 287, 20 Am. Rep. 533. The provision for compulsory compensation, in the act under consideration,*cannot be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote,—the primary cause, as it may be deemed,—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that, in modern industry, the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or, in case of his death, to those who were entitled to look to him for support, in lieu of

the common-law liability confined to cases of negligence.

This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation*prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract; and we are referred to two recent declarations by this court. The first is this: "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense." *Coppage v. Kansas*, 236 U. S. 1, 14, 59 L. ed. 441, 446, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240. And this is the other: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure." *Truax v. Raich*, 239 U. S. 33, 41, 60 L. ed. 131, 135, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7.

It is not our purpose to qualify or weaken either of these declarations in the least. And we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state. In our opinion it is fairly supportable upon that ground. And for this reason: The subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. "The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state*must suffer." *Holden v. Hardy*, 169 U. S. 366, 397, 42 L. ed. 780, 793, 18 Sup. Ct. Rep. 383. It cannot be doubted that the state may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering

away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be "natural and inalienable;" and the authority to prohibit contracts made in derogation of a lawfully-established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 571, 55 L. ed. 328, 340, 31 Sup. Ct. Rep. 259; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 52, 56 L. ed. 327, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

We have not overlooked the criticism that the act imposes no rule of conduct upon the employer with respect to the conditions of labor in the various industries embraced within its terms, prescribes no duty with regard to where the workmen shall work, the character of the machinery, tools, or appliances, the rules or regulations to be established, or the safety devices to be maintained. This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. ed. 819, 820; *Missouri P. R. Co. v. Castle*, 224 U. S. 541, 545, 56 L. ed. 875, 879, 32 Sup. Ct. Rep. 606.

No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the 14th*Amendment. The denial of a trial by jury is not inconsistent with "due process." *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Frank v. Mangum*, 237 U. S. 309, 340, 59 L. ed. 960, 985, 35 Sup. Ct. Rep. 582.

The objection under the "equal protection" clause is not pressed. The only apparent basis for it is in the exclusion of farm laborers and domestic servants from the scheme. But, manifestly, this cannot be judicially declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar. *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, 650, 58 L. ed. 1135,

1137, 34 Sup. Ct. Rep. 678, and cases there cited.

We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the 14th Amendment, and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By § 50, this may be done in one of three ways: (a) State insurance; (b) insurance with an authorized insurance corporation or association; or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose the third method, and, with the sanction of the Commission, deposited securities to the amount of \$300,000, under § 50, and \$30,000 in cash as a deposit to secure prompt and convenient payment, under § 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

The system of compulsory compensation having been found to be within the power of the state, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of § 50 has not been, and presumably will not be, construed so as to give an unbridled discretion to the Commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employees, and the amount of its pay roll (about \$50,000,000 annually); hence no criticism of the practical effect of the third clause is suggested.

This being so, it is obvious that this case presents no question as to whether the state might, consistently with the 14th Amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the state to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employee is not injuriously affected in a constitutional sense by the provisions giving to the employer an option to secure pay-

ment of the compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employee's interests.

Judgment affirmed.

(243 U. S. 210)

J. C. HAWKINS, Appt.,

v.

JOHN L. BLEAKLY, Auditor of the State of Iowa, and Warren Garst, Iowa Industrial Commissioner.

CONSTITUTIONAL LAW §301 — MASTER AND SERVANT §347—DUE PROCESS OF LAW — WORKMEN'S COMPENSATION — ABOLISHING COMMON-LAW DEFENSES — PRESUMPTION OF UNDUE INFLUENCE.

1. There is no denial of due process of law in the provisions of the Iowa elective Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. chap. 147), that an employer rejecting the compensation features of that act shall not escape liability for personal injury sustained by an employee arising out of, or in the usual course of, the employment, because the employee assumed the risk of the employment, or because of the employee's negligence, unless this was wilful and with the intent to cause the injury, or was the result of intoxication, or because the injury was caused by the negligence of a coemployee, and that in an action against such rejecting employer it shall be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to rebut such presumption.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 848-850, 857.]

CONSTITUTIONAL LAW §311—DUE PROCESS OF LAW—CREATING PRESUMPTION—REGULATING BURDEN OF PROOF.

2. A state may, consistently with the due process of law clause of U. S. Const. 14th Amend., establish by statute presumptions and rules respecting the burden of proof, provided that the statute be not unreasonable in itself, and not conclusive of the rights of a party.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 932.]

CONSTITUTIONAL LAW §311—DUE PROCESS OF LAW — WORKMEN'S COMPENSATION ACT—REJECTION BY EMPLOYÉ.

3. There is nothing repugnant to U. S. Const. 14th Amend., in the provision of the Iowa Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. chap. 147) that where an employee elects to reject the act he shall state in an affidavit who, if anybody, requested or suggested that he should do so, and that if it be found that the employer or his agent made such request or suggestion, the employee shall be conclusively presumed to have been unduly influenced and his rejection of the act shall be void.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 932.]

CONSTITUTIONAL LAW — 301—DUE PROCESS OF LAW — WORKMEN'S COMPENSATION.

4. The scheme adopted by the Iowa Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. chap. 147), for the adjustment of compensation when the employer accepts its provisions, is not in contravention of U. S. Const. 14th Amend., as clothing an administrative body with an arbitrary discretion inconsistent with due process of law, where the act provides the measure of compensation, the circumstances under which it is to be made, establishes administrative machinery for applying the statutory measure to the facts of each particular case, and provides for a hearing before an administrative tribunal, and for judicial review upon all fundamental and jurisdictional questions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 848-850, 857.]

CONSTITUTIONAL LAW — 313—DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS—TRIAL BY JURY.

5. Trial by jury is not embraced in the rights secured by the 14th Amendment to the Federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 933.]

JURY — 10—RIGHT TO JURY TRIAL—IN NORTHWEST TERRITORY.

6. Iowa was not a part of the Northwest Territory, and was therefore unaffected by the guaranty in the Ordinance of July 13, 1787 (1 Stat. at L. 51, note), for the government of that territory, that the inhabitants thereof shall always be entitled to the benefits of trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 15, 16, 27½.]

STATES — 9—EFFECT OF ADMISSION—SUSPENDING EXTENSION OF ORDINANCE OF 1787—JURY TRIAL.

7. The admission of Iowa to the Union under the Acts of March 3, 1845 (5 Stat. at L. 742, 789, chaps. 48 and 76); August 4, 1846 (9 Stat. at L. 52, chap. 82); and December 28, 1846 (9 Stat. at L. 117, chap. 1), upon an equal footing with the original states, and the adoption of a state Constitution, abrogated any extension to Iowa of the guaranties of the Ordinance of July 13, 1787 (1 Stat. at L. 51, note), for the government of the Northwest Territory, including the right to trial by jury, which may have been effected by the Act of June 12, 1838 (5 Stat. at L. 235, chap. 96), establishing a territorial government for Iowa.

[Ed. Note.—For other cases, see States, Cent. Dig. § 4.]

CONSTITUTIONAL LAW — 301—EQUAL PROTECTION OF THE LAWS—CLASSIFICATION —WORKMEN'S COMPENSATION ACT.

8. Employers are not denied the equal protection of the laws, contrary to U. S. Const. 14th Amend., by the provisions of the Iowa Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. chap. 147), § 5, that where both employer and employee reject the act, the liability of the employer shall be the same as though the employee had not rejected it, thus leaving a rejecting

employer liable, whether the employee on his part accepts or rejects the act, for personal injuries sustained by an employee arising out of and in the usual course of the employment, with no right to avail himself of the fellow-servant rule or the defenses of contributory negligence or assumption of risk, while, by § 3b, if the employee rejects the act and the employer accepts it, the latter may avail himself of such common-law rules and defenses.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 848-850, 857.]

CONSTITUTIONAL LAW — 42—PERSONS ENTITLED TO RAISE CONSTITUTIONAL QUESTIONS.

9. The question of the constitutionality of the compulsory insurance provisions of the Iowa elective Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. chap. 147), § 42, will not be considered by the Federal Supreme Court at the instance of an appealing employer who has not accepted the act, where the highest state court construes such act as not compelling an employer to insure unless he has accepted and thus become subject to the act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40.]

[No. 35.]

Submitted January 24, 1916. Restored to docket for oral argument November 13, 1916. Argued December 20, 1916. Decided March 6, 1917.

A PPEAL from the District Court of the United States for the Southern District of Iowa to review a decree dismissing a suit to restrain the enforcement of the Iowa Workmen's Compensation Act. Affirmed.

See same case below, 220 Fed. 378.

The facts are stated in the opinion.

Messrs. Robert Ryan, James P. Hewitt, and F. G. Ryan for appellant.

Messrs. Henry E. Sampson and John T. Clarkson, and Mr. George Cosson, Attorney General of Iowa, for appellees.

*Mr. Justice Pitney delivered the opinion of the court:

This is a suit in equity, brought by appellant in the United States district court, to restrain the enforcement of an act of the general assembly of the state of Iowa, approved April 18, 1913, relating to employers' liability* and workmen's compensation; it being chap. 147 of Laws of Iowa, 35 G. A.; embraced in Iowa Code, Supp. of 1913, § 2477m. The bill sets forth that complainant is an employer of laborers within the meaning of the act, but has rejected its provisions, alleges that the statute is in contravention of the Federal and state Constitutions, etc., etc. A motion to dismiss was sustained by the district court (220 Fed. 378), and the case

comes here by direct appeal, because of the constitutional question, under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215].

Since the decision below, the supreme court of Iowa, in an able and exhaustive opinion, has sustained the act against all constitutional objections, at the same time construing some of its provisions. *Hunter v. Colfax Consol. Coal Co.* 175 Iowa, 245, L.R.A.—, —, 154 N. W. 1037, 157 N. W. 145, 11 N. C. C. A. 886. Hence no objection under the state Constitution is here pressed, and we, of course, accept the construction placed upon the act by the state court of last resort.

As to private employers, it is an elective workmen's compensation law, having the same general features found in the recent legislation of many of the states, sustained by their courts. See *Opinion of Justices*, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; *State ex rel. Yaple v. Creamer*, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569, 86 N. J. L. 701, 91 Atl. 1070; *Deibeikis v. Link-Belt Co.* 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; *Crooks v. Tazewell Coal Co.* 263 Ill. 343, 105 N. E. 132, Ann. Cas. 1915C, 304, 5 N. C. C. A. 410; *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, 113 N. E. 173; *Matheson v. Minneapolis Street R. Co.* 126 Minn. 286, L.R.A. 1916D, 412, 148 N. W. 71, 5 N. C. C. A. 871; *Shade v. Ash Grove Lime & Portland Cement Co.* 92 Kan. 146, 139 Pac. 1193, 5 N. C. C. A. 763, 93 Kan. 257, 144 Pac. 249; *Sayles v. Foley*, 38 R. I. 484, 96 Atl. 340; *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 648; *Middleton v. Texas Power & Light Co.* — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873. The main purpose of the act is to establish, in all employments except those of household servants, farm laborers, and casual employees, a system of compensation according to a prescribed schedule for all employees sustaining injuries arising out of and in the course of the employment, and producing temporary or permanent disability, total or partial, and, in case of death resulting from such injuries, a contribution towards the support of those dependent upon the earnings of the employee; the compensation in either case to be paid by the employer in lieu of other liability, and acceptance of the terms of the act be-

ing presumed unless employer or employee gives notice of an election to reject them. To this main purpose no constitutional objection is raised, the attack being confined to particular provisions of the law.

Some of appellant's objections are based upon the ground that the employer is subjected to a species of duress in order to compel him to accept the compensation features of the act, since it is provided that an employer rejecting these features shall not escape liability for personal injury sustained by an employee, arising out of and in the usual course of the employment, because the employee assumed the risks of the employment, or because of the employee's negligence, unless this was wilful and with intent to cause the injury, or was the result of intoxication, or because the injury was caused by the negligence of a coemployee. But it is clear, as we have pointed out in *New York C. R. Co. v. White*, No. 320, decided this day, 243 U. S. 183, 61 L. ed. 667, 37 Sup. Ct. Rep. 247, that the employer has no vested right to have these so-called common-law defenses perpetuated for his benefit, and that the 14th Amendment does not prevent a state from establishing a system of workmen's compensation without the consent of the employer, incidentally abolishing the defenses referred to.

The same may be said as to the provision that, in an action against an employer who has rejected the act, it shall be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to rebut the presumption of negligence. In addition, we may repeat that the establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, not unreasonable in itself, and not conclusive of the rights of the party, does not constitute a denial of due process of law. *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 42, 55 L. ed. 78, 79, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243.

Objection is made to the provision in § 3, that where an employee elects to reject the act he shall state in an affidavit who, if anybody, requested or suggested that he should do so, and if it be found that the employer or his agent made such a request or suggestion, the employee shall be conclusively presumed to have been unduly influenced, and his rejection of the act shall be void. Passing the point that appellant is an employer, and will not be heard to raise constitutional objections that are good only from the standpoint of employees

(New York *ex rel. Hatch v. Reardon*, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; *Rosenthal v. New York*, 226 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; *Hendrick v. Maryland*, 235 U. S. 610, 621, 59 L. ed. 385, 390, 35 Sup. Ct. Rep. 140), it is sufficient to say that the criticized provision evidently is intended to safeguard the employee from all influences that might be exerted by the employer to bring about his dissent from the compensation features of the act. The lawmaker no doubt entertained the view that the act was more beneficial to employees than the common-law rules of employer's liability, and that it was highly improbable an employee would reject the new arrangement of his own free will. The provision is a permissible regulation in aid of the general scheme of the act.

It is said that there is a denial of due process in that part of the act which provides for the adjustment of the compensation where the employer accepts its provisions. In case of disagreement between an employer and an injured employee, either party may notify the Industrial Commissioner, who thereupon shall call for the formation of an arbitration committee consisting of three persons, with himself as chairman. The committee is to make such inquiries and investigations as it shall deem necessary, and its report is to be filed with the Industrial Commissioner. If a claim for review is filed, the Commissioner, and not the committee, is to hear the parties, may hear evidence in regard to pertinent matters, and may revise the decision of the committee in whole or in part, or refer the matter back to the committee for further findings of fact. And any party in interest may present the order or decision of the Commissioner, or the decision of an arbitration committee from which no claim for review has been filed, to the district court of the county in which the injury occurred, whereupon the court shall render a decree in accordance therewith, having the same effect as if it were rendered in a suit heard and determined by the court, except that there shall be no appeal upon questions of fact or where the decree is based upon an order or decision of the Commissioner which has not been presented to the court within ten days after the notice of the filing thereof by the Commissioner. With respect to these provisions, the supreme court of Iowa held (154 N. W.

1064): "Appeal is provided from the decree enforcing the award on which all save pure questions of fact may be reviewed. . . . We hold that though the act does not in terms provide for judicial review, except by said appeal, the statute does not take from the courts all jurisdiction in the premises. . . . We are in no doubt that the very structure of the law of the land, and the inherent power of the courts, would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitration committee were by it exceeded—could inquire whether the act was being enforced against one who had rejected it, whether the claiming employee was an employee, whether he was injured at all, whether his injury was one arising out of such employment, whether it was due to intoxication of the servant, or self-inflicted, or, acceptance being conceded, into whether an award different from the statute schedules had been made, into whether the award were tainted with fraud on part of the prevailing party, or of the arbitration committee, and into whether that body attempted judicial functions, in violation of or not granted by the act." Thus it will be seen that the act prescribes the measure of compensation and the circumstances under which it is to be made, and establishes administrative machinery for applying the statutory measure to the facts of each particular case; provides for a hearing before an administrative tribunal, and for judicial review upon all fundamental and jurisdictional questions. This disposes of the contention that the administrative body is clothed with an arbitrary and unbridled discretion, inconsistent with a proper conception of due process of law. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 545, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359.

Objection is made that the act dispenses with trial by jury. But it is settled that this is not embraced in the rights secured by the 14th Amendment. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Frank v. Mangum*, 237 U. S. 309, 340, 59 L. ed. 969, 35 Sup. Ct. Rep. 582; *New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, 37 Sup. Ct. Rep. 247.

It is elaborately argued that, aside from the 14th Amendment, the inhabitants of the state of Iowa are entitled to this right, because it was guaranteed by the Ordinance of July 13, 1787, for the government of the Northwest Territory (1 Stat. at L. 51, note), in these terms: "The inhabitants of the said territory shall always be entitled to the benefits of . . . the trial by jury." The argument is rested, first, upon the ground that Iowa was a part of

the Northwest Territory. This is manifestly untenable, since that territory was bounded on the west by the Mississippi river, and Iowa was not a part of it, but of the Louisiana Purchase. But, secondly, it is contended that the guaranties contained in the ordinance were extended to Iowa by the act of Congress approved June 12, 1838, establishing a territorial government (chap. 96, § 12, 5 Stat. at L. 235, 239), and by the act for the admission of the state into the Union. Acts of March 3, 1845, chaps. 48 and 76, 5 Stat. at L. 742, 789; Act of August 4, 1846, chap. 82, 9 Stat. at L. 52; Act of December 28, 1846, chap. 1, 9 Stat. at L. 117; 1 Poore, *Characters & Const.* 331, 534, 535, 551. This is easily disposed of. The Act of 1838 was no more than a regulation of territory belonging to the United States, subject to repeal like any such regulation; and the act for admitting the state, so far from perpetuating any particular institution previously established, admitted it "on an equal footing with the original states in all respects whatsoever." The regulation, although embracing provisions of the ordinance declared to be unalterable unless by common consent, had no further force in Iowa after its admission as a state and the adoption of a state Constitution, than other acts of Congress for the government of the territory. All were superseded by the state Constitution. *Permoli v. New Orleans*, 3 How. 589, 610, 11 L. ed. 739, 748; *Coyle v. Smith*, 221 U. S. 559, 567, 570, 55 L. ed. 853, 858, 859, 31 Sup. Ct. Rep. 688; *Cincinnati v. Louisville & N. R. Co.* 223 U. S. 390, 401, 56 L. ed. 481, 484, 32 Sup. Ct. Rep. 267. The state of Iowa, therefore, is as much at liberty as any other state to abolish or limit the right of trial by jury; or to provide for a waiver of that right, as it has done by the act under consideration.

Section 5 is singled out for criticism, as denying to employers the equal protection of the laws. It reads: "Where the employer and employee elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employee had not rejected the terms, conditions and provisions thereof." As we have shown, if the employer rejects the act, he remains liable for personal injury sustained by an employee, arising out of and in the usual course of the employment, and is not to escape by showing that he had exercised reasonable care in selecting competent employees in the business, or that the employee had assumed the risk, or that the injury was caused by the negligence of a

coemployee, or even by showing that the plaintiff was negligent, unless such negligence was wilful and with intent to cause the injury, or was the result of intoxication on the part of the injured party. This is the result whether the employee on his part accepts or rejects the act. But where the employee rejects it and the employer accepts it, then, by § 3b, "the employer shall have the right to plead and rely upon any and all defenses including those at common law, and the rules and defenses of contributory negligence, assumption of risk and fellow servant shall apply and be available to the employer as by statute authorized unless otherwise provided in this act;" with a proviso not material to the present point. We cannot say that there is here an arbitrary classification within the inhibition of the "equal protection" clause of the 14th Amendment. All employers are treated alike, and so are all employees; and if there be some difference as between employer and employee respecting the inducements that are held out for accepting the compensation features of the act, it goes no further than to say that, if neither party is willing to accept them, the employer's liability shall not be subject to either of the several defenses referred to. As already shown, the abolition of such defenses is within the power of the state, and the legislation cannot be condemned when that power has been qualifiedly exercised, without unreasonable discrimination.

Section 42 of the act provides: "Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance. . . . And if such employer refuses, or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under part one (1) of this act." The supreme court of Iowa, in the *Hunter Case*, said of § 42 (154 N. W. 1056): "This clearly shows that no employer is compelled to insure unless he has accepted, and thus become subject to, the act;" proceeding, however, to discuss the case further upon the hypothesis that all employers named in the act were compelled to maintain insurance. In view of the construction adopted, it is unnecessary for us to pass upon the question of compulsory insurance in this case, appellant not having accepted the act.

Other contentions are advanced, but they are without merit and call for no particular mention.

Decree affirmed.

(243 U. S. 219)

**MOUNTAIN TIMBER COMPANY, Plff. in
Err.,
v.
STATE OF WASHINGTON.**

CONSTITUTIONAL LAW ⚡301—MASTER AND
SERVANT ⚡347—DUE PROCESS OF LAW
—WORKMEN'S COMPENSATION ACT—VA-
LIDITY AS AGAINST EMPLOYEES.

1. Rights of employees under U. S. Const. 14th Amend. are not invaded by the abolition, under the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), of private rights of action for damages in case of disabling or fatal accidental personal injuries received by employees in certain employments denominated "extra hazardous" (and in any other industry, at the option of employer and employees), and the substitution of a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazards of each class of occupation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 848-850, 857.]

CONSTITUTIONAL LAW ⚡68(1)—POLITICAL
QUESTION—REPUBLICAN FORM OF GOV-
ERNMENT.

2. Whether or not a state has violated the provision of U. S. Const. art. 4, § 4, guarantying to every state in the Union a republican form of government, is not a judicial question, but is a political one, which is solely for Congress to determine.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 125.]

CONSTITUTIONAL LAW ⚡313 — RIGHT TO
TRIAL BY—EFFECT OF WORKMEN'S COM-
PENSATION ACT.

3. The right to trial by jury, guaranteed by U. S. Const. 7th Amend., cannot be said to be infringed by the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), on the theory that if such act be valid, it must be followed in the Federal courts in cases that are within its provisions, where there is nothing in such act that excludes trial by jury in any private rights of action which are preserved, and, as between employer and employee, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by a jury.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 933.]

CONSTITUTIONAL LAW ⚡301—DUE PRO-
CESS OF LAW—EQUAL PROTECTION OF THE
LAWS — WORKMEN'S COMPENSATION ACT.

4. A state may, consistently with U. S. Const. 14th Amend., substitute a system of compulsory compensation for disabling or fatal accidental personal injuries received by employees in the course of their employment in certain so-called hazardous employments without regard to fault of the employer, in lieu of the existing right to maintain actions for damages in cases of the employers' negligence, in which the latter may assert immunity for the negligence of a fellow servant and the defenses of contributory negligence and assumed risk.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 848-850, 857.]

CONSTITUTIONAL LAW ⚡245, 301 — DUE
PROCESS OF LAW—EQUAL PROTECTION OF
THE LAWS—POLICE POWER—WORKMEN'S
COMPENSATION ACT.

5. The exaction, under the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), from employers in certain industries denominated "extra hazardous," without regard to any wrongful act on their part, or to whether injuries have befallen their own employees or not, of periodical contributions based upon percentages of pay rolls to a state fund from which compensation shall be made for disabling or fatal injuries received by employees in the course of their employment in such industries, is not inconsistent with the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., but such exaction is a valid exercise of the state's police power, there being no claim that the scale of compensation is unduly large, and the schedule of contribution evidencing an intent to proportion the various percentages according to the hazard of each of the groups into which the industries are divided, and to limit the burden to the requirements of each industry.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 702, 848-850, 857.]

CONSTITUTIONAL LAW ⚡245—DUE PRO-
CESS OF LAW—EQUAL PROTECTION OF THE
LAWS — WORKMEN'S COMPENSATION ACT.

6. The evident purpose of the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), to classify the various occupations according to the respective hazard of each, is a sufficient answer (there being no particular showing of erroneous classification) to the objection, founded on U. S. Const. 14th Amend., that the statute goes too far in classifying as hazardous large numbers of occupations that are not hazardous in their nature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702.]

STATUTES ⚡61—CONSTRUCTION FAVORING
CONSTITUTIONALITY.

7. The Federal Supreme Court will not assume, in the absence of an actual decision of the state court, that the provision of the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), making it unlawful for the employer to deduct any part of his compulsory contribution to the state fund created by that act from the wages or earnings of his workmen, will be so broadly construed as to bring it in conflict with the Federal Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 56, 196.]

[No. 13.]

Argued March 1 and 2, 1916. Restored to docket for reargument November 13, 1916. Reargued January 30, 1917. Decided March 6, 1917.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the

Superior Court of Cowlitz County, in that state, in favor of the state in an action to recover certain premiums alleged to be due under the Workmen's Compensation Act. Affirmed.

See same case below, 75 Wash. 581, L.R.A. —, —, 135 Pac. 645, 4 N. C. C. A. 811.

The facts are stated in the opinion.

Messrs. F. Markoe Rivinus, Theodore W. Reath, Coy Burnett, and Edmund C. Strode for plaintiff in error.

Mr. W. V. Tanner, Attorney General of Washington, for defendant in error.

* Mr. Justice Pitney delivered the opinion of the court:

This was an action brought by the state against plaintiff in error, a corporation engaged in the business of logging timber and operating a logging railroad and a sawmill having power-driven machinery, all in the state of Washington, to recover under chap. 74 of the Laws of 1911, known as the Workmen's Compensation Act, certain premiums based upon a percentage of the estimated pay roll of the workmen employed by plaintiff in error during the three months beginning October 1, 1911. Plaintiff in error by demurrer raised objections to the act, based upon the Constitution of the United States. The supreme court of Washington overruled them, and affirmed a judgment in favor of the state (75 Wash. 581, L.R.A. —, —, 135 Pac. 645, 4 N. C. C. A. 811), following its previous decision in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L.R.A. (N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; and the case comes here under § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214].

The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employers and employees in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sole source of compensation for injured employees and for the dependents of those whose injuries result in death. We will recite its provisions to an extent sufficient to show the character of the legislation.

The 1st section contains a declaration of policy, reciting that the common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions, and in practice proves to be

economically unwise and unfair; that the remedy of the workman has been uncertain, slow, and inadequate; that injuries in such employments, formerly occasional, have become frequent and inevitable; and that the welfare of the state depends upon its industries, and even more upon the welfare of its wage workers. "The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

The 2d section, declaring that while there is a hazard in all employment, certain employments are recognized as being inherently constantly dangerous, enumerates those intended to be embraced within the term "extra hazardous," including factories, mills, and workshops where machinery is used, printing, electrotyping, photoengraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gas works, waterworks, reduction works, breweries, elevators, wharves, docks, dredges, smelters, powder works, logging, lumbering, and shipbuilding operations, logging, street, and interurban railroads, steamboats, railroads, and a number of others; at the same time declaring that if there be or arise any extra hazardous occupation not enumerated, it shall come under the act, and its rate of contribution to the accident fund shall be fixed by the department created by the act upon the basis of the relation which the risk involved bears to the risks classified, until the rate shall be fixed by legislation. The 3d section contains a definition of terms, and, among them: "Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in § 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer;" with a proviso giving to a workman injured while away from the plant through the negligence or wrong of another not in the same employ, or, if death result from the injury, to his widow, children, or dependents, an election whether to take

* 230 under the act or to seek a remedy against the third party. "Injury" is defined as an injury resulting from some fortuitous event, as distinguished from the contraction of disease.

Section 4 contains a schedule of contribution, reciting that industry should bear the greater portion of the burden of the cost of its accidents, and requiring each employer prior to January 15th of each year to pay into the state treasury, in accordance with the schedule, a sum equal to a percentage of his total pay roll for the year, "the same being deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." The application of the act as between employers and workmen is made to date from the 1st day of October, 1911, the payment for that year to be made prior to that date and upon the basis of the pay roll of the last preceding three months of operation. At the end of each year an adjustment of accounts is to be made upon the basis of the actual pay roll. The schedule divides the various occupations into groups, and imposes various percentages upon the different groups, the lowest being 1½ per cent, in the case of the textile industries, creameries, printing establishments, etc., and the highest being 10 per cent, in the case of powder works. The same section establishes forty-seven different classes of industry, and declares:

"For the purpose of such payments accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. There shall be collected from each class as an initial payment into the accident fund as above specified on or before the 1st day of October, 1911, one fourth of the premium of the next succeeding year, and one twelfth thereof at the close of each month after December, 1911: Provided, any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet*the requirements of the accident fund, that class shall not be called upon for such month. In case of accidents

occurring in such class after lapsed payment or payments said class shall pay the said lapsed or deferred payments commencing at the first lapsed payment, as may be necessary to meet such requirements of the accident fund. The fund thereby created shall be termed the 'accident fund' which shall be devoted exclusively to the purpose specified for it in this act. *In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to rearrangement following any relative increase or decrease of hazard shown by experience.*¹ . . . If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless management, any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard. In accordance with the same principle, any such increase in classification or premium rate, shall be subject to restoration to the schedule rate. . . . If, at the end of any*year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the 1st day of February of the following year by the employers of that class in proportion to their respective payments for the past year."

Section 5 contains a schedule of the compensation to be awarded out of the accident fund to each injured workman, or to his family or dependents in case of his death, and declares that except as in the act otherwise provided, such payment shall be in lieu of any and all rights of action against any person whomsoever. Where death results from the injury, the compensation includes the expenses of burial, not exceeding \$75 in any case, a monthly payment of \$20 for the widow or invalid widower, to cease at remarriage, and \$5 per month for each child under the age of sixteen years until that age is reached, but not exceeding \$35 in all,

* 231 ¹ By Sess. Laws 1915, chap. 183, pp. 674, 677, § 4 was amended so as to substitute in the place of the clause italicized the following: "In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration, the rates named in this section are subject to future adjustment by the industrial insurance department, in accordance with any relative increase or de-

crease in hazard shown by experience, and if in the judgment of the industrial insurance department the moneys paid into the fund of any class or classes shall be insufficient to properly and safely distribute the burden of accidents occurring therein, the department may divide, rearrange or consolidate such class or classes, making such adjustment or transfer of funds as it may deem proper."

with a lump sum of \$240 to a widow upon her remarriage; if the workman leaves no wife or husband, but a child or children under the age of sixteen years, there is to be a monthly payment of \$10 to each child until that age is reached, but not exceeding a total of \$35 per month; if there be no widow, widower, or child under the age of sixteen years, other dependent relatives are to receive monthly payments equal to 50 per cent of the average monthly support actually received by such dependent from the workman during the twelve months next preceding his injury, but not exceeding a total of \$20 per month. For permanent total disability of a workman, he is to receive, if unmarried, \$20, or, if married, \$25 per month, with \$5 per month additional for each child under the age of sixteen years, but not exceeding \$35 per month in all. (Section 7 provides that the monthly payment, in case of death or permanent total disability, may be converted into a lump sum payment, not in any case exceeding \$4,000, according to the expectancy of life.) For temporary total disability there is a somewhat different scale, compensation to cease when earning power is restored. For permanent partial disability the workman is to receive compensation in a lump sum equal to the extent of the injury, but not exceeding \$1,500.

By § 6, if injury or death results to a workman from his deliberate intention to produce it, neither he nor his widow, child, or dependents shall receive any payment out of the fund. If injury or death results to a workman from the deliberate intention of the employer to produce it, the workman or his widow, child, or dependent shall have the privilege to take under the act, and also have a cause of action against the employer for any excess of damage over the amount receivable under the act.

By § 19 provision is made for the adoption of the act by the joint election of any employer and his employees engaged in works not extra hazardous. By § 21, the Industrial Insurance Department is created, consisting of three commissioners. By § 20, a judicial review is given, in the nature of an appeal to the superior court, from any decision of the department upon questions of fact or of the proper application of the act, but not upon matters resting in the discretion of the department. Other sections provide for matters of detail, and § 11 renders void any agreement by employer or workman to waive the benefit of the act.

From this recital it will be clear that the fundamental purpose of the act is to abolish private rights of action for damages to employees in the hazardous industries (and in any other industry, at the option of em-

ployer and employees), and to substitute a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazard of each class of occupation.

*While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the quid pro quo for the burdens imposed upon him, so that if the act is not valid as against employees, it is not valid as against employers.

However, so far as the interests of employees and their dependents are concerned, this act is not distinguishable in any point raising a constitutional difficulty from the New York Workmen's Compensation Act, sustained in *New York C. R. Co. v. White*, decided this day [243 U. S. 188, 61 L. ed. 667, 37 Sup. Ct. Rep. 247]. It is true that in the Washington act the state fund is the sole source from which the compensation shall be paid, whereas the New York act gives to the employer an option to secure the compensation either through state insurance, insurance with an authorized insurance corporation, or by a deposit of securities with the state Commission. But we find here no ground for a distinction unfavorable to the Washington law.

So far as employers are concerned, however, there is a marked difference between the two laws, because of the enforced contributions to the state fund that are characteristic of the Washington act, and it is upon this feature that the principal stress of the argument for plaintiff in error is laid.

Two of the constitutional objections may be disposed of briefly. It is urged that the law violates § 4 of article 4 of the Constitution of the United States, guarantying to every state in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress, and not to the courts. *Luther v. Borden*, 7 How. 1, 39, 42, 12 L. ed. 581, 597, 599; *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; *Kiernan v. Portland*, 223 U. S. 151, 56 L. ed. 386, 32 Sup. Ct. Rep. 231; *Marshall v. Dye*, 231 U. S. 250, 256, 58 L. ed. 206, 207, 34 Sup. Ct. Rep. 92; *Ohio ex rel. Davis v.*

Hildebrandt, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708.

The 7th Amendment, with its provision for preserving the right of trial by jury, is invoked. It is conceded that this has no reference to proceedings in the state courts (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 217, 60 L. ed. 961, 963, L.R.A. 1917A, 86, 36 Sup. Ct. Rep. 595), but it is urged that the question is material for the reason that if the act be constitutional it must be followed in the Federal courts in cases that are within its provisions. So far as private rights of action are preserved, this is no doubt true; but, with respect to those, we find nothing in the act that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury.

The only serious question is that which is raised under the "due process of law" and "equal protection" clauses of the 14th Amendment. It is contended that since the act unconditionally requires employers in the enumerated occupations to make payments to a fund for the benefit of employees, without regard to any wrongful act of the employer, he is deprived of his property, and of his liberty to acquire property, without compensation and without due process of law. It is pointed out that the occupations covered include many that are private in their character, as well as others that are subject to regulation as public employments, and it is argued that, with respect to private occupations (including those of plaintiff in error), a compulsory compensation act does not concern the interests of the public generally, but only the particular interests of the employees, and is unduly oppressive upon employers, and arbitrarily interferes with and restricts the management of private business operations.

The statute, although approved March 14, 1911, took effect as between employers and workmen on October 1* in that year, actions pending and causes of action existing on September 30 being expressly saved. It therefore disturbed no vested rights, its effect being confined to regulating the relation of employer and employee in the hazardous occupations in futuro.

If the legislation could be regarded merely as substituting one form of employer's liability for another, the points raised against it would be answered sufficiently by our opinion in New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, 37 Sup. Ct. Rep. 247, where it is pointed out that the common-law rule confining the employer's liability to cases of negligence on his part or on the part of others for whose conduct he is made answerable, the immunity from respon-

sibility to an employee for the negligence of a fellow employee, and the defenses of contributory negligence and assumed risk, are rules of law that are not beyond alteration by legislation in the public interest; that the employer has no vested interest in them nor any constitutional right to insist that they shall remain unchanged for his benefit; and that the states are not prevented by the 14th Amendment, while relieving employers from liability for damages measured by common-law standards and payable in cases where they or others for whose conduct they are answerable are found to be at fault, from requiring them to contribute reasonable amounts and according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries to their employees, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall; that is, upon particular injured employees and their dependents.

But the Washington law goes further, in that the enforced contributions of the employer are to be made whether injuries have befallen his own employees or not; so that, however prudently one may manage his business, even to the point of immunity to his employees from accidental injury or death, he nevertheless is required to make periodical contributions to a fund for making compensation to the injured employees of his perhaps negligent competitors.

In the present case the supreme court of Washington (75 Wash. 581, 583) sustained the law as a legitimate exercise of the police power, referring at the same time to its previous decision in the Clausen Case (65 Wash. 156, 203, 207), which was rested principally upon that power, but also (pp. 203, 207) sustained the charges imposed upon employers engaged in the specified industries as possessing the character of a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purposes of regulation. We are not here concerned with any mere question of construction, nor with any distinction between the police and the taxing powers. The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect. Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 268, 23 L. ed. 543, 547; Stockard v. Morgan, 185 U. S. 27, 36, 46 L. ed. 785, 794, 22 Sup. Ct. Rep. 576; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 28, 30, 54 L. ed. 355, 366, 367, 30 Sup. Ct. Rep.

190; *Ludwig v. Western U. Tele. Co.* 216 U. S. 146, 162, 54 L. ed. 423, 429, 30 Sup. Ct. Rep. 280; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99. And the Federal Constitution does not require a separate exercise by the states of their powers of regulation and of taxation. *Gundling v. Chicago*, 177 U. S. 183, 189, 44 L. ed. 725, 729, 20 Sup. Ct. Rep. 633.

Whether this legislation be regarded as a mere exercise of power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the 14th Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of its validity, and the burden of proof and argument is upon those who seek to overthrow it. *Erie R. Co. v. Williams*, 233 U. S. 685, 699, 58 L. ed. 1155, 1160, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761. In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation.

As to the first point: The authority of the states to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration. *Lawton v. Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499. "The police power of a state is as broad and plenary as its taxing power." *Kidd v. Pearson*, 128 U. S. 1, 26, 32 L. ed. 346, 352, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6. In *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357, the court, by Mr. Justice Field, said: "Neither the [14th] Amendment—broad and comprehensive as it is—nor any other Amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate

so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits,—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment." It seems to us that the considerations to which we have adverted in *New York C. R. Co. v. White*, supra, as showing that the Workmen's Compensation Law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the state of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies. Certainly the operation of industrial establishments that, in the ordinary course of things, frequently and inevitably produce disabling or mortal injuries to the human beings employed, is not a matter of wholly private concern. It hardly would be questioned that the state might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed. Does direct compensation stand on a less secure ground? A familiar exercise of state power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation, or as tending to encourage the performance of the public duty of defense. But is the state powerless to compensate,

with pensions or otherwise, those who are disabled, or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the state? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. In a recent case, the supreme court of Washington said: "Under our statutes the workman is the soldier of organized industry, accepting a kind of pension in exchange for absolute insurance on his master's premises." *Stertz v. Industrial Ins. Commission*, 91 Wash. 588, 158 Pac. 256, 263. It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the state powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the state are not thus circumscribed by the 14th Amendment.

Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? If not warranted by any just occasion, the least imposition is oppressive. But that point is covered by what has been said. Taking the law, therefore, to be justified by the public nature of the object, whether as a tax or as a regulation, the question whether the charges are excessive remains. Upon this point no particular contention is made that the compensation allowed is unduly large; and it is evident that, unless it be so, the corresponding burden upon the industry cannot be regarded as excessive if the state is at liberty to impose the entire burden upon the industry. With respect to the scale of compensation, we repeat what we have said in *New York C. R. Co. v. White*, that, in sustaining the law, we do not intend to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable, and that any question of that kind may be met when it arises.

Upon the third question,—the distribution of the burden,—there is no criticism upon the act in its details. As we have seen, its 4th section prescribes the schedule of contribution, dividing the various occupations into groups, and imposing various percentages evidently intended to be proportioned to the hazard of the occupations in the respective groups. Certainly the application of a proper percentage to the pay roll of the industry cannot be deemed an arbitrary adjustment, in view

of the legislative declaration that it is "deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." It is a matter of common knowledge that, in the practice of insurers, the pay roll frequently is adopted as the basis for computing the premium. The percentages seem to be high; but when these are taken in connection with the provisions requiring accounts to be kept with each industry in accordance with the classification, and declaring that no class shall be liable for the depletion of the accident fund from accidents happening in any other class, and that any class having sufficient funds to its credit at the end of the first three months or any month thereafter is not to be called upon, it is plain that, after the initial payment, which may be regarded as a temporary reserve, the assessments will be limited to the amounts necessary to meet actual losses. As further rebutting the suggestion that the imposition is exorbitant, or arbitrary, we should accept the declaration of intent that "the fund shall ultimately" become neither more nor less than self-supporting, and that the rates are subject to future adjustment by the legislature and the classifications to rearrangement according to experience, as plain evidence of an intelligent effort to limit the burden to the requirements of each industry.

We may conveniently answer at this point the objection that the act goes too far in classifying as hazardous large numbers of occupations that are not in their nature hazardous. It might be sufficient to say that this is no concern of plaintiff in error, since it is not contended that its businesses of logging timber, operating a logging railroad, and operating a sawmill with power-driven machinery, or either of them, are nonhazardous. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359. But further, the question whether any of the industries enumerated in § 4 is nonhazardous will be proved by experience, and the provisions of the act themselves give sufficient assurance that if in any industry there be no accident, there will be no assessment, unless for expenses of administration. It is true that, while the section as originally enacted provided for advancing the classification of risks and premium rates in a particular establishment shown by experience to be unduly dangerous because of poor or careless management, there was no corresponding provision for reducing a particular industry shown by experience to be included in a class which imposed upon it too high a rate. This was remedied by the amendment of 1915, quoted in the margin, above, which, however, cannot affect the decision of the

present case. But in the absence of any particular showing of erroneous classification,—and there is none,—the evident purpose of the original act to classify the various occupations according to the respective hazard of each is sufficient answer to any contention of improper distribution of the burden amongst the industries themselves.

*There remains, therefore, only the contention that it is inconsistent with the due process and equal protection clauses of the 14th Amendment to impose the entire cost of accident loss upon the industries in which the losses arise. But if, as the legislature of Washington has declared in the 1st section of the act, injuries in such employments have become frequent and inevitable, and if, as we have held in *New York C. R. Co. v. White*, the state is at liberty, notwithstanding the 14th Amendment, to disregard questions of fault in arranging a system of compensation for such injuries, we are unable to discern any ground in natural justice or fundamental right that prevents the state from imposing the entire burden upon the industries that occasion the losses. The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the pay roll, the repair account, or any other item of cost. The plan of assessment insurance is closely followed, and none more just has been suggested as a means of distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them.

We are clearly of the opinion that a state, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability, with consequent loss of earning power, among the men and women employed, and, occasionally, loss of life of those who have wives and children or other relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in *New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, 37 Sup. Ct. Rep. 247, or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes. The act cannot be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that, if charged

to the industry, it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the state is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether.

To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry, they will occur, we deem that the state acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it cannot be deemed arbitrary or unreasonable for the state, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation.

The idea of special excise taxes for regulation and revenue, proportioned to the special injury attributable to the activities taxed, is not novel. In *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, this court sustained an Oklahoma statute which levied upon every bank existing under the laws of the state an assessment of a percentage of the bank's average deposits, for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks. There, as here, the collection and distribution of the fund were made a matter of public administration, and the fund was created not by general taxation, but by a special imposition in the nature of an occupation tax upon all banks existing under the laws of the state. In *Hendrick v. Maryland*, 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 Sup. Ct. Rep. 140, and *Kane v. New Jersey*, 242 U. S. 160, 169, 61 L. ed. 222, 37 Sup. Ct. Rep. 30, we sustained laws, of a kind now familiar, imposing license fees upon motor vehi-

cles, graduated according to horse power, so as to secure compensation for the use of improved roadways from a class of users for whose needs they are essential, and whose operations over them are peculiarly injurious. And see *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 394, 395, 35 L. ed. 1051, 1054, 1055, 12 Sup. Ct. Rep. 255, and cases cited. Many of the states have laws protecting the sheep industry by imposing a tax upon dogs in order to create a fund for the remuneration of sheep owners for losses suffered by the killing of their sheep by dogs. And the tax is imposed upon all dog owners, without regard to the question whether their particular dogs are responsible for the loss of sheep. Statutes of this character have been sustained by the state courts against attacks based on constitutional grounds. *Morey v. Brown*, 42 N. H. 373, 375; *Tenney v. Lenz*, 16 Wis. 566; *Mitchell v. Williams*, 27 Ind. 62; *Van Horn v. People*, 46 Mich. 183, 185, 186, 41 Am. Rep. 159, 9 N. W. 246; *Longyear v. Buck*, 83 Mich. 236, 240, 10 L.R.A. 42, 47 N. W. 234; *Cole v. Hall*, 103 Ill. 30; *Holst v. Roe*, 39 Ohio St. 340, 344, 48 Am. Rep. 459; *McGlone v. Womack*, 129 Ky. 274, 283, et seq., 17 L.R.A. (N.S.) 855, 111 S. W. 688.

*We are unable to find that the act, in its general features, is in conflict with the 14th Amendment. Numerous objections are urged, founded upon matters of detail, but they call for no particular mention, either because they are plainly devoid of merit, are covered by what we have said, or are not such as may be raised by plaintiff in error.

Perhaps a word should be said respecting a clause in § 4 which reads as follows: "It shall be unlawful for the employer to deduct or obtain (sic) any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deductions shall be a gross misdemeanor." If this were to be construed so broadly as to prohibit employers and employees, in agreeing upon wages and other terms of employment, from taking into consideration the fact that the employer was a contributor to the state fund, and the resulting effect of the act upon the rights of the parties, it would be open to serious question whether, as thus construed, it did not interfere to an unconstitutional extent with their freedom of contract. So far as we are aware, the clause has not been so construed, and on familiar principles we will not assume in advance that a construction will be adopted such as to bring the law into conflict with the Federal Constitution. *Bachtel v. Wilson*, 204

U. S. 36, 40, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 243; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546, 58 L. ed. 713, 720, 34 Sup. Ct. Rep. 359.

Judgment affirmed.

The CHIEF JUSTICE, Mr. Justice McKenna, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissent.

(243 U. S. 43)

WILLIAM RAYMOND, Plff. in Err.,

v.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY.

COMMERCE ⇄ 27(8) — EMPLOYERS' LIABILITY—SERVANT ENGAGED IN "INTERSTATE COMMERCE."

1. An employee of an interstate railway company who was engaged in the work of cutting a tunnel was not then employed in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. 1913, § 8657), since the tunnel, being only partially bored, was not in use as an instrumentality of interstate commerce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

COMMERCE ⇄ 8(6)—STATE REGULATION — WORKMEN'S COMPENSATION—INTERSTATE RAILWAY.

2. The operation of a state Workmen's Compensation Act in the case of an injured railway employee is not prevented merely because the railway company, in a general sense, may be engaged in interstate commerce.

[No. 636.]

Argued and submitted January 31, 1917.
Decided March 6, 1917.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of Washington in favor of defendant in a personal-injury action. Affirmed.

See same case below, 147 C. C. A. 245, 233 Fed. 239.

The facts are stated in the opinion.

Messrs. John T. Casey and Thomas J. Walsh for plaintiff in error.

Messrs. Heman H. Field and George W. Korte for defendant in error.

*Mr. Chief Justice White delivered the opinion of the court:

Raymond, the plaintiff in error, sued the railway company, a foreign corporation do-

ing business in Washington, to recover damages resulting from injuries sustained by him while in its employ. The petition alleged that the defendant operated an interstate commerce railroad between Chicago and Seattle, and that, for the purpose of shortening its main line and making more efficient and expeditious its freight and passenger service, was engaged in cutting a tunnel through the mountain between Horrick's Spur and Rockdale, in Washington. It was averred that plaintiff was employed by the defendant in the tunnel as a laborer, and that, while he was at work, his pick struck a charge of dynamite which, through the defendant's negligence, had not been removed, and that from the explosion which followed he had sustained serious injuries.

The defendant's answer contained a general denial and alleged that at the time and place of the accident the railroad and Raymond were not engaged in interstate commerce, since the tunnel was only partially bored, and hence not in use as an instrumentality of interstate commerce. It was further alleged that the court was without jurisdiction to hear the cause because of the provisions of the Washington Workmen's Compensation Act (Laws 1911, chap. 74), with whose requirements the defendant had fully complied. The reply of the plaintiff admitted the facts alleged in the answer, but denied that they constituted defenses to the action.

The trial court entered a judgment for the defendant on the pleadings, and this writ of error is prosecuted to a judgment of the court below, affirming such action. 147 C. C. A. 245, 233 Fed. 239.

Considering the suit as based upon the Federal Employers' Liability Act, it is certain, under recent decisions of this court, whatever doubt may have existed in the minds of some at the time the judgment below was rendered, that, under the facts as alleged, Raymond and the railway company were not engaged in interstate commerce at the time the injuries were suffered, and consequently no cause of action was alleged under the act. *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; *Minneapolis & St. L. R. Co. v. Nash*, 242 U. S. 619, 61 L. ed. —, 37 Sup. Ct. Rep. 239.

It is also certain that if the petition be treated as alleging a cause of action under the common law, the court below was without authority to afford relief, as that result could only be attained under the local law, in accordance with the provisions of the Washington Workmen's Compensation Act, which has this day been decided to be not repugnant to the Constitution of the United States (*Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260). And this result is controlling even although it be conceded that the railroad company was, in a general sense, engaged in interstate commerce, since it has been also this day decided that that fact does not prevent the operation of a state Workmen's Compensation Act (*New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, 37 Sup. Ct. Rep. 247).

Affirmed.

(243 U. S. 291)

OLAF LIE, Master of the Norwegian Steamship Selja, etc., Petitioner,
v.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY.

COLLISION—§144—IN FOG—VIOLATION OF RULE—CONTRIBUTORY CAUSE—DIVISION OF DAMAGES.

The master and owners of a vessel sunk in a collision which followed her violation of international rule 16, providing that "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over," cannot escape an apportionment of the damages with the other vessel, which was palpably at fault, under the admiralty rule of cross liabilities obtaining when both vessels are at fault, without showing not merely that such violation of the rule might not have been one of the causes of the disaster, or that it probably was not, but that it could not have been.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 296.]

[No. 110.]

Argued December 21, 1916. Decided March 6, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the District Court for the Northern District of California, adjudging two ships to have been equally in fault for a collision. Affirmed.

See same case below, 135 C. C. A. 32, 219 Fed. 134.

The facts are stated in the opinion.

Messrs. Edmund B. McClanahan, S. Hasket Derby, and L. Russell Alden for petitioner.

Mr. J. Parker Kirlin for respondent.

Mr. Justice Clarke delivered the opinion of the court:

On his own behalf and on behalf of the owners, officers, and crew of the Norwegian steamship Selja, the petitioner, Olaf Lie, her master, instituted this suit in admiralty against the American steamship Beaver, to recover for the loss of the Selja, her equipment and the personal effects of her officers and crew, which was occasioned by the collision of the two ships on the afternoon of November 22, 1910, near Point Reyes, on the California coast. For the purposes of trial this case was consolidated with an intervening libel by the owners of the cargo of the Selja, and with an independent

suit by her charterers to recover for loss of freight.

When approaching San Francisco, the end of her voyage from Yokohama, the Selja, a freight-carrying steamship, collided in a fog with the Beaver, a passenger and freight-carrying steamer then on a voyage from San Francisco to Portland, Oregon, and was so damaged that she sank, a total loss, in about fifteen minutes.

From 1 o'clock in the morning of November 22d, the Selja had been running in a fog which, for a considerable time before the collision, was so thick that it was possible to see only about twice her length,—about 800 feet.

The master of each ship makes the characteristic claim that at the moment of collision he had his engines working full speed astern, and each claims that his vessel was without headway when the two came together. It is beyond controversy, however, that the Beaver was running at a rate of speed much too high for prudent navigation in the then prevailing fog until her master heard the whistle of the Selja, about three minutes before the accident, and it is beyond controversy also that this negligent speed contributed directly to cause the collision. The two lower courts agree that the Beaver was culpably negligent, but they also find that the master of the Selja was likewise negligent in the navigation of his ship in a manner which contributed directly to bring about the accident, and therefore, while allowing recovery by the owners and underwriters of the cargo, by the charterers of the Selja, and by her other officers and crew, they decreed that, apportioning the damages suffered by the owner and master of the Selja and by the owner of the Beaver, under the usual rule of cross liabilities, there could be no recovery by the master, Lie, personally, or by the owners of the Selja, and it is from this denial of the right to recover by Lie and by the owners of the Selja, and from the order as to the payment of costs, that this appeal is prosecuted.

The petitioner claimed in the courts below, and in this court still claims, that if the master of the Selja was negligent at all, which is denied, his negligence was of such a character and had so spent its effect long before the accident, that, in the most unfavorable view that can be taken of it, it was a remote, and not a proximate, cause of the collision, and that, therefore, the Beaver being palpably negligent, he has a lawful right to recover.

The master of the Selja admits that he heard what ultimately proved to be the warning fog whistle of the Beaver, at 3 o'clock, and therefore the ships must be con-

sidered as within the danger zone from that time forward, and the decision of the case turns upon what was done by the two vessels during the sixteen minutes which elapsed between 3 o'clock and the moment of collision.

There is all of the customary conflict between the stories told by the officers of the respective vessels, but we think that a correct and just decision of the case may be arrived at by accepting the statements of the master of the Selja, as they appear in various parts of the record.

His narrative of what occurred during the fateful sixteen minutes after 3 o'clock may be condensed into the following:

At 3 o'clock I was running at half speed (6 knots an hour) and very shortly after that I heard for the first time "a whistle about right ahead"—"dead ahead"—which proved to be the whistle of the Beaver. "It sounded faint, but distant," and I could then see only about two lengths of my ship (about 800 feet). The sea was calm, with a long westerly swell, there were no noises on the ship to interfere with my hearing the whistle, which blew at intervals of fifty-six or fifty-seven seconds and for five seconds each time. When I first heard the whistle it sounded far away, and "it just came into my mind that it might be one of the fog horns off the Golden Gate," at Point Bonita, about 20 miles away. After I heard the whistle the third time I commenced to time it and continued to do so until five minutes past 3 o'clock, when I concluded that it was the whistle of an approaching steamer, and I reduced speed from half speed (6 knots) to slow speed (3 knots an hour) because "I considered that 6 knots was not moderate enough under the circumstances." I did not stop my engines when I first heard the whistle or when I concluded that it was that of an approaching steamer "because the sound was located as good as it could be located in the fog, and showed absolutely no danger of collision." (This statement is twice repeated in the testimony.) "I was familiar with the international rule which requires a steamer to stop in a fog." During the entire fifteen minutes before the accident I heard the whistle of the Beaver blow every fifty-six or fifty-seven seconds and for five seconds at a time, and the Selja blew one single blast between each two blasts of the Beaver's whistle; I "answered his whistle" from 3 o'clock until the collision. My engines were reduced to slow speed at five minutes after 3 o'clock, and they were kept at this speed—3 knots an hour—until 3:10 o'clock, when they were stopped. At 3:13 my ship still had steerage way upon her, and at 3:14 she was not quite at a

standstill, but was still moving a little through the water, and I intended to answer the Beaver's next whistle with two blasts of my whistle, which would have meant that my boat was stopped and had no way upon her. I did not tell my third officer to blow the two whistles, as I intended to do, "because the Beaver loomed in sight and I saw her blow three whistles." I mean "I saw steam come out of his whistle and I heard it, of course, at the same time." "She loomed in sight and the three whistles were almost at the same time." When I saw and heard the three whistles from the Beaver, I told my third officer to blow three whistles, and I rang "full speed astern" on my engine at the same time. I noticed that the Beaver was coming fast by the way she cut the water. I was watching the Beaver carefully, and I thought probably she would pass wide of me, her starboard side was widening all the time and I was watching her. I first saw the Beaver approaching at about 3:15. She was then about 900 feet away, and about a minute after, the collision came.

The foregoing statements of fact are as favorable to the petitioner as he can possibly deserve. They leave out of account a number of statements claimed to have been made by him: to the master of the Beaver immediately after the accident; to the agent of the company which had the Selja under charter on the day after the accident, and to the United States inspector of steam vessels on the second day after the accident, all of which are in serious conflict with, and are much less favorable to, his claim than the summary we have given.

In the year 1889 representatives of over thirty of the maritime nations of the world met in convention at Washington for the purpose of discussing the international code of rules to prevent collisions at sea, and of suggesting such changes and modifications as experience had shown to be necessary. The recommendations of this convention were adopted by Act of Congress of August 19, 1890 (26 Stat. at L. 320, chap. 802), became effective by proclamation of the President (28 Stat. at L. 1250) on the 1st day of July, 1897, and have been operative ever since.

Of these rules the following is applicable to the case we are considering:

"Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the

case admit, stop her engines, and then navigate with caution until danger of collision is over."

The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator, discretion as to what shall be "moderate speed" in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him. The difficulty of locating the direction or source from which sounds proceed in a fog renders it not necessary to dwell upon the purpose and obvious wisdom of this second paragraph of the rule.

Mr. Justice Brown, an experienced admiralty lawyer, but repeated the expression of many cases, which finds new illustration in the mistake in this case made by the master, Lie, in determining the location and the distance of the Beaver, when he said, in *The Umbria*, 166 U. S. 404, 408, 41 L. ed. 1053, 1056, 17 Sup. Ct. Rep. 610: "It is difficult to locate the exact position of a vessel in a fog, and still more difficult to determine her course and distance." And the circuit court of appeals in this case expresses the result of testimony constantly met with in the trial of such cases when it says: "The cases are very numerous in which an approaching whistle, which sounded far off, was really very close, and in which the sound seemed to come from one direction, while in fact, it came from another. Indeed, it is a matter of common knowledge that sounds in a dense fog are very deceptive." [135 C. C. A. 36, 219 Fed. 134.]

It is enough to say that this second paragraph is an addition to the former rule for preventing collisions at sea, which the International Conference recommended, after full discussion by the most intelligent seafaring men of many nations; that, at the time of the collision, obedience to it was commanded by act of Congress and by the law of the country under the flag of which the *Selja* was sailing, and that if it had been obeyed the collision would not have occurred.

By his own statement, as we have epitomized it, Lie, the master of the *Selja*, confesses that when he first heard the whistle of the Beaver he realized that it was "forward of the beam" of his ship, and although it is plain that he was not able to ascertain the position of the vessel from which the danger warning came, for he thought it the whistle at Point Bonita, 20 miles away, yet he not only did not stop his engines, as required, but, on the contrary, he continued to run them for five minutes following at half speed (6 knots an hour) in thick fog, until each succeeding

whistle of the Beaver, sounding nearer than the one before, at length convinced him that it was the whistle of an approaching steamer. But even then, when convinced that the danger signals which he had been hearing repeated at one minute intervals for five minutes were from an approaching steamer still "forward of his beam," he did not obey the rule by stopping his engines, but contented himself with reducing his speed to slow, 3 knots an hour, not out of deference to the rule of law, but because, as he says, "I considered that 6 knots was not moderate enough under the circumstances," and this speed he continued for five minutes longer, until ten minutes past 3, when, at length, he ordered his engines stopped, with the result, he is obliged to confess, that at 3:14, two minutes before the collision, his ship still had steerage way upon her, "was not quite at a standstill," and a moment later the crash came. It is of no avail for this master to say that at the instant of the accident he thinks the momentum of his ship had been overcome, and that she was commencing to move backward in response to the "full speed astern" order, which had been given during the instant that had elapsed between the appearance of the Beaver through the fog and the coming of the ships together, for the evil had been done and the collision rendered inevitable.

When it is considered that the statement of the master of the *Selja* as to the moment when he gave the order to reduce speed from half to slow, and then from slow to stop, and then from stop to full speed astern, are all but approximations, arrived at after the disaster to his ship had occurred, when every possible influence, conscious and unconscious, was operating to induce a recollection favorable to the conclusion he most desired, it is not possible in the administration of practical justice to avoid the conclusion that the effect of the wilful disobedience of this imperative and important statutory rule of law, which should have governed his conduct, continued as an effective force, operating on the movement of his vessel to the instant of collision, driving her forward steadily, even though in the last moments slowly, to the fateful point of intersection of the courses of the two ships.

Such a state of fact makes sharply applicable the conclusion of this court in *The Pennsylvania*, 19 Wall. 125, 22 L. ed. 148: "But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of

the disaster. In such a case the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

* The record before us not only fails to show that the fault of the Selja might not have been one of the causes of the accident, or that it probably was not, or that it could not have been one of the causes of it, but, on the contrary, it clearly shows, as we have seen, that the negligent failure to observe the statutory rule contributed directly to cause the collision.

The case is not one for the application of refinements as to what would have been good seamanship without the rule, such as we are invited in argument to consider, nor is it a case for consideration of the doctrine of major and minor fault. Both of the masters were palpably negligent in respects which contributed directly to cause the collision; the negligence of each continued to operate as an efficient cause until the moment when the accident occurred, and we agree with the lower courts that the case is one in which the master and owner of the Selja must be left to suffer their self-inflicted loss.

The judgment of the Circuit Court of Appeals is affirmed.

(243 U. S. 299)

MEMPHIS STREET RAILWAY COMPANY, Petitioner,
v.

S. C. MOORE, Administrator of the Estate of Ivy B. Douglas, Deceased.

COURTS ⇨366(22)—FOLLOWING DECISIONS OF STATE COURTS.

1. The Federal Supreme Court will accept as conclusive the view of the highest state court that the sole purpose of Tenn. Acts 1903, chap. 501, providing that "whenever a nonresident of the state of Tennessee qualifies in this state as the executor or administrator of a person dying in or leaving assets or property in this state, for the purpose of suing and being sued, he shall be treated as a citizen of this state," is to determine privileges in the state courts of nonresidents who may be appointed administrators or executors of the estates of persons such as are described in that act.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 960.]

COURTS ⇨311—JURISDICTION — DIVERSE CITIZENSHIP—SUIT BY NONRESIDENT ADMINISTRATOR.

2. The requisite diversity of citizenship to sustain Federal jurisdiction must be deemed to exist where a citizen of Arkansas, in his representative capacity as adminis-

trator, under appointment by a probate court of Tennessee, sues a Tennessee corporation for wrongfully causing the death of his decedent, although by Tenn. Acts 1903, chap. 501, it is provided that "whenever a nonresident of the state of Tennessee qualifies in this state as the executor or administrator of a person dying in or leaving assets or property in this state, for the purpose of suing and being sued, he shall be treated as a citizen of this state," in view of the declaration of the highest state court that the only purpose of this act is to determine privileges in the state courts of nonresidents who may be appointed administrators or executors of the estates of persons such as are described in the act.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 858.]

[No. 623.]

Argued January 29, 1917. Decided March 6, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of Tennessee in an action by a nonresident administrator against a Tennessee corporation for wrongfully causing the death of the decedent. Affirmed.

See same case below, 146 C. C. A. 634, 232 Fed. 708.

The facts are stated in the opinion.

Messrs. **Roane Waring** and **Luke E. Wright** for petitioner.

Messrs. **Ike W. Crabtree** and **Milton J. Anderson** for respondent.

* Mr. Justice **Clarke** delivered the opinion* of the court:

The respondent, **S. C. Moore**, a citizen of Arkansas, in his representative capacity as administrator of the estate of **Ivy B. Douglas**, deceased, under appointment by the probate court of Shelby county, Tennessee, sued the petitioner, the **Memphis Street Railway Company**, a corporation organized under the laws of Tennessee, in the United States district court for the western district of Tennessee, for wrongfully causing the death of his decedent. He recovered judgment, which was affirmed by the circuit court of appeals, and the case is here on certiorari for review of the holding of that court that the plaintiff had legal capacity to maintain the suit in a Federal court.

On the face of the declaration there was the requisite diversity of citizenship to give the Federal court jurisdiction, but the pe-

tioner claims that the respondent, Moore, although a citizen of Arkansas, must be treated as a citizen of Tennessee under the statute of that state, entitled, "An Act to Declare That, for the Purpose of Suing and Being Sued, a Nonresident of Tennessee, Who Qualifies as Executor or Administrator in Tennessee, Shall Be Considered a Citizen of Tennessee, and to Provide for the Service of Process upon Him" (Acts 1903, chap. 501, p. 1344), which provides:

"That whenever a nonresident of the state of Tennessee qualifies in this state as the executor or administrator of a person dying in or leaving assets or property in this state, for the purpose of suing and being sued, he shall be treated as a citizen of this state."

The remainder of the act prescribes the method of service of summons upon such a nonresident executor or administrator.

Upon a full review of the legislation of the state in *Southern R. Co. v. Maxwell*, 113 Tenn. 464, 82 S. W. 1137, the supreme court of Tennessee decided that the sole purpose of this act is to extend to such nonresident executors and administrators as are described in it the privilege of suing in the state courts in forma pauperis, and that the effect of it, when read with the other statutes of the state on the subject, is to confine this privilege to the people of the state or to suits devoted to their interest, "since the right is not extended to nonresident administrators generally, but only to those who have qualified in this state as the personal representatives of persons dying or leaving assets or property in this state." No conflict with the Federal Constitution or laws being involved, this construction of the state statute will be accepted by this court as conclusive. *Elmendorf v. Taylor*, 10 Wheat. 152, 159, 6 L. ed. 289, 292; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 116, 57 L. ed. 1410, 1416, 33 Sup. Ct. Rep. 967.

But, irrespective of this rule, we quite agree with this authoritative declaration that the only purpose of the act is to determine privileges in the state courts of nonresidents who may be appointed administrators or executors of the estates of persons such as are described in the act. There is nothing whatever in the statute which indicates any intention on the part of the legislature to exclude nonresident executors or administrators from resort to Federal courts under appropriate conditions, and the construction which is urged upon us to give to it such an effect is too strained and artificial to be allowed. The judgment of the Circuit Court of Appeals is affirmed.

MIRIAM McALLISTER, as Administratrix of the Estate of A. J. McAllister, Deceased, Plff. in Err.,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY and Maysville & Big Sandy Railroad Company.

COURTS ⇐385(4)—JURISDICTION BELOW—CERTIFICATE.

1. An order of a Federal district judge which, in allowing a writ of error from the Federal Supreme Court, recited that plaintiff's petition "had been dismissed by the judgment of this court upon consideration solely of the question of this court's jurisdiction of the action," takes the place of the certificate required by the Judicial Code, § 238,¹ governing the direct review in the Federal Supreme Court of the judgments and decrees of the district courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1031.]

RAILROADS ⇐344(1)—SUFFICIENCY OF PETITION—NEGLIGENCE.

2. A cause of action against an operating railway company is stated in Kentucky by allegations in the petition that on a specified day when plaintiff's decedent "was at or near a public crossing . . . a place in the town of Fullerton where numerous people were accustomed to be and travel," as the railway company well knew, without fault on his part, and while in plain view of the railway company's agents and servants, he was negligently and wantonly run down and killed by a train operated by such railway company, and that the latter's negligence consisted in the excessive speed of the train, failure to keep proper lookout for travelers at such a place, and failure to give adequate signals or warnings of the approaching train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1107.]

RAILROADS ⇐259(1)—LIABILITY OF LESSOR COMPANY—NEGLIGENCE OF LESSEE.

3. A lessor railway company continues liable to the public in Kentucky, notwithstanding the lease, for the torts of its lessee in operating the leased railway.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 802, 806, 808, 813.]

REMOVAL OF CAUSES ⇐59—SEPARABLE CONTROVERSY—FRAUDULENT JOINDER.

4. A nonresident operating railway company joined as party defendant with its lessor, a resident railway company, owning the road, in an action grounded upon the negligent operation of the road by the lessee, may not remove the cause to a Federal court as presenting a separable controversy between it and the resident plaintiff, where the petition, tested by the local law, stated a cause of joint liability, and no facts are alleged in support of the charge that the joinder of the two companies was fraudulent except that it was made for the purpose of preventing removal to the Federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 112, 113.]

[No. 748.]

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

¹ Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. 1913, § 1215.]

Submitted January 30, 1917. Decided March 6, 1917.

IN ERROR to the District Court of the United States for the Eastern District of Kentucky to review a judgment dismissing the petition in an action for death which had been removed to that court from a state court. Reversed, with directions to remand the case to the state court.

The facts are stated in the opinion.

Messrs. Allan D. Cole, W. T. Cole, and H. W. Cole for plaintiff in error.

Messrs. E. L. Worthington, W. D. Cochran, Le Wright Browning, and Proctor K. Malin for defendants in error.

* Mr. Justice Clarke delivered the opinion of the court:

On March 26, 1902,—fifteen years since,—the plaintiff filed her petition in the circuit court of Greenup county, Kentucky, against the Chesapeake & Ohio Railway Company, a corporation organized under the laws of Virginia, hereinafter called the Virginia company, lessee, and the Maysville & Big Sandy Railroad Company, a corporation organized under the laws of Kentucky, hereinafter called the Kentucky company, the owner and lessor of the railway on which plaintiff's decedent, on March 15th, 1902, was run down by a passing train and so injured that he soon thereafter died.

In due time, the Virginia company filed a petition for removal of the cause to the circuit court of the United States for the eastern district of Kentucky, in which petition it is alleged: that there is in the case a separable controversy which is wholly between citizens of different states, the petitioner, a corporation of Virginia, and the plaintiff, a citizen of Kentucky; that the Kentucky corporation is not a necessary or proper party to the cause, which can be determined between the Virginia company and the plaintiff without reference to the Kentucky company; and that the Kentucky company is "wrongfully, fraudulently, and falsely" made a party for the sole purpose of preventing removal to the Federal court, without any intention on the part of the plaintiff of proving against it any of the acts of negligence alleged in the petition. It is charged that no cause of action is stated in the amended petition against the Kentucky company.

On May 24, 1905, the plaintiff filed a motion to remand the case to the state court, on the ground that the Federal court "is without jurisdiction to hear and determine the cause," which motion was overruled on the same day. Various consent continuances carried the case over for two and one-half years, until December 27, 1907, when the

plaintiff filed a motion to set aside "the order heretofore made denying her motion to remand the case," and in support of this motion, on the same day, she filed an answer to the petition for removal which is, in substance, a detailed denial of all of the allegations of that petition.

On the 25th of the following May (1908) plaintiff's motion to reconsider the court's ruling denying her motion to remand the case was submitted, and thirty days given for filing a brief, but it was not decided until a year later, when, on May 24th, 1909, it was overruled. Again various continuances by consent caused the case to go over for three years more, until May 27th, 1912, when the plaintiff's motion to reconsider the court's action in overruling her motion to remand was again overruled. Then followed other continuances, aggregating two years more, until, on May 25th, 1914, on motion of the defendant, the case was dismissed for want of prosecution, in an order which, four days later, was set aside, and again nothing was done for eighteen months, until December 15th, 1915, when the case was a second time dismissed for want of prosecution, in an order which was revoked on the 24th of the following July, at which time the former action of the court in overruling plaintiff's motion to remand the case was reaffirmed, and the plaintiff, having elected to stand on her motion to remand, and "refusing to recognize the jurisdiction of the United States court or to proceed with the prosecution of her case therein," upon motion, it was dismissed at plaintiff's costs.

On the next day the district judge allowed a writ of error to this court in an order reciting that plaintiff's petition "had been dismissed by the judgment of this court upon consideration solely of the question of this court's jurisdiction of the action."

The case is properly in this court, the order of the district judge being sufficient to take the place of the certificate required by § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215]. *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; *Herndon-Carter Co. v. James N. Norris, Son & Co.* 224 U. S. 496, 498, 56 L. ed. 857, 858, 32 Sup. Ct. Rep. 550.

The validity of the denial of the plaintiff's motion to remand the case, which is thus brought before us, must be determined upon the allegations of the amended petition and of the petition for removal (*Madisonville Traction Co. v. St. Bernard Min. Co.* 196 U. S. 239, 245, 49 L. ed. 462, 464, 25 Sup. Ct. Rep. 251), when tested by the laws of

Kentucky (Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101; Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 153, 58 L. ed. 544, 547, 34 Sup. Ct. Rep. 278). Fully recognizing this rule, the district court decided the motion on the face of the pleadings, and its reasons for refusal to remand the case, as stated in *McAllister v. Chesapeake & O. R. Co.* 85 C. A. 316, 157 Fed. 741, 744, 13 Ann. Cas. 1068, are, that the Kentucky company had lawful authority*to lease its railroad to the Virginia company (*McCabe v. Maysville & B. S. R. Co.* 112 Ky. 861, 66 S. W. 1054), that the allegation of plaintiff's amended petition that plaintiff's decedent was injured "at or near a public crossing" is an admission that he was a trespasser on the railroad track at the time (*Davis v. Chesapeake & O. R. Co.* 116 Ky. 144, 75 S. W. 275); and that the lessor company is not liable for injury to a trespasser by the negligence of its lessee. These reasons were restated at length by the district judge when he denied the motion to reconsider his refusal to remand.

This conclusion of the district court, that the allegation of the amended petition that the deceased, "at the time of the injuries complained of, was at or near a public crossing in the town of Fullerton," is an admission that he was a trespasser at the time, is based, we think, upon an insufficient statement of the allegations of the amended petition, and upon much too narrow a view of the effect of the decisions of the Kentucky court of appeals as applied to the facts pleaded in this case.

The allegations of the amended petition are:

That since before the year 1890 the Virginia company had been operating the line of railway owned by the Kentucky company under a lease "which in no wise relieves the lessor from liability for the torts of the operating lessee," and that, on March 15th, 1902, when plaintiff's decedent "was at or near a public crossing, . . . a place in the town of Fullerton where numerous people were accustomed to be and travel," as the defendants well knew, without fault on his part, and while in plain view of the agents and servants of the defendants, he was "negligently and wantonly" run down and killed by a train operated by the defendant, the Virginia company. The negligence alleged is excessive speed of the train,—50 miles an hour,—failure to keep proper lookout for travelers at such a place, and failure to give adequate signals or warnings of the approaching train.

*In the case cited by the court in its opinion (*Davis v. Chesapeake & O. R. Co.* supra), the petition alleged that "the

intestate was run over and killed at or near a private crossing over the railroad track, between her garden and her home;" that it was "not far" from public crossings to the east and west of her; and that the train was negligently running at 50 miles an hour, without any appropriate lookout being kept or signals given.

In considering this petition the court of appeals, saying that it must be taken most strongly against the pleader, decided that the allegation that the deceased was killed "at or near a private crossing" must be construed as meaning that she was killed at a place on the track other than at the crossing, and that it is only at a public crossing that reckless speed or any failure to give signals amounts to negligence.

The differences between this decided case and the case at bar are obvious and vital,—a private crossing in the one, a public crossing in the other, and "a place where numerous people were accustomed to be and travel" in the one case, and silence as to the extent of use in the other. We shall see the court of appeals laying sharp hold upon both of these distinctions when determining what the state law applicable to such cases is.

Whatever doubt there may have been before, as to what duty the operating railroad company owed to the plaintiff's decedent, was settled by the decision in *Illinois C. R. Co. v. Murphy*, 123 Ky. 787, 11 L.R.A. (N.S.) 352, 97 S. W. 729, in which the court of appeals, in a comprehensive survey of its prior decisions, formulates in two "principles" or rules, the duty of the operating railroad company to persons crossing or walking along its tracks. The first of these is that in sparsely-settled districts, or where few people cross or walk along railroad tracks, such users are to be regarded as trespassers, to whom no duty is owed by the company, except to keep from injuring them if it reasonably can, after their presence and peril shall have been discovered.

The second principle, and it is the one applicable to the case stated in the amended petition, is, that in more populous communities, or where many people are accustomed to cross or otherwise use railroad tracks, the duty of the company is "to operate the train with the fact of the trespassers' presence in mind,—that is, at a speed which has the train under control, and keeping such a lookout as will enable the operatives to give timely warnings of its approach, as well as to stop it in case of necessity before injury has been inflicted upon the trespasser." Legislation has not regulated the speed of trains in such (smaller) communities, and until it does

each case must rest upon its own facts. "Whether the speed is so great as to amount to negligence will be a fact to be determined by the jury, for the circumstances will necessarily vary, according to the population, the use of the track for passage by foot or vehicle travelers, the obstruction to the view, and so forth. . . .

"If the railroad company knows that the public habitually uses its tracks and right of way in a populous community as a foot pass way, so that it knows that at any moment people may be expected to be found thereon, such knowledge is treated as equivalent to seeing them there, and their presence must be taken into consideration by the train operatives in the movement of their trains."

Six years later, in *Chesapeake & O. R. Co. v. Warnock*, 150 Ky. 74, 150 S. W. 29, and, oddly enough, in a case growing out of an accident which occurred in this same village of Fullerton, the court of appeals again reviews its decisions, approves the statement of the law in the *Murphy Case*, as we have quoted it, and concludes with the statement that:

*309 "Although Fullerton was not an incorporated town,*it was a town in fact; and the place where the accident occurred [described as 60 feet from any public crossing] was such a locality that the presence of persons on the track might be anticipated at any time."

Again recurring to the subject, the same court in *Corder v. Cincinnati, N. O. & T. P. R. Co.* 155 Ky. 536, 159 S. W. 1144, restates the rule, saying:

"It is not so much whether the accident occurs in the city or village as it is that there was evidence of such long and continued use of the footpath by a large number of people as to impose upon the railroad the duty of giving warning of the approach of its trains to this point. . . . It is the nature and use of the crossing by the public that is to determine the applicability of the rule which requires the lookout."

And yet again, in *Willis v. Louisville & N. R. Co.* 164 Ky. 124, 175 S. W. 18, the same court concludes another discussion of its decisions with the approval of the *Warnock* and *Corder Cases*, and adds:

"Running through all these opinions will be found the thought that it is the habitual use of the track by large numbers of persons, rather than the location of the track, that creates the distinction between trespassers and licensees."

Watson v. Chesapeake & O. R. Co. 170 Ky. 254, 185 S. W. 852, the last decision dealing with this subject, plainly is not intended to modify the rule we have thus seen so long established.

While these decisions of the court of appeals of Kentucky leave something to be desired in the definition of the distinction between "trespassers" and "licensees," there can be no doubt that, regardless of the terms of designation used, the result of them is that the allegations of the amended petition in the case under consideration, if supported by appropriate testimony, would require that the case be sent to a jury under a proper charge of*the court, and that it was error for the trial court to hold that they did not state a cause of action as against the lessee (operating) company.

There remains only the question whether the amended petition states a cause of action against the lessor, the Kentucky company, and it is very clear that the decisions of the highest court of that state answer this question in the affirmative.

In *McCabe v. Maysville & B. S. R. Co.* (this same Kentucky corporation) 112 Ky. 861, 66 S. W. 1054, the court of appeals of Kentucky expressly decides that, under the lease of its line to the Virginia company, which was in effect when the action complained of occurred, the lessor company, notwithstanding the lease, continued liable to the public for the torts of its lessee in operating the leased railroad, holding that where both lessor and lessee were joined as defendants in a suit for causing the wrongful death of a man killed by an engine operated by the lessee, the liability was joint, and that a removal petition, not to be distinguished in substance and scarcely in form from the one filed by the Virginia company in this case, did not state a case of a separable controversy, justifying removal to the United States court. To this same effect, construing the Constitution and statutes of Kentucky, as applied to leases by other corporations, are *Illinois C. R. Co. v. Sheegog*, 126 Ky. 252, 103 S. W. 323, affirmed in 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101, and *Louisville Bridge Co. v. Sieber*, 157 Ky. 151, 162 S. W. 804. The plaintiff's decedent was not an employee of the Virginia company, and the rule of the cases cited is not modified by *Swice v. Maysville & B. S. R. Co.* 116 Ky. 253, 75 S. W. 278.

Since the amended petition states a joint cause of action against the Kentucky company and the Virginia company, the claim that there is a separable controversy in the case, justifying removal by the latter company, must fail, and since no facts are alleged in support of the*charge that the joinder of the two companies is fraudulent, except that it was made for the purpose of preventing removal to the Federal court, this claimed reason for removal must also fail (*Illinois C. R. Co. v. Sheegog*, supra, and *Chesapeake & O. R. Co. v. Cockrell*, 237

U. S. 146, 153, 58 L. ed. 544, 547, 34 Sup. Ct. Rep. 278), and therefore the decision of the District Court is reversed and the case must be remanded to the state court.

The petition for removal of this case was filed on the 21st day of July, 1902, and now, fifteen years after, in directing that the case be remanded, we cannot fail to notice the many seemingly needless delays to which it has been subjected, and we direct that appropriate action be taken to return it as promptly as possible to the state court.

Reversed.

(243 U. S. 311)

ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Plff. in Err.,
v.

RALPH W. MOORE.

REMOVAL OF CAUSES $\hookrightarrow$ 3—DIVERSE CITIZENSHIP—SUIT ARISING UNDER FEDERAL EMPLOYERS' LIABILITY ACT.

1. The removal from a state court to a Federal court, upon the sole ground of diversity of citizenship, of an action brought under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as amended by the Act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), is prohibited by the provision of such amendatory act that no action brought in any state court of competent jurisdiction shall be removed to any court of the United States.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5.]

MASTER AND SERVANT $\hookrightarrow$ 110—SAFETY APPLIANCES—HANDHOLDS OR GRAB IRONS—EQUIVALENTS.

2. The requirement of the Safety Appliance Act of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8608), § 4, made applicable to locomotive tenders by the Act of March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), that "it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to the men in coupling and uncoupling cars," is not satisfied by equivalents or by anything less than literal compliance with what it prescribed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 214, 214½.]

APPEAL AND ERROR $\hookrightarrow$ 1033(5)—REVERSIBLE ERROR — INSTRUCTION TOO FAVORABLE TO COMPLAINING PARTY.

3. The giving of an instruction at the request of a railway company that any iron rod or iron device securely fastened upon the end of a locomotive tender to which employees could catch hold while in the performance of their duties in coupling or uncoupling cars was a handhold or grab iron within the meaning of the Safety Appliance Acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8608), § 4,

and March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), and that therefore if a vertical iron handhold and iron rod—pin lifting or uncoupling lever—extending across the tender just above the coupler were so designed and constructed as to permit employees engaged in coupling or uncoupling cars to grasp them readily for their better security the railway company was not guilty of negligence in failing to provide necessary and proper handholds or grab irons, and an injured employee cannot recover for any injury sustained from lack of them upon the tender,—is error in the railway company's favor, being more favorable to it than it deserved under the law, even as modified by the trial court's qualification that the jury must find that such attachments or devices furnish reasonable security to the company's employees in coupling and uncoupling the tender and cars.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056.]

[No. 573.]

Argued January 30, 1917. Decided March 6, 1917.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Buchanan County, in that state, in favor of plaintiff in an action under the Federal Employers' Liability Act. Affirmed. See same case below, 268 Mo. 31, 186 S. W. 1035.

The facts are stated in the opinion.

Mr. Robert A. Brown for plaintiff in error.

Mr. John G. Parkinson for defendant in error.

* Mr. Justice Clarke delivered the opinion* of the court:

Moore, the defendant in error, was in the employ of the plaintiff in error as a brakeman, and was desperately injured on June 9, 1910. His claim is that, at the moment of the accident, he was engaged in adjusting a defective automatic coupler on the rear end of the tender of an engine, which was started unexpectedly, causing him to be thrown from his feet by the steam hose equipment, which hung down to within a few inches of the surface of the track, and that, in part because the tender was not equipped with grab irons or handholds, as required by the Federal law, he fell helpless under the wheels and lost both of his hands.

He recovered a judgment in the trial court, which was affirmed by the supreme court of Missouri, and the case is here on writ of error.

The applicability of the Employers' Liability Act to the case was admitted from

the beginning; but nevertheless a petition was promptly filed for the removal of the case to the United States circuit court on the ground of diversity of citizenship. This petition was denied, and the claim that this denial constitutes reversible error is now argued here, albeit somewhat faintly. The claim is wholly without merit, as is apparent from the plain reading of the Federal Employers' Liability Act, and as is determined in *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844, and in *Southern R. Co. v. Lloyd*, 239 U. S. 496, 60 L. ed. 402, 36 Sup. Ct. Rep. 210.

It is claimed, with much apparent confidence, that no substantial evidence appears in the record to support the judgment of the state courts, and that, under the authority of *Southern P. Co. v. Pool*, 160 U. S. 438, 40 L. ed. 485, 16 Sup. Ct. Rep. 338, the judgment should be reversed. An inspection of the record satisfies us that substantial testimony was introduced in support of the claimed negligence of the railroad company, and that, applying the usual rule, the result cannot be disturbed on this claim.

But chief emphasis, perhaps, is laid on the argument upon the claim that the trial court erred in refusing to say to the jury, as a matter of law, that "any iron rod or iron device securely fastened upon the end of defendant's tender to which employees could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars was a handhold or grab iron within the meaning of the law," and that, therefore, if the vertical iron handhold and iron rod—pin lifting or uncoupling lever—extending across the tender just above the coupler, were so designed and constructed as to permit employees engaged in coupling or uncoupling cars to readily grasp them for their better security while in the performance of such work, the defendant was not guilty of negligence in failing to provide necessary and proper handholds or grab irons, and the plaintiff cannot recover for any injury sustained from lack of them on the engine tender.

The trial court gave this request as the law of the case, but provided, only, the jury should find "that said attachments or devices furnished reasonable security to the employees of defendant in coupling and uncoupling said tender and cars." The railroad company excepted to this modification of its request to charge, and argues now that to so modify it was error.

We quite agree with the supreme court of Missouri in its conclusion that the giving of the company's request, even as modified by the trial court, was error in its favor,

being much more than it deserved under the law.

Section 4 of the Safety Appliance Statute provides: "It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to the men in coupling and uncoupling cars." 27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8608. This statute was, in terms, made applicable to tenders of engines by the amendment of 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613).

The request preferred is an obvious attempt to secure the application of the doctrine of equivalents to the Safety Appliance Act, and to persuade the court to say that it is not necessary for carriers to comply with the law if only they will furnish some other appliance which one jury may say is "just as good" but which another jury may say is not.

It is much too late for such a claim to be seriously entertained. In the case of *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464, often approved by this court, it was settled, once for all, that Congress, not satisfied with the common-law duty and its resulting liability, in the Safety Appliance Act of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8609), prescribed and defined certain definite standards to which interstate carriers must conform, and of the required automatic couplers this court said: Congress has enacted that "no cars, either loaded or unloaded, shall be used in interstate commerce which do not comply with the standard." There is no escape from the meaning of these words. Explanation cannot clarify them and ought not to be employed to confuse them or to lessen their significance.

The exercise of care, even the greatest, in supplying and repairing these appliances, will not excuse defects in them,—the duty and liability are absolute. *St. Louis, I. M. & S. R. Co. v. Taylor*, supra; *Great Northern R. Co. v. Otos*, 239 U. S. 349, 351, 60 L. ed. 322, 323, 36 Sup. Ct. Rep. 124. If equivalents were allowed the statute would be lost in exceptions and its humane purpose defeated in the uncertainty of litigation.

The request to charge on which the plaintiff in error relies in its terms implies the absence of the required handholds or grab irons, and an inspection of the photograph of the tender confirms the inference. The vertical handhold referred to in the request was at the corner of the tender, and could be useful only to a man walking or run-

ning alongside the track to operate the uncoupling lever, or, as it is sometimes called, the pin-lifting lever. It could not be of value when the automatic coupler was not in working condition, or to a man in the position in which Moore was when injured.

This grab iron requirement first appears in the Act of 1893, and the amendment ten years later (March 2d, 1903), 32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613, making the requirement in terms applicable to tenders, did not change it. Whatever may be said of 1893, there can be no doubt that in 1903 automatic couplers, and therefore uncoupling or pin-lifting levers, were in common, if not general, use, on the tenders of engines, and if Congress had intended them to be accepted as a substitute for handholds or grab irons, we must assume that the amendment of 1903 would have so provided. The statute requires both. If practical confirmation of this conclusion were desired, it is to be found in the fact that, in the order of the Interstate Commerce Commission standardizing safety appliances, under the Act of Congress of April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617), two rear end handholds are required on locomotives, "one near each side on rear end of tender *on the face of the end sill*."

It is not admissible to allow such an important statutory requirement to be satisfied by equivalents or by anything less than literal compliance with what it prescribes. The charge as given being more favorable to the company than it deserved, the judgment of the Supreme Court of Missouri is affirmed.

(243 U. S. 264)

PHILADELPHIA & READING RAILWAY
COMPANY, Plff. in Err.,
v.

ROBERT J. McKIBBIN,

CORPORATIONS $\Leftrightarrow$ 668(15) — SERVICE ON
FOREIGN CORPORATION—WHAT IS DOING
BUSINESS IN THE STATE.

1. A foreign railway company whose railway lies wholly outside the state of New York, and which has no dock, or freight or passenger ticket office, or any other office or agent or property therein, except freight cars, which it sends loaded into that state over connecting carriers, and which are, in course of time, returned, receiving only that portion of the through freight payable for the haul over its own line, and on whose behalf no business is transacted in New York except the issue and sale of the customary through coupon passenger tickets by a local carrier at the latter's ferry terminal, where signs are displayed bearing the name of the foreign railway

company, its name also appearing in the telephone directory opposite the number of the local carrier's telephone line,—is not doing business in the southern district of New York in such a sense that process can be served upon it there.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2626.]

For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

CORPORATIONS $\Leftrightarrow$ 668(15) — SERVICE ON
FOREIGN CORPORATION—WHAT IS DOING
BUSINESS IN THE STATE.

2. A foreign railway company cannot be said to be doing business within the state so as to be amenable to service of process there because certain so-called "subsidiary companies" are doing business in the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2626.]

[No. 136.]

Argued January 25, 1917. Decided March
6, 1917.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment in favor of plaintiff in an action against a foreign railway company. Reversed and remanded, with directions to dismiss the suit for want of jurisdiction.

The facts are stated in the opinion.

Mr. Pierre M. Brown for plaintiff in error.

Messrs. Joseph A. Shay and L. B. McKelvey for defendant in error.

* Mr. Justice Brandeis delivered the opinion of the court:

A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state, the process will be valid only if served upon some authorized agent. *St. Louis Southwestern R. Co. v. Alexander*, 227 U. S. 218, 226, 57 L. ed. 486, 483, 33 Sup. Ct. Rep. 245, Ann. Cas. 1915B, 77. Whether the corporation was doing business within the state, and whether the person served was an authorized agent, are questions vital to the jurisdiction of the court. A decision of the lower court on either question, if duly challenged, is subject to review in this court; and the review extends to findings of fact as well as to conclusions of law. *Herndon-Carter Co. v. James N. Norris & Co.* 224 U. S. 496, 56 L. ed. 857, 32 Sup. Ct. Rep. 550; *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293. The main question presented here is whether*the plaintiff* in error—defendant below—was doing business in New York.

The Philadelphia & Reading Railway Company, a Pennsylvania corporation, operated a railroad in that state and in New Jersey. McKibbin, a citizen and resident of New York, was a brakeman in one of its New Jersey freight yards. For injuries sustained there, he brought this action in the United States district court for the southern district of New York. The summons was served on defendant's president, while he was passing through New York, engaged exclusively on personal matters unconnected with the company's affairs. The defendant appeared specially in the cause for the sole purpose of moving to set aside the service of the summons; and invoked the provisions of the Federal Constitution guarantying due process of law. The motion was denied "upon the sole ground that upon the facts stated in the affidavits said defendant is doing business within the state of New York, so as to be subject to service of process within said state." Under a right reserved in the order, the objection to the jurisdiction was renewed in the answer, and insisted upon at the trial before the jury. The motion to dismiss was again heard upon the affidavits originally presented, and was denied. Exceptions were duly taken. A verdict was rendered for the plaintiff; judgment entered thereon; and the case brought here on writ of error; the question of jurisdiction being certified in conformity to § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215].

The affidavits established the following facts: No part of the Philadelphia & Reading's railroad is situated within the state of New York. It has no dock, or freight or passenger ticket office or any other office or any agent or property therein. Like other railroads distant from New York, it sends into that state, over connecting carriers, loaded freight cars, shipped by other persons, which cars are, in course of time, returned. The carriage within that state is performed wholly by such connecting carriers, which receive that portion of the entire compensation paid by the shipper therefor; and the Philadelphia & Reading receives only that portion of the compensation payable for the haul over its own line. The Central Railroad of New Jersey is such a connecting carrier, and has a ferry terminal at the foot of West 23d St., New York City. It issues there the customary coupon tickets over its own and connecting lines, including the Philadelphia & Reading and the Baltimore & Ohio. The whole ticket, in each case, is issued by the Central Railroad of New Jersey; and each coupon so recites. In these tickets there is a separate coupon for the journey over each of the connecting railroads; and the coupon for the journey

over each such railroad bears also its name. Each coupon is declared thereon to be "void if detached." The Philadelphia & Reading receives in ultimate accounting between the carriers, that portion of the fare which is paid for the journey over its own line. Passengers for points on the Philadelphia & Reading or on the Baltimore & Ohio, or beyond, may reach these railroads over the Central Railroad of New Jersey. At various places in and on this ferry terminal are signs bearing the name "Philadelphia & Reading," "P. & R.," or "Reading;"—and also like signs of the "Baltimore & Ohio," or "B. & O." In the New York Telephone Directory there are inserted the words "Phila. & Reading Ry., ft. W. 23d St. Chelsea 6550." These signs on the terminal, this insertion in the telephone directory, and the information given in response to inquiries at the ticket office or over the telephone, are all designed to facilitate and encourage travel and for the convenience of the public. Neither the Philadelphia & Reading nor the Baltimore & Ohio has any office or any employee at the terminal. The Philadelphia & Reading did not direct the insertion of its name in the telephone book. Chelsea 6550 is the number of the trunk line of the Central Railroad of New Jersey; and that company pays the whole expense of the telephone service.

An affidavit filed on plaintiff's behalf, states that the names of the Philadelphia & Reading Coal & Iron Company and of the Philadelphia & Reading Trans. Line, Towing Dept., appear in the telephone directory as at 143 Liberty street, telephone number 5672 Cortlandt; and upon information and belief alleges, that these are subsidiary companies of the Philadelphia & Reading, and "tow the cars of said company from the Jersey points to the city of New York."

The finding that the defendant was doing business within the state of New York is disproved by the facts thus established. The defendant transacts no business there; nor is any business transacted there on its behalf, except in the sale of coupon tickets. Obviously the sale by a local carrier of through tickets does not involve a doing of business within the state by each of the connecting carriers. If it did, nearly every railroad company in the country would be "doing business" in every state. Even hiring an office, the employment by a foreign railroad of a "district freight and passenger agent . . . to solicit and procure passengers and freight to be transported over the defendant's line," and having under his direction "several clerks and various traveling passenger and freight agents," was held not to constitute "doing business within the state." *Green v. Chicago, B. & Q. R. Co.*

205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595. Nor would the fact, if established by competent evidence, that "subsidiary companies" did business within the state, warrant a finding that the defendant did business there. *Peterson v. Chicago*, R. I. & P. R. Co. 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513. As the defendant did no business in New York, we need not consider its other contention, that it could not be sued there on a cause of action arising in New Jersey, and in no way connected with the business alleged to be done in New York. On this proposition we express no opinion.

On behalf of the plaintiff it was also urged that an arrangement between counsel by which service of the summons had been facilitated operated as a waiver of all objections to the jurisdiction of the court. We find this contention to be unfounded.

The judgment of the District Court is reversed and the cause remanded to that court with directions to dismiss it for want of jurisdiction.

Reversed.

(243 U. S. 269)

CHARLES C. PENNINGTON, Plff. in Err.,
v.

FOURTH NATIONAL BANK OF CINCINNATI, OHIO.

CONSTITUTIONAL LAW — 312 — DUE PROCESS OF LAW — SUBSTITUTED SERVICE ON NONRESIDENT — PROCEEDING QUASI IN REM — SATISFYING ALIMONY OUT OF BANK DEPOSIT.

The alimony obligations of a non-resident husband served only by publication, though inchoate at the commencement of the divorce suit, may, consistently with the due process of law guaranteed by U. S. Const. 14th Amend., be enforced out of his bank deposit in a local bank, where, upon the filing of the suit, the court entered a preliminary order enjoining the bank from paying out any part of the deposit, such order being as effective a seizure for this purpose as the customary garnishment or taking by trustee process.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 928.]

[No. 147.]

Argued January 26, 1917. Decided March 6, 1917.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Court of Appeals for Hamilton County, in that state, affirming a judgment of the Circuit Court of that County in favor of defendant in an action to recover the amount of a bank deposit. Affirmed.

See same case below, — Ohio St. —, 112 N. E. 1085.

The facts are stated in the opinion.

Mr. Guy W. Mallon for plaintiff in error.

Messrs. W. S. Little and C. B. Wilby for defendant in error.

* Mr. Justice Brandeis delivered the opinion of the court:

Mrs. Pennington obtained in a state court of Ohio a decree of divorce which is admitted to be valid. In the same proceeding she sought alimony; and in order to insure its payment joined as a defendant the Fourth National Bank of Cincinnati, in which her husband had a deposit account. When the suit was filed the court entered a preliminary order enjoining the bank from paying out any part of the deposit. Under later orders of the court the bank made payments from it to the wife. Finally it was perpetually enjoined from making any payment to the husband, and ordered to pay the balance to the wife, which it did. The husband then presented to the bank a check for the full amount of the deposit, asserting that the court's orders deprived him of his property without due process of law, in violation of the 14th Amendment, and were void; since he was a nonresident of Ohio, had not been personally served with process within the state, had not voluntarily appeared in the suit, and had been served by publication only, all of which the bank knew. Payment of the check was refused. Thereupon Pennington brought, in another state court of Ohio, an independent action against the bank for the amount. Judgment being rendered for the bank, he took the case by writ of error to the court of appeals for Hamilton county, and from there to the supreme court of Ohio. Both these courts affirmed the judgment below. Then the case was brought to this court for review, Pennington still claiming that his constitutional rights had been violated.

The 14th Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a nonresident—of which bank deposits are an example—is property within the state. *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797. It is, indeed, the species of property which courts of the several states have most frequently applied in satisfaction of the obligations of absent debtors. *Harris v. Balk*, 198 U.

S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084. Substituted service on a nonresident by publication furnishes no legal basis for a judgment in personam. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. But garnishment or foreign attachment is a proceeding quasi in rem. Freeman v. Alderson, 119 U. S. 185, 187, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power.

It is asserted that these settled principles of law cannot be applied to enforce the obligation of an absent husband to pay alimony, without violating the constitutional guaranty of due process of law. The main ground for the contention is this: In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection, without legal significance. The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort.* It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt,—that is, it will be valid not in personam, but as a charge to be satisfied out of the property seized. Cases are cited in the margin.¹

The objection that this proceeding was

¹ Enforcement of allowance of alimony from property of absent defendant, seized at the commencement of the suit by attachment or similar process. Hanscom v. Hanscom, 6 Colo. App. 97, 39 Pac. 885; Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017; Wood v. Price, 79 N. J. Eq. 1, 9, 10, 81 Atl. 1093. See Bailey v. Bailey, 127 N. C. 474, 37 S. E. 502; Twing v. O'Meara, 59 Iowa, 326, 331, 13 N. W. 321. Cf. Bunnell v. Bunnell, 25 Fed. 214, 218.

The wife's inchoate right to alimony makes her a creditor of the husband under the statutes against fraudulent conveyances. Livermore v. Boutelle, 11 Gray, 217, 220,

void, because there was no seizure of the res at the commencement of the suit, is also unfounded. The injunction which issued against the bank was as effective a seizure as the customary garnishment or taking on trustee process. Such equitable process is frequently resorted to in order to reach and apply property which cannot be attached at law. Cases are cited in the margin.²

Affirmed.

(243 U. S. 273)

CLARK PEASE, Petitioner,

v.

RATHBUN-JONES ENGINEERING COMPANY. (No. 360.)

CLARK PEASE et al., Petitioners,

v.

RATHBUN-JONES ENGINEERING COMPANY. (No. 419.)

APPEAL AND ERROR $\hookrightarrow$ 1207(4)—COMPLIANCE WITH MANDATE—DEFICIENCY EXECUTION.

1. A decree entered pursuant to the mandate of a Federal circuit court of appeals in an action to foreclose a vendor's lien is not void in so far as it orders a deficiency execution to issue against the defendant and the sureties on his appeal bond, where the original decree, which the circuit court of appeals affirmed, adjudged that plaintiff "do have and recover" a certain sum of money, established a lien on certain property, and ordered the sale thereof to satisfy the judgment if not paid in a specified time, and the mandate from the appellate court commanded that "such execution and further proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4699.]

APPEAL AND ERROR $\hookrightarrow$ 1207(2)—JUDGMENT—SUBSEQUENT PROCEEDINGS BELOW—WAIVER.

2. No objection to the form of the decree in a suit to foreclose a vendor's lien, based upon the recital therein that plaintiff "do have and recover" a certain sum of money, can be raised in the proceedings had after such decree was affirmed on ap-

71 Am. Dec. 708; Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017; Murray v. Murray, 115 Cal. 266, 274, 37 L.R.A. 626, 56 Am. St. Rep. 97, 47 Pac. 37; Hinds v. Hinds, 80 Ala. 225, 227.

² An injunction issued against a resident debtor of a nonresident defendant is a sufficient seizure of the defendant's property to give jurisdiction. Bragg v. Gaynor, 85 Wis. 468, 487, 21 L.R.A. 161, 55 N. W. 919. See Murray v. Murray, 115 Cal. 266, 276, 37 L.R.A. 626, 56 Am. St. Rep. 97, 47 Pac. 37. See Tyler v. Judges of Ct. of Registration, 175 Mass. 71, 77, 51 L.R.A. 433, 55 N. E. 812.

peal, where this objection was not taken on the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4697.]

ABATEMENT AND REVIVAL ◊39 — DISSOLUTION OF CORPORATION — PENDING SUIT.

3. The abatement of a suit pending against a corporation on appeal when such corporation was dissolved was prevented by the provisions of Tex. Rev. Stat. 1911, art. 1206, that upon dissolution of a corporation the president and directors shall be trustees of the creditors and stockholders, with full power to settle its affairs, and in the name of such corporation to collect all debts, compromise controversies, and maintain or defend judicial proceedings, and that the existence of every corporation may be continued for three years after its dissolution, for the purpose of enabling those charged with the duty to settle its affairs.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 194-204.]

ESTOPPEL ◊68(2)—TO ASSERT ABATEMENT — INCONSISTENT ACTS.

4. A dissolved corporation which takes an appeal from a decree against it and gives bond for its successful prosecution is hardly in a position to assert that it is non-existent and incapable of maintaining and defending pending suits.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 166, 169.]

JURY ◊31(1)—INFRINGEMENT OF RIGHT—SUMMARY JUDGMENT ON APPEAL BOND.

5. The constitutional right of trial by jury presents no obstacle to the rendition by a Federal district court, conformably to the local law, of a summary judgment against the sureties on an appeal bond upon the affirmance of the decree appealed from, since a person, by becoming a surety, submits himself to be governed by the fixed rules which regulate the practice of the court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204, 214.]

APPEAL AND ERROR ◊1237 — SUMMARY JUDGMENT ON APPEAL BOND—REMEDY AT LAW.

6. A Federal court of equity is not without jurisdiction on the ground of the existence of an adequate remedy at law to render a summary judgment, conformably to the local law, against sureties on an appeal bond, where the decree appealed from has been affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4778-4784.]

APPEAL AND ERROR ◊1237—LIABILITY ON APPEAL BOND—SUMMARY JUDGMENT—WAIVER.

7. The jurisdiction or power of a Federal district court to render summary judgment against the sureties on an appeal bond upon an affirmance of the decree appealed from, and without notice to the sureties, could not be questioned after the parties had, by motions subsequently filed, invoked a decision of the court upon the question of the sureties' liability on the evidence presented by them, no relevant fact being in dispute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4778-4784.]

APPEAL AND ERROR ◊158(1)—QUESTIONS REVIEWABLE—DEFICIENCY JUDGMENT ON APPEAL BOND—EFFECT OF PAYMENT.

8. The payment by a surety on the appeal bond of a dissolved corporation, "as trustee for himself and the other stockholders," of the deficiency execution issued on the bond upon the affirmance of the decree appealed from relieves an appellate court from the necessity of determining whether the trial court erred in entering judgment against the sureties for the deficiency instead of judgment merely for the costs and any damages to the plaintiff resulting from the delay incident to the unsuccessful appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 973, 977.]

[Nos. 360 and 419.]

Submitted January 8, 1917. Decided March 6, 1917.

TWO WRITS of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review decrees which affirmed decrees of the District Court for the Southern District of Texas, enforcing the liability of sureties on an appeal bond. Affirmed.

See same case below, 142 C. C. A. 565, 228 Fed. 273.

The facts are stated in the opinion.

Messrs. Perry J. Lewis and Frank H. Booth for petitioners.

Mr. Carlos Bee for respondent.

* Mr. Justice Brandeis delivered the opinion of the court:

Pease and Heye were sureties on a supersedeas bond given on appeal to the United States circuit court of appeals in a suit to foreclose a vendor's lien. The district court for the southern district of Texas had entered a decree against the People's Light Company, declaring that Rathbun-Jones Engineering Company "do have and recover" \$6,804.90, with interest; establishing a lien on certain personal property; and directing that it be sold to satisfy the judgment, if the same be not paid within sixty days. The appellate court affirmed the decree. 133 C. C. A. 523, 218 Fed. 167. The mandate directed that the defendant and the sureties "pay the costs in this court, for which execution may be issued out of the district court," and "commanded that such execution and further proceedings be had in said cause as, according to right and justice, and the laws of the United States, ought to be had." Thereupon the district court, apparently without notice having been given specifically to sureties, entered its "decree on mandate." This decree ordered "that said mandate be made

the judgment of this court;" that a sale be made, as herein provided, "to satisfy said judgment," and that "in the event said property does not sell for sufficient amount to satisfy said judgment, interest and costs, the clerk of this court issue execution against the defendant and against the sureties on the appeal bond, . . . for any deficiency that may remain."

The sale was had. Pease, being the highest bidder, purchased all the property for a sum which, when applied upon the judgment, left a large deficiency. Immediately after the sale, and before execution issued, Pease and Heye's administratrix (he having died pending the appeal) filed, in the district court, a motion that execution be stayed and that so much of the "decree on mandate" as directed its issue be set aside. On the same day a similar motion was filed by the trustee in liquidation of the People's Light Company (it having been dissolved pending the appeal). Both motions were presented by the counsel who had theretofore acted for the defendant. The authority of the court to issue the execution was attacked on several grounds. Both motions alleged that the original decree contained no provision for such execution, and that it could not be enlarged on return of the mandate, because the term had expired at which it was entered. They alleged that the order for execution was illegal because the People's Light Company had been dissolved and Heye had died, pending the appeal. They asserted that the "decree on mandate," so far as it directed the issuance of the execution, was "wrongful and illegal," because "it was entered by the court without pleading, without notice, and without hearing, against, to, or of these petitioners," and "deprived them of their property without due process of law." The motion on behalf of the sureties alleged also that they had been deprived of their constitutional right to "trial by jury in actions at common*law." The prayers for relief were rested, also, on still broader grounds, which involved directly the whole merits of the controversy. It was alleged that the "bond did not secure, . . . the payment of the amount of said judgment or any deficiency that might remain after the application of the proceeds of the sale of said property, but operated only as indemnity against damages and costs by reason of said appeal,"—and that the costs on said appeal had been paid. The motions, which were fully heard upon evidence introduced by the petitioners, were denied. An appeal was taken by all the petitioners from this denial; and by Pease alone from the "decree on mandate." Both the decrees were affirmed on appeal; and a rehearing

was refused. 142 C. C. A. 565, 228 Fed. 273. Thereupon petitions to this court for certiorari to the circuit court of appeals were filed and granted.

After issue of the execution, Pease instituted still another proceeding,—a suit to restrain its enforcement. But when the injunction was denied by the district court, the marshal made levy, and Pease, "as trustee for himself and the other stockholders of the People's Light Company," paid to the clerk of court the balance due on the judgment. An appeal from the denial of the injunction was dismissed by the circuit court of appeals; but review of that decree is not sought here.

The petitioners still contend, on various grounds, that the proceedings below are void for lack of due process of law, or should be set aside for error:

First. It is contended that the "decree on mandate" was void so far as it ordered execution to issue for any deficiency; because that direction was not contained in the original decree or in the mandate of the circuit court of appeals. We are referred to cases holding that the lower court must enforce the decree as affirmed without substantial enlargement or alteration. But, the original decree ordered that the plaintiff "do have and recover" \$6,804.90. *This* is the customary language used in personal judgments which are, without further direction, enforceable by general execution. If the defendant desired to insist that, because the suit was a foreclosure proceeding, the decree in this form was not proper, the objection should have been taken on the first appeal; and, not having been so taken, must be considered as waived. The "decree on mandate" obeyed the command of the mandate "that such execution and further proceedings be had in said cause as, according to right and justice, and the laws of the United States, ought to be had." The amount of the deficiency was fixed by the sale; the insertion of the amount in the execution was but a clerical act.

Second. It is contended that all suits pending against the People's Light Company abated upon its dissolution. As we read the Texas statute (Rev. Stat. 1911, art. 1206), such a consequence is carefully avoided. It is there provided that upon dissolution the president and directors shall be trustees of the creditors and stockholders of the corporation, "with full power to settle its affairs," and with power "in the name of such corporation . . . to collect all debts, compromise controversies, maintain or defend judicial proceedings." This general language makes no distinction between pending and subsequent "judicial proceedings," which the trustees are empowered

to maintain and defend in the corporation's name; and there seems no reason why such a distinction should be read into the statute. There is also the further provision in the article that "the existence of every corporation may be continued for three years after its dissolution from whatever cause, for the purpose of enabling those charged with the duty to settle upon its affairs." The People's Light Company, which takes this appeal and gives bond for its successful prosecution, is hardly in a position to assert that it is nonexistent and incapable of maintaining and defending pending suits.

* Third. It is contended that the district court had no power under the Constitution to render a summary judgment against the sureties upon affirmance of the decree appealed from, and that resort should have been had to an action at law. The method pursued has been introduced by statute into the practice of many states, including Texas. Rev. Civ. Stat. art. 1627. See cases in the margin.¹ Pursuant to the requirements of the Conformity Act (Rev. Stat. § 914), this practice is followed by the Federal courts in actions at law. *Hiriart v. Ballon*, 9 Pet. 156, 9 L. ed. 85; *Gordon v. Third Nat. Bank*, 6 C. C. A. 125, 13 U. S. App. 554, 56 Fed. 790; *Egan v. Chicago G. W. R. Co.* 163 Fed. 344. The constitutional right of trial by jury presents no obstacle to this method of proceeding, since by becoming a surety the party submits himself "to be governed by the fixed rules which regulate the practice of the court." *Hiriart v. Ballon*, 9 Pet. 156, 167, 9 L. ed. 85, 89. Although the adoption of state procedure is not obligatory upon the Federal

courts when sitting in equity, they have frequently rendered summary judgment against sureties on appeal bonds. See cases² in the margin.² Some of the district courts, by formal rule of court require the bond* to contain an express agreement that the court may, upon notice to the sureties, proceed summarily against them in the original action or suit. See Rule 91, Ariz. Dist. Court Rules, adopted March 5, 1912; Rule 90, Wash. Dist. Court Rules, 1905. But this is not a general provision; nor is it a necessary one. For, as this court has said, sureties "become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgment may be rendered on their bonds." *Babbitt v. Finn* (*Babbitt v. Shields*) 101 U. S. 7, 15, 25 L. ed. 820, 822. The objection that a court of equity has no jurisdiction because there is an adequate remedy at law on the bond is not well taken. A court of equity, having jurisdiction of the principal case, will completely dispose of its incidents and put an end to further litigation. Applying this principle, equity courts, upon the dissolution of an injunction, commonly render a summary decree on injunction bonds. See cases cited in the margin.³

Fourth. It is contended that notice was not given to the surety of the motion for summary judgment. It is a proper and usual practice to give such notice; but it may be questioned whether notice is always essential. See *Union Surety Co. v. American Fruit Product Co.* 238 U. S. 140, 59 L. ed. 1238, 35 Sup. Ct. Rep. 828; *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388,

¹ Summary judgment was entered on appeal bonds in the following cases: *White v. Prigmore*, 29 Ark. 208; *Meredith v. Santa Clara Min. Asso.* 60 Cal. 617; *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254 (Ill.); *Jewett v. Shoemaker*, 124 Iowa, 561, 100 N. W. 531; *Greer v. McCarter*, 5 Kan. 17; *Holmes v. The Bell Air*, 5 La. Ann. 523; *Chappee v. Thomas*, 5 Mich. 53; *Davidson v. Farrell*, 8 Minn. 258, Gil. 225; *Beall v. New Mexico*, 16 Wall. 535, 21 L. ed. 292 (N. M.); *Clerk's Office v. Huffsteller*, 67 N. C. 449; *Charman v. McLane*, 1 Or. 339; *Whiteside v. Hickman*, 2 Yerg. 358; *Allen v. Catlin*, 9 Wash. 603, 38 Pac. 79.

² Cases where equity courts gave summary judgment against the sureties on appeal bonds: *Woodworth v. North Western Mut. L. Ins. Co.* 185 U. S. 354, 46 L. ed. 945, 22 Sup. Ct. Rep. 676; *Smith v. Gaines*, 93 U. S. 341, 23 L. ed. 901; *Richards v. Harrison*, 218 Fed. 134 (D. C. S. D. Iowa); *Fidelity & D. Co. v. Expanded Metal Co.* 106 C. C. A. 114, 183 Fed. 568 (3d C. C. A.), affirming 177 Fed. 604; *Perry v. Tacoma Mill Co.* 81 C. C. A. 333, 152 Fed. 115 (9th C. C.

A.); *Empire State-Idaho Min. & Developing Co. v. Hanley*, 69 C. C. A. 87, 136 Fed. 99 (9th C. C. A.); *Brown v. North Western Mut. L. Ins. Co.* 55 C. C. A. 654, 119 Fed. 148 (8th C. C. A.).

³ Cases where it was held that courts of equity might render summary judgment on injunction bonds: *Russell v. Farley*, 105 U. S. 433, 445, 26 L. ed. 1060, 1064; *Lea v. Deakin*, 11 Biss. 40, 13 Fed. 514 (C. C. N. D. Ill.); *Lehman v. McQuown*, 31 Fed. 138 (C. C. Colo.); *Coosaw Min. Co. v. Farmers' Min. Co.* 51 Fed. 107 (C. C. S. C.); *Tyler Min. Co. v. Last Chance Min. Co.* 32 C. C. A. 498, 61 U. S. App. 193, 90 Fed. 15, 19 Mor. Min. Rep. 525 (9th C. C. A.); *Cimiotti Unhairing Co. v. American Fur Ref. Co.* 158 Fed. 171 (C. C. N. J.). A few of the districts have a rule of court providing that damages upon dissolution of an injunction "may be assessed in the same proceeding, either by the court or by reference to a master and judgment entered in the same action against the sureties on the bond." See Ark. West. D. Rule 16, as amended to Feb. 27, 1908; Ark. East. D. Rule 14, as amended to Oct. 1, 1915.

30 L. ed. 447, 7 Sup. Ct. Rep. 254, and cases in the margin.⁴

Furthermore, the last two objections, if originally well taken, were waived or cured by the subsequent proceedings. For the motions filed later invoked a decision by the court upon the question of the sureties' liability on the evidence presented by them; and no relevant fact was in dispute. There was no issue to submit to a jury, even if the sureties had been otherwise entitled thereto. After thus voluntarily submitting their cause and encountering an adverse decision on the merits, it is too late to question the jurisdiction or power of the court. *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Western Life Indemnity Co. v. Rupp*, 235 U. S. 261, 273, 59 L. ed. 220, 224, 35 Sup. Ct. Rep. 37.

Fifth. It is further contended that the district court erred in entering judgment against the surety for the deficiency, instead of merely for the costs and any damages to the plaintiff resulting from the delay incident to the unsuccessful appeal. This objection raises a more serious question. The supersedeas bond was in the common form, conditioned that the appellant shall "prosecute its appeal to effect and answer all damages and costs, if it fails to make its plea good." It has long been settled that a bond in that form binds the surety, upon affirmance of a judgment or decree for the mere payment of money, to pay the amount of the judgment or decree. *Catlett v. Brodie*, 9 Wheat. 553, 6 L. ed. 158. Rule 29 of this court—rule 13, 5th C. C. A.—makes provision for a difference with respect to the bond, between a judgment or decree for money not otherwise secured, and cases "where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages." It is not clear

whether the purpose of the rule, in case of secured judgments or decrees, was merely to limit the amount of the penalty, or was also to affect the nature of the liabilities, so that the sureties would be liable to an-

⁴ Cases showing the usual practice of giving to the sureties notice of the motion: *Empire State-Idaho Min. & Developing Co. v. Hanley*, 69 C. C. A. 87, 136 Fed. 99; *Gordon v. Third Nat. Bank*, 6 C. C. A. 125, 13 U. S. App. 554, 56 Fed. 790. Cf. *Leslie v. Brown*, 32 C. C. A. 556, 61 U. S. App. 727, 90 Fed. 171. Cases in state courts holding that notice to the surety is not requisite: *Rogers v. Brooks*, 31 Ark. 194; *Meredith v. Santa Clara Min. Asso.* 60 Cal. 817; *Jewett v. Shoemaker*, 124 Iowa, 561, 100 N. W. 531; *Portland Trust Co. v. Havelly*, 36 Or. 234, 245, 59 Pac. 466, 61 Pac. 346.

swer only for the costs, and damages actually resulting from the delay.

We are, however, relieved from deciding this question; because the record discloses that after the issue of the execution complained of, Pease paid the amount due "as trustee for himself and the other stockholders of the People's Light Company." In other words, the record does not show that Pease paid the amount as surety in satisfaction of the deficiency of judgment against himself. The payment by him may have been made "as trustee," because before that time the corporation had been dissolved. If this payment was made on behalf of the corporation, obviously Pease could get no benefit from a reversal of the decree; and as the decree has been satisfied by the principal obligor, the sureties are in no danger of further proceeding against themselves. On the facts appearing of record the decree is therefore affirmed.

SWIFT & COMPANY, Plff. in Err.,
v.

HOCKING VALLEY RAILWAY COMPANY.

STIPULATIONS ⇨18(1)—EFFECT—CONTRA-VENING RECORD.

1. A stipulation in a suit to recover demurrage charges on private cars, "made for the purpose only of reviewing the judgment" below, that the track on which the cars were placed was a "private track," will be treated by the Federal Supreme Court on writ of error as a nullity, where the facts set forth in the petition and exhibits which determine the character of the track and the relation to it of carrier and shipper, and which were admitted by the demurrer, show that such track in fact was owned by the carrier.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41, 45, 47, 54.]

CARRIERS ⇨100(1)—DEMURRAGE—PRIVATE CARS.

2. An interstate carrier may lawfully adopt a demurrage rule exacting demurrage charges on private cars detained on the carrier's tracks while still in railroad service.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 427-430, 432, 433.]

[No. 376.]

Argued December 5, 1916. Decided March 6, 1917.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Court of Appeals of Cuyahoga County, in that state, affirming a judgment of the Court of Common Pleas of said county in favor of a carrier in an action to recover demurrage charges on private cars. Affirmed.

See same case below, 93 Ohio St. 143, L.R.A.—, —, 112 N. E. 212.

The facts are stated in the opinion.

Messrs. M. Hampton Todd and William L. Day for plaintiff in error.

Messrs. C. M. Horn and James H. Hoyt for defendant in error.

* Mr. Justice Brandeis delivered the opinion of the court:

The National Convention of Railway Commissioners, an association comprising the commissioners of the several states, adopted in November, 1909, a Uniform Demurrage Code. This action was based upon extensive investigations and thorough discussion, participated in by the railroad commissioners, commercial organizations, representatives of railroads, and individual shippers from all parts of the country. On December 18, 1909, the Interstate Commerce Commission indorsed the rules so adopted, and recommended "that they be made effective on interstate transportation throughout the country." Re Demurrage Investigation, 19 Inters. Com. Rep. 496.

These rules provide that after two days' free time "cars held for or by consignors or consignees for loading" or unloading shall (with certain exceptions not here material) pay a demurrage charge of \$1 per car per day. Private cars are specifically included by the following note:

NOTE.—Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

(Empty private cars are in railroad service from the time they are placed by the carrier for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)

In 1910 the Hocking Valley Railway Company, an interstate carrier, inserted in its freight tariff duly filed and published as required by the Act to Regulate Commerce, the demurrage rules and charges, including that relating to private cars, quoted above. Thereafter, Swift & Company, Chicago meat packers, established on the line of that railroad at Athens, Ohio, a ware-

house to which it made, from time to time, shipments in private cars. These cars, which were placed on the switch used in connection with the warehouse, were not unloaded within the forty-eight hours' free time allowed by the tariff; and demurrage charges were assessed by the Railway Company. Payment being refused, this action was brought in the court of common pleas of Cuyahoga county, Ohio, to recover the amount. The amended petition alleged, among other things, that the demurrage rules and charges had been

"approved by the Interstate Commerce Commission by a decision rendered by the Commission on the 14th day of November, 1910, in the case of Procter & G. Co. v. Cincinnati, H. & D. R. Co. which decision is reported in 19 Inters. Com. Rep. 556 to 560, inclusive thereof, and which decision, approving said car demurrage rules and charges, is hereby referred to and made a part hereof, as though the same were fully written out at length herein."

Swift & Company demurred; and defended on the single ground that the cars in question were its private cars, standing on its "private track;" contended that the demurrage rule which required payment of charges under such circumstances was an arbitrary imposition; that it was unlawful and void; and that it was subject to collateral attack, even though included in a tariff duly filed and published under the Act to Regulate Commerce. Two days after the case had been heard on demurrer in the court of common pleas, counsel filed a stipulation as follows:

"For the purpose only of reviewing the judgment of the common pleas court on defendant's demurrer to the amended petition, it is stipulated by the parties hereto that the track on which the cars in question were placed was the private track of Swift & Company."

The next day judgment was rendered for the Railway Company. It was affirmed both by the court of appeals of Cuyahoga county and by the supreme court of Ohio. 93 Ohio St. 143, L.R.A.—, —, 112 N. E. 212.

The supreme court of Ohio assumed the track in question to be a "private track," as stipulated by the parties, and declared that "demurrage rules relating to private cars employed in interstate commerce and the charges assessable thereunder are matters properly included in the tariff or schedule required to be filed and published. This tariff containing the demurrage rule having been filed and published according to law was binding alike on carrier and shipper, and so long as it was in force was to be treated as though it were a statute. . . . This rule having been approved by

Federal tribunal acting within the scope of its authority, its decision must be followed by the courts of this state and be given full force and effect."

The case was then brought to this court on writ of error. The errors assigned were, in substance, that the demurrage rule was repugnant to the Act to Regulate Commerce, and that the decisions below deprived Swift & Company of its property without the due process of law guaranteed by the 14th Amendment.

Prior to the bringing of this action the Interstate Commerce Commission had held in *Procter & G. Co. v. Cincinnati, H. & D. R. Co.* 19 Inters. Com. Rep. 556, that carriers were "within their lawful rights in establishing and maintaining" the above rule for demurrage charges on private cars. The commerce court approved the finding. *Procter & G. Co. v. United States*, 188 Fed. 221, 227. An effort to secure a review of these decisions by this court failed. *Procter & G. Co. v. United States*, 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. Rep. 761.

We do not find it necessary to decide whether the ruling of the supreme court of Ohio was correct; or whether the rule concerning demurrage charges on private cars is in all respects valid; or whether a shipper who has delivered private cars to a carrier, knowing such rule to be in force, is in a position to question its validity in an action for charges accruing thereunder. For the record discloses, contrary to the statement in the stipulation, that the track in question was not a "private track."

The facts which determine the character of the switch and the relation to it of carrier and shipper were carefully set forth in the amended petition and the "license" annexed, copied in the margin.¹ Under it

Swift &* Company occupied a part of the Railway Company's premises for its warehouse and office and enjoyed the rights in the switch from its main lines. The "license" recites, among other things, the licensee's desire "to occupy a track o*ground belonging to the Railway Company" . . . for the purpose of maintaining thereon a warehouse and office . . . in such a manner as not in any way to interfere with the . . . tracks . . . of the Railway Company . . . ;" that the premises lie on "the north side of the Railway Company's siding, known as the 'Bank Track' . . . ;" that "the switch of the Railway Company hereby let and connected with its main line shall at all times be under control of the Railway Company;" and that "the Railway Company shall have the right at all times to enter upon the premises hereby let, for the purpose of repairing or maintaining the track thereon, or switching or removing cars thereover." A rental of \$30 per annum is provided for; but the license is terminable on thirty days' notice.

These facts were admitted by the demurrer, upon*them the case was heard by the court of common pleas, and upon them the case must be decided in this court, unaffected by stipulation of counsel made "for the purpose only of reviewing the judgment of the common pleas court." The construction and effect of a written instrument is a question of law. *Dillon v. Barnard*, 21 Wall. 430, 437, 22 L. ed. 673, 678. Clearly the track in question was not a private track of the shipper, but a track of the carrier,—like the spur passed upon in *National Ref. Co. v. St. Louis, I. M. & S. R. Co.* 150 C. C. A. 361, 237 Fed. 347, affirming 226 Fed. 357.

If the stipulation is to be treated as an

¹ Exhibit "B"—License.—Memorandum of agreement, made this 22d day of March, A. D. 1911, by and between the Hocking Valley Railway Company, a corporation existing under the laws of the state of Ohio, hereinafter known as the "Railway Company," party of the first part, and Swift & Company, a corporation whose principal place of business is in Chicago, county of Cook, state of Illinois, hereinafter known as the "licensee," party of the second part, witnesseth:

Whereas, the licensee, at its own request, desires to occupy a tract of ground belonging to the Railway Company at Athens, Ohio, for the purpose of maintaining thereon a warehouse and office in connection with its business at that point, together with all the improvements and appurtenances thereto, in such a manner as not in any way to interfere with the premises, building, structures, tracks, or business of said Railway Company, upon the following described premises, to wit:

37 S. C.—19.

The northeast part of outlot No. 112 and the northwest part of outlot No. 113, in the village of Athens, Ohio, fronting 175 feet on the south side of State street, immediately west of the premises occupied by the Standard Oil Company, said tract extending southward from said street to the north side of the railway company's siding, known as the "Bank Track," as will more clearly appear shaded in yellow on blue print hereto attached and made a part thereof, for a period of five (5) years, beginning on the 1st day of November, 1910, at a rental of thirty (\$30) dollars per annum, payable annually in advance on the following terms and conditions, to wit:

First. This agreement shall not be assigned by the licensee without the written consent of the railway company being first obtained, and in case the said licensee shall permit its interests to be seized or sold under legal process, this agreement shall thereupon become null and void.

Second. The switch of the Railway Com-

agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law. See cases cited in the margin.² If the stipulation is to be treated as an attempt to agree "for the purpose only of reviewing the judgment" below, that what are the facts shall be assumed not to be facts, a moot or fictitious case is presented. "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. . . . No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard." *California v. San Pablo & T. R. Co.* 149 U. S. 308, 314, 37 L. ed. 747, 748, 13 Sup. Ct. Rep. 876. See *Mills v. Green*, 159 U. S. 651, 654, 40 L. ed. 293, 294, 16 Sup. Ct. Rep. 132. The fact that effect was given to the stipulation by the appellate courts of Ohio does not conclude

this court. See *Tyler v. Judges of Ct. of Registration*, 179 U. S. 405, 410, 45 L. ed. 252, 254, 21 Sup. Ct. Rep. 206. We treat the stipulation, therefore, as a nullity.

* Consignors or consignees of freight shipped in private cars pay the same rates for transportation as if the commodities had been shipped in the cars owned by the carriers; but the owners or lessees of private cars are paid or allowed by the carriers (east of the Mississippi river) a sum equal to three fourths of a cent per mile for refrigerator or tank cars and three fifths of a cent per mile for other cars. The cars are returned by the railroads to the owners without extra charge. The mileage allowance is paid for the return trip as well as on the journey to destination with load. And if the private car owner does not furnish a load for the return journey, the carriers have the right to load the cars. *Re Demurrage Charges on Tank Cars*, 13 Inters. Com. Rep. 378, 379.

Swift & Company's cars were, therefore, though privately owned, still in railroad

pany hereby let and connected with its main line shall at all times be under control of the Railway Company.

Third. The Railway Company shall have the right at all times to enter upon the premises hereby let, for the purpose of repairing or maintaining the track thereon, or switching or removing cars thereover.

Fourth. Either party hereto may terminate this agreement at any time, after giving to the other party thirty (30) days' notice in writing, and at or before the termination of said thirty (30) days said licensee shall, at its own expense, remove all said improvements from said premises, without causing damage of any kind to the property of the Railway Company. Upon its failure to do so within said time, the Railway Company may make such removal at the sole cost of the licensee.

Fifth. The licensee shall pay all taxes assessed upon improvements upon said premises or said premises by reason thereof and will at all times hereafter indemnify and save harmless the Railway Company, its successors and assigns, from and against all loss, costs, charges, and accidents whatsoever, which it may suffer, sustain, or in any wise be subjected to, on account of injuries accruing to its property, or loss or damage to the property of any other person or corporation, arising out of, resulting from or in any manner caused by the construction, erection, maintenance, presence, or use of said improvements installed or existing under this agreement, and said Railway Company shall not be liable in any way for any loss or damage to said improvements or to any property belonging to or in the possession or control of said licensee on or about said premises, resulting from the operation of and use of its railway, engines, cars, or machinery, or by reason of

fire or sparks therefrom, or any other casualty arising from the use and operation of its railway, and shall be held forever free and harmless by said licensee from any such liability.

Sixth. The licensee shall consign all products shipped to it, intended to be placed on the siding hereby let, where the rates and services are equal, via the line or lines of the Railway Company, and shall give said Railway Company the long hauls thereof.

Seventh. The licensee hereby accepts the license herein made with the above specified terms and conditions, and agrees that any failure or default on its part as to either of the same may be held and considered a forfeiture and surrender of this license by it.

In witness whereof, the parties hereto have caused this instrument to be executed in duplicate, on the day and year first above written.

The Hocking Valley Railroad Company,
(Signed)

By W. L. Mattoon, Real Estate Agent.

Swift & Company,

(Signed) By L. B. Swift.

Witness:

(Signed) E. Osler Hughes.

Witness:

(Signed) D. E. Hartwell.

² *San Francisco Lumber Co. v. Bibb*, 139 Cal. 325, 73 Pac. 864; *Owen v. Herzihoff*, 2 Cal. App. 622, 84 Pac. 274; *Aubuchon v. Bender*, 44 Mo. 560; *Prescott v. Brooks*, — N. D. —, 94 N. W. 88, 94; *Holms v. Johnston*, 12 Heisk. 155. See also *Breeze v. Haley*, 11 Colo. 351, 362, 18 Pac. 551; *Lyon v. Robert Garrett Lumber Co.* 77 Kan. 823, 827, 92 Pac. 589; *Wells v. Covenant Mut. Ben. Asso.* 126 Mo. 630, 639, 29 S. W. 607.

service while under lading. The cars while on the switch were on track owned by the Railway Company. The "transportation," within the meaning of the Act to Regulate Commerce, had not ended. It cannot be said that a charge for detention of a private car and use of a railroad track under such circumstance is unreasonable. Even before the adoption of the Uniform Demurrage Code such a charge had been upheld by the Interstate Commerce Commission. *Cudahy Packing Co. v. Chicago & N. W. R. Co.* 12 Inters. Com. Rep. 446. Defendant's argument was based wholly upon the assumption that the switch was a "private track;" and the propriety of such a charge for cars detained on a public track seems not to have been questioned.

Affirmed.

Mr. Justice McKenna, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissent.

(243 U. S. 257)

ROME RAILWAY & LIGHT COMPANY,
Appt.,
v.

FLOYD COUNTY, GEORGIA, et al.

STREET RAILROADS ⇄31—RIGHT TO USE
HIGHWAY BRIDGE—MUNICIPAL CONSENT
—COMPENSATION — COMPROMISE AGREEMENT.

1. Any legal right of a street railway company to use highway bridges without the county's consent and without making compensation was destroyed by the execution of a formal contract between the county commissioners and the street railway company in order to settle the controversy between them as to their respective rights in the matter, whereby the county granted, subject at all times to revocation, the right to use the bridges in consideration of the street railway company's promise to pay a specified sum per annum for the use of each bridge.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 67, 68.]

STREET RAILROADS ⇄31—USE OF HIGHWAY BRIDGE — SHARING COST OF REBUILDING.

2. To require a street railway company occupying certain highway bridges, under a revocable grant from the county authorities, to pay one third of the actual cost of removing the old bridges and erecting new ones before such company should be permitted to use the new structures, was within the power of those authorities, under Ga. Laws 1914, p. 487, providing that all existing permits and franchises to operate over any of said bridges are revoked and repealed "so far as the same applies to any future bridges hereafter constructed under this or any other law," unless the street railway company will conform to the reasonable terms and conditions prescribed by the county authorities, giving the latter

exclusive right and jurisdiction to grant franchises to operate over new bridges, and to prescribe terms for such grants, and empowering them to require, as a condition precedent, that any grantee shall pay to the county "one third of the actual cost of the building of said bridges . . . but any corporation now having a franchise shall have the right to use any new bridge upon complying with reasonable conditions imposed" by the county authorities and the terms of the act.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 67, 68.]

[No. 547.]

Argued January 25, 1917. Decided March 6, 1917.

APPEAL from the District Court of the United States for the Northern District of Georgia to review a decree which dismissed the bill in a suit by a street railway company to enjoin county authorities from requiring it to share the cost of removing old bridges and erecting new ones. Affirmed.

See same case below, 228 Fed. 775.

The facts are stated in the opinion.

Messrs. John C. Doolan, Linton A. Dean, J. Ed. Dean, Edmund F. Trabue, and Attila Cox, Jr., for appellant.

Messrs. George E. Maddox, Mark B. Eubanks, and Joel Branham for appellees.

*Mr. Justice McReynolds delivered the opinion of the court:

Within the limits of Rome, Georgia, since 1881, three public bridges have crossed the Etowah and Oostanaula rivers. Appellant is successor to the Rome Street Railroad Company incorporated in 1884 by special act, and empowered to construct and operate railroads in that city, also in certain neighboring towns, and, with consent of the Floyd county board of Commissioners of roads and*revenues, for 5 miles along public roads (Ga. Laws 1884-5, pp. 191, 235). Authority was given to use horses, electricity, underground cables driven by steam, "or any other appliance that may hereafter be invented or used as motive power." The company began to run horse-drawn cars over the city streets and across Howard street or Second Avenue bridge as early as 1885; and this mode of operation continued until 1892 or 1893.

The Howard Street bridge having been destroyed in April, 1886, the county erected a new one upon the same site; thereafter it refused to permit the car company to lay tracks or operate over this without payment therefor, and brought suit to enjoin any attempt so to do. In *Floyd County v. Rome Street R. Co.* 77 Ga. 617, 3 S. E. 3 (Oct. Term, 1886), the state supreme

court held: "The only question made by the record, therefore, is, whether the legislature has authorized the street railroad company to appropriate this bridge to its use in the manner claimed by it, without the county's consent, and without making it compensation. . . . The bridge forms a continuation of the streets of the city across the river, and is a part of the same. . . . The legislature, unless restricted by the state Constitution, may, even without the consent of a municipality, and without allowing it compensation, authorize railroads to be laid in its highways. . . . But even had the consent of the county of Floyd been required to this use of the bridge by the street railroad company, that assent was given, and when the condition on which it was accorded was accepted and acted upon by the company, it became a binding contract until the license was revoked by the only authority having power to revoke it. . . . The precise point insisted upon by counsel for the county is, that where any part of a public street or highway is washed out or otherwise destroyed by any means, and the damage is repaired by a new structure upon the portion thus destroyed or rendered unfit for use, this gives the county a right to exact additional compensation from a railroad company which, previously to the injury, used the street or public highway with the assent of the municipality, where the railroad company proposes to make the same use of the street or highway after it has been repaired. We certainly know of no case which has carried the right of compensation for its use to this extent, and think that its recognition and enforcement by the courts would work great injury to the prosperity of the community."

An amendment to its charter, September 21, 1887 (Ga. Laws 1887, p. 148), empowered the company to use dummy steam engines on the bridges, subject to such regulations as the board of commissioners might prescribe from time to time. Extensions were also specially authorized with consent of the board as to public roads and town authorities as to streets. Another amendment, November 12, 1889 (Ga. Laws 1889, p. 696), prohibited the use of dummy engines or steam power on the bridges without unanimous consent of all the commissioners, declared by public resolution in an official meeting, and it provided, "that the board of commissioners of roads and revenues of Floyd county shall not have the right to grant any vested or contract rights to said Street Railroad Company, or any other persons on or over said bridges, but may, in their discretion, grant temporary uses and privileges to said Railroad Com-

pany over said bridges, subject at all times to be revoked by said commissioners."

February 25, 1892, Floyd county, through its board of commissioners, and the Rome Street Railroad Company, by formal writing, agreed that "said party of the first part grants to the said party of the second part the right to lay and maintain a single track on one side of the county bridges at Rome, to wit, . . . with the right to place electric wires and appliances and to run electric cars across said bridges upon the consideration and conditions herein named,"—among them payment of \$100 annually for use of each bridge, and commencing to build electric lines within ninety days. Later, in 1892 or 1893, the car lines were equipped electrically and extended over and beyond all of the bridges, and since that time have been continuously operated. February 3, 1896, it was stipulated by the county and the City Electric Railway Company, a successor to the Rome Street Railroad Company, and appellant's predecessor, "that said party of the first part grants to the said party of the second part the right to use its electric wires and appliances and to run electric cars across the Floyd county bridges . . . said company shall pay annually to said party of the first part the sum of \$200 for the use of said bridges, in consideration of the grant herein named."

In *City Electric R. Co. v. Floyd County*, 115 Ga. 655, 42 S. E. 45 (March Term, 1902), the state supreme court sustained the agreement of February 25, 1892. It said: "If the railroad company originally had the right, under the power granted to it by the legislature, as we are inclined to think it had, to construct and operate its electric lines over the bridges in question without the consent of the county and without paying anything whatever therefor, it lost this right when the dispute between it and the county was compromised and settled by the execution of this contract. If there had been no controversy between the parties as to their respective rights in the matter, and the county had simply charged the railroad company \$100 per annum for the use of each of the bridges, and the company had simply agreed to pay this sum annually, the contract entered into might have been, as contended by the plaintiff in error, a nudum pactum, and, therefore, not binding upon the company. But this was not the case; the parties asserted conflicting claims,* depending upon a question of law, and these claims were compromised and settled by the contract now under consideration."

An act of the Georgia legislature, ap-

proved August 15, 1914 (Ga. Laws 1914, p. 487), provides:

That all right, title, and interest in the Rome bridges, together with complete jurisdiction and control over them, shall be vested in Floyd county, to be exercised by its authorities. All permits and franchises theretofore granted by state, county, or city, to any street railroad company, to lay tracks or operate cars over any one of the bridges, are revoked and repealed "so far as the same applies to any future bridges hereafter constructed under this or any other law, unless the said companies will conform to the reasonable terms and conditions required by the county authorities;" and Floyd county is authorized to condemn and remove existing bridges and construct new ones. The street railway company, upon notice, shall remove its tracks, as may be required by the county authorities; the latter are given exclusive right and jurisdiction to grant franchises to operate over new bridges and to prescribe terms for such grants; and they are authorized to require as a condition precedent that any grantee shall pay to the county "one third of the actual cost of the building of said bridges . . . but any corporation now having a franchise shall have the right to use any new bridge upon complying with the reasonable conditions imposed by the board of commissioners and the terms of this act." The validity of any part of the act shall be contested only by injunction proceedings before the work of tearing down and removing the bridges is begun.

The commissioners of Floyd county gave public notice, May 3, 1915, that on June 16th, they would begin the work of tearing down old and rebuilding new bridges at an estimated total cost of \$260,000. Ten days later* they passed resolutions wherein, after referring to the Act of August 15, 1914, and reciting their determination to remove the old bridges and erect others, they declared that appellant would be required to pay one third of the actual cost of removing the old bridges and erecting new ones, "which sum shall be paid to the county treasurer before said company shall be allowed to place any tracks, wires, equipment, or operate any cars on and over" the new structures.

By its original bill, filed May 26, 1915, in the United States district court, appellant sought to enjoin defendants from undertaking to enforce the Act of 1914 according to their declared purpose upon the ground (a) that such action would deprive it of property without due process of law and of the equal protection of the laws, and impair the obligation of contracts with the state, contrary to the Constitution of

the United States; (b) that, when properly construed, the Act of 1914 does not authorize defendants to require appellant to pay one third of the cost of removing old bridges and constructing others, such charge being permitted only in the absence of a then-existing franchise to cross the former.

Being of opinion that nothing in acts of the legislature, ordinances, or resolutions gave appellant "any such vested interests, or such right to occupy and use these bridges," as it claimed, upon motion, the trial judge dismissed the bill. The judgment is correct and must be affirmed.

It is unnecessary now definitely to determine what rights were conferred by the Act of 1884. Under the agreements of 1892 and 1896 between appellant's predecessors and the board of commissioners the former accepted a temporary grant, subject at all times to revocation,—all the latter was empowered to make by the Act of 1889. This, we think, is clearly true, and it is also but the logical result of what the supreme court of Georgia held in *City of Atlanta v. Electric R. Co. v. Floyd County*, supra. And*see *West End & A. Street R. Co. v. Atlanta Street R. Co.* 49 Ga. 151, 158.

Considering the entire Act of 1914, we are unable to conclude that the legislature did not intend to authorize the county authorities to require appellant to pay "a sum equal to one third of the actual cost of the building of said bridges" before being allowed to use the same.

Affirmed.

(243 U. S. 247)
WERNER HORN, Appt.,
v.

JOHN J. MITCHELL, United States Marshal for the District of Massachusetts.

HABEAS CORPUS 113(3)—APPEAL FROM CIRCUIT COURT OF APPEALS—JURISDICTIONAL AMOUNT.

1. A habeas corpus case cannot involve the jurisdictional amount necessary, under the Judicial Code, § 241,¹ to sustain an appeal to the Federal Supreme Court from a circuit court of appeals.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 104.]

HABEAS CORPUS 113(3)—APPEAL FROM CIRCUIT COURT.

2. The right of an appeal from a decree of a Federal circuit court in a habeas corpus case existed after the passage of the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, Comp. Stat. 1913, § 1646), only in the cases designated in § 5 of that act as involving constitutional, jurisdictional, and certain other specified questions.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 104.]

 For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

¹ Act March 3, 1911, c. 281, 36 Stat. 1157 [Comp. St. 1913, § 1218.]

HABEAS CORPUS  113(2)—APPEAL FROM CIRCUIT COURT OF APPEALS.

3. The abolition of the federal circuit courts by the Judicial Code, § 289,² removed the last vestige of any authority for an appeal to the Federal Supreme Court from the circuit courts of appeals in habeas corpus cases which is asserted to arise out of the provisions of U. S. Rev. Stat. §§ 763, 764, giving appeals in habeas corpus cases from district to circuit courts, and thence to the Supreme Court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 103.]

[No. 679.]

Argued January 11 and 12, 1917. Decided March 6, 1917.

APPEAL from the United States Circuit Court of Appeals for the First Circuit to review a decree which affirmed a decree of the District Court for the District of Massachusetts, refusing relief by way of habeas corpus to a person in custody under an indictment found in that district. Dismissed for want of jurisdiction.

See same case below, 147 C. C. A. 13, 232 Fed. 819.

Messrs. Joseph F. O'Connell, James E. O'Connell, and Daniel T. O'Connell for appellant.

Assistant Attorney General Warren for appellee.

Memorandum opinion by Mr. Justice Pitney, by direction of the court:

Appellant, being in the custody of the United States marshal for the district of Massachusetts, under an indictment found in that district for a violation of the Act of May 30, 1908, chap. 234, 35 Stat. at L. 554, now §§ 232-235 of the Criminal Code (chap. 321, 35 Stat. at L. 1088, 1134, Comp. Stat. 1913, §§ 10,165, 10,402), in unlawfully transporting explosives from New York through Massachusetts to Vanceboro, Maine, petitioned the district court for a writ of habeas corpus upon the ground that the order of commitment was in violation of his rights under the Constitution and laws of the United States and existing treaties between the United States and the German Empire and the Kingdom of Prussia, for that (among other reasons) appellant is an officer of the army of the German Empire; that a state of war, recognized by the President of the United States in an official proclamation, exists between Great Britain and Germany; that appellant is accused of destroying a part of the international bridge in the township of McAdam, Province of New Brunswick, and

Dominion of Canada; that the charge of carrying explosives illegally, upon which he is held in custody, is, if true, inseparably connected with the destruction of that bridge; and that "he is a subject and citizen of the Empire of Germany and domiciled therein, and is being held in custody for the aforesaid act, which was done under his right, title, authority, privilege, protection, and exemption claimed under his commission as said officer."

After a hearing, the district court refused the writ of habeas corpus and dismissed the petition (223 Fed. 549), and an appeal to the circuit court of appeals for the first circuit resulted in an affirmance of the judgment (147 C. C. A. 13, 232 Fed. 819). An appeal from the judgment of affirmance to this court was then allowed.

There is a motion to dismiss the appeal, and this must be granted. Assuming, as we do, that the petition for habeas corpus raised questions involving the application of the Constitution of the United States or the construction of a treaty made under its authority, appellant might have taken a direct appeal from the district court to this court under § 238, Judicial Code (Act of March 3, 1911, chap. 231, 36 Stat. at L. 1087, 1157, Comp. Stat. 1913, §§ 968, 1215), Frank v. Mangum, 237 U. S. 309, 59 L. ed. 969, 35 Sup. Ct. Rep. 582; Kelly v. Griffin, 241 U. S. 6, 60 L. ed. 861, 36 Sup. Ct. Rep. 487; Bingham v. Bradley, 241 U. S. 511, 60 L. ed. 1136, 36 Sup. Ct. Rep. 634. Having appealed to the circuit court of appeals, he cannot bring his case here except under some provision of law allowing an appeal from that court to this. Appeals of this character are regulated by § 241, Judicial Code (36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1218), and are confined to cases "where the matter in controversy shall exceed one thousand dollars, besides costs." It long has been settled that the jurisdiction conferred by Congress upon any court of the United States in a case where the matter in controversy exceeds a certain sum of money does not include cases where the rights of the parties are incapable of being valued in money, and therefore excludes habeas corpus cases. Kurtz v. Moffitt, 115 U. S. 487, 498, 29 L. ed. 458, 460, 6 Sup. Ct. Rep. 148; Lau Ow Bew v. United States, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; Cross v. Burke, 146 U. S. 82, 88, 36 L. ed. 896, 898, 13 Sup. Ct. Rep. 22; Whitney v. Dick, 202 U. S. 132, 135, 50 L. ed. 963, 964, 26 Sup. Ct. Rep. 584; Healy v. Backus, 241 U. S. 655, 60 L. ed. 1224, 36 Sup. Ct. Rep. 726.

Appellant seeks to sustain his appeal under §§ 763 and 764 of the Revised Stat-

 For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

² Act March 3, 1911, c. 231, 36 Stat. 1167 [Comp. St. 1913, § 1266.]

utes.¹ They gave a right of appeal from the district court to the circuit court in two classes of habeas corpus cases, and an appeal from the circuit court to this court in cases of a class that includes the present case. Section 764 was amended by act of March 3, 1885, chap. 353, 23 Stat. at L. 437, by extending the right of appeal from the circuit courts to this court so as to include the remaining cases described in the preceding section. But by § 4 of the Act of March 3, 1891, establishing circuit courts of appeals (26 Stat. at L. 827, chap. 517, Comp. Stat. 1913, § 1646), all appellate jurisdiction was taken from the circuit courts, and by §§ 5 and 6 it was distributed between this court and the circuit courts of appeals. By § 14, all acts and parts of acts relating to appeals or writs of error, inconsistent with the provisions for review in §§ 5 and 6, were repealed. Section 5 preserved a direct appeal from the district court to this court in cases involving the construction or application of the Constitution of the United States, or the validity or construction of any treaty made under its authority. In *Cross v. Burke*, 146 U. S. 82, 88, 36 L. ed. 896, 898, 13 Sup. Ct. Rep. 22, it was pointed out that the effect of this was that appeals from the decrees of the circuit court on habeas corpus could no longer be taken to this court except in cases of the class mentioned in the 5th section of that act. And it was so held in *Re Lennon*, 150 U. S. 393, 399, 37 L. ed. 1120, 1122, 14 Sup. Ct. Rep. 123.

Even were it otherwise, an appeal from

¹Sec. 763. From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard:

1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States.

2. In the case of any prisoner who, being a subject or citizen of a foreign state, and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any state, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty the validity and effect whereof depend upon the law of nations, or under color thereof.

Sec. 764. From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the last clause of the preceding section.

the circuit court to this court was not the same as an appeal from the circuit court of appeals to this court. And the abolishment of the circuit courts by § 289, Judicial Code [36 Stat. at L. 1167, chap. 231, Comp. Stat. 1913, § 1266], removed the last vestige of authority for an appeal to this court under § 764, Rev. Stat.

Appeal dismissed.

(243 U. S. 251)

STATE OF WASHINGTON EX REL.
GRAYS HARBOR LOGGING COMPANY
and W. E. Boeing, Plffs. in Err.,
v.

COATS-FORDNEY LOGGING COMPANY.

COURTS — 393 — REVIEW OF STATE COURTS
— FINALITY OF DECISION BELOW.

A judgment of the highest state court affirming on certiorari a judgment entered below to the effect that the petitioner was entitled under Wash. Const. art. 1, § 16, and Wash. Laws 1913, chap. 133, to condemn and appropriate certain land for a private way of necessity, and remanding the cause for further proceedings, i. e., the determination and assessment of damages and compensation, is not final for the purpose of review in the Federal Supreme Court, since the judgment must be construed as being subject to the condition of the state Constitution that proper compensation be first ascertained and paid.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1048.]

[No. 132.]

Argued January 23, 1917. Decided March 6, 1917.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed on certiorari a judgment of the Superior Court for Chehalis County, in that state, to the effect that the petitioner was entitled to condemn and appropriate certain land for a private way of necessity, and remanded the cause for further proceedings. Dismissed for want of jurisdiction.

See same case below, 82 Wash. 503, 144 Pac. 722.

The facts are stated in the opinion.

Messrs. W. H. Abel and A. M. Abel for plaintiffs in error.

Messrs. William M. Smith, Alexander Britton, Evans Browne, and F. W. Clements for defendant in error.

*Mr. Justice Pitney delivered the opinion of the court:

The Coats-Fordney Logging Company, defendant in error, instituted a proceeding by petition in the superior court of the

state of Washington for Chehalis county against Grays Harbor Logging Company and W. E. Boeing, wherein it sought to condemn and take certain of their lands situate in that county for the purpose of constructing and maintaining a logging railroad as a private way of necessity in order to bring its lumber to market. The proceeding was based upon the following provisions of the constitution and statutes of the state:

Section 16 of art. 1 of the Constitution declares: "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived," Under this constitutional provision the legislature passed an act (Sess. Laws 1913, chap. 133, p. 412; Rem. & Bal. Code, §§ 5857-1 et seq.) which provides that lands for the construction and maintenance of a private way of necessity may be acquired by condemnation, including within the term "private way of necessity" a right of way over or through the land of another for means of ingress or egress and the construction and maintenance of roads, logging roads, tramways, etc., upon which timber, stone, minerals, or other valuable materials and products may be transported and carried. The procedure is to be the same as provided for condemnation of private property by railroad companies. This refers us to Rem. & Bal. Code, §§ 921-931 (5637-5645), whereby it is provided, in substance (§ 921), that any corporation authorized by law to appropriate land for a right of way may present to the superior court of the county in which the land is situate a petition describing the property sought to be appropriated, setting forth the names of the owners and parties interested, and the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money; a notice (§ 922) of the petition stating the time and place where it will be presented to the court is to be served upon each person named therein as owner or otherwise in-

terested; (§ 925) at the hearing, if the court be satisfied by competent proof that the contemplated use for which the land is sought to be appropriated is really a public use, or is for a private use for a private way of necessity, and that the public interest requires the prosecution of such enterprise, and that the land sought to be appropriated is necessary for the purpose, the court may make an order directing the sheriff to summon a jury; at the trial (§ 926) the jury shall ascertain, determine, and award the amount of damages to be paid to the owners and other persons interested, and upon the verdict judgment shall be entered for the amount thus awarded; (§ 927) at the time of rendering judgment for damages, if the damages awarded be then paid, or, if not, then upon their payment, the court shall also enter a judgment or decree of appropriation, thereby vesting the legal title to the land in the corporation seeking to appropriate it; * (§ 929) upon the entry of judgment upon the verdict of a jury and award of damages the petitioner may make payment of the damages and costs of the proceeding to the parties entitled to the same by depositing the same with the clerk of the superior court, to be paid out under the direction of the court, and upon making such payment the petitioner shall be released from further liability, unless upon appeal the owner or other party interested shall recover a greater amount; (§ 931) "Either party may appeal from the judgment for damages entered in the superior court to the supreme court of the state within thirty days after the entry of judgment as aforesaid, and such appeal shall bring before the supreme court the propriety and justness of the amount of damages in respect to the parties to the appeal."

Plaintiffs in error opposed the petition for condemnation upon the ground, among others, that the Act of 1913 was contrary to the Constitution of the United States, and that petitioner sought to take their property for a private use, and therefore without due process of law, in violation of that Constitution. After hearing testimony upon the question of necessity, the superior court entered an order of condemnation, and by the same order set the cause down for trial before a jury for the purpose of determining and assessing the damages and compensation. At this point, and before the cause could be brought to trial before a jury, plaintiffs in error applied for and obtained from the supreme court of the state a writ of certiorari for the purpose of reviewing the question of the constitutionality of the act and the right of petitioner to condemn their property for its

right of way. The supreme court sustained the proceedings (82 Wash. 503, 144 Pac. 722), and entered a judgment affirming the judgment of the superior court, and remitting the cause to that court for further proceedings. A writ of error was then sued out from this court under § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214].

* Defendant in error moves to dismiss the writ of error on the ground that the judgment of the state court is not final. To this plaintiffs in error respond by saying that, under the state practice, the judgment of the superior court establishing the right of petitioner to acquire the property or right of way sought is final; that while an appeal will not lie from such a judgment to the supreme court, this is because the statutory provision for an appeal in condemnation cases is limited to the question of the amount of damages, and a general statute providing for appeals has been held not applicable to eminent domain proceedings (Western American Co. v. St. Ann Co. 22 Wash. 158, 60 Pac. 158), that because an appeal will not lie, the supreme court has held that a writ of certiorari or review will issue to bring before that court for determination the questions of use and necessity (Seattle & M. R. Co. v. Bellingham Bay & E. R. Co. 29 Wash. 491, 92 Am. St. Rep. 907, 69 Pac. 1107); and that by repeated decisions of that court it has been settled that after an order adjudging necessity has been made and a trial had to determine the amount of damages, an appeal taken therefrom raises no question as to the right to condemn, but is confined to the propriety and justness of the amount of damages (Fruitland Irrig. Co. v. Smith, 54 Wash. 185, 102 Pac. 1031; Calispel Diking Dist. v. McLeish, 63 Wash. 331, 115 Pac. 508; Seattle, P. A. & L. C. R. Co. v. Land, 81 Wash. 206, 209, 142 Pac. 680; State ex rel. Davis v. Superior Ct. 82 Wash. 31, 34, 143 Pac. 168). In this state of the local practice it is argued that the judgment that has been entered should be regarded as finally disposing of a distinct and definite branch of the case, and therefore subject to our review as a final judgment; leaving the ascertainment of the compensation and damages to be dealt with as a separate branch of the case. Wheeling & B. Bridge Co. v. Wheeling Bridge Co. 138 U. S. 287, 290, 34 L. ed. 967, 968, 11 Sup. Ct. Rep. 301, is cited in support of this contention, and certainly seems to lend color to it.

* But, notwithstanding* the decision in that case, we cannot regard a condemnation proceeding taken under the authority of the Constitution of Washington and the Act of 1913 as severable into two distinct

branches. The Constitution forbids that the property be taken without compensation first made or ascertained and paid into court for the owner, and, of course, in case of controversy, compensation cannot be made to the owner until the amount of it has been ascertained. It follows that the judgment entered by the superior court to the effect that petitioner was entitled to condemn and appropriate the land in question for its right of way must be construed as being subject to a condition that the proper compensation be first ascertained and paid.

As we read the decisions of the supreme court of the state, such judgments are not interpreted in any other sense; they are not described as final, nor as independent judgments. In two cases the term "order" and even "preliminary order" has been employed with respect to such judgments (State ex rel. Pagett v. Superior Ct. 46 Wash. 35, 36, 89 Pac. 178; Seattle, P. A. & L. C. R. Co. v. Land, 81 Wash. 206, 209, 142 Pac. 680), and they are held reviewable by certiorari, and not by appeal, not because they are final, or are independent of the subsequent proceedings ascertaining the damages, but because in Washington proceedings by appeal are statutory, and no statute has been enacted giving an appeal from the order or judgment determining the questions of use and necessity; by reason of which, the writ of certiorari is employed as a means of exercising the constitutional power of review.

The judgment, therefore, seems to us to be interlocutory, and the case to be within the authority of *Luxton v. North River Bridge Co.* 147 U. S. 337, 341, 37 L. ed. 194, 195, 13 Sup. Ct. Rep. 356; *Southern R. Co. v. Postal Teleg. Cable Co.* 179 U. S. 641, 643, 45 L. ed. 355, 356, 21 Sup. Ct. Rep. 249, and *United States v. Beatty*, 232 U. S. 463, 466, 58 L. ed. 686, 687, 34 Sup. Ct. Rep. 392.

When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the Federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the supreme court (82 Wash. 503), as laying down the law of the case, this court will not be thus bound (*United States v. Denver & R. G. R. Co.* 191 U. S. 84, 93, 48 L. ed. 106, 109, 24 Sup. Ct. Rep. 33; *Messenger v. Anderson*, 225 U. S. 436, 444, 56 L. ed. 1152, 1156, 32 Sup. Ct. Rep. 739; *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 418, 59 L. ed. 1027, 1029, 35 Sup. Ct. Rep. 625).

The judgment brought up by the present

writ of error not being a final judgment, within the meaning of § 237, Judicial Code, the writ must be dismissed.

(243 U. S. 332)

FRANCIS M. WILSON, United States Attorney for the Western District of Missouri, Appt.,

v.

ALEXANDER NEW and Henry C. Ferris, as Receivers of the Missouri, Oklahoma, & Gulf Railway Company.

MASTER AND SERVANT — 13—PRESCRIBING STANDARD WORKDAY FOR RAILWAY EMPLOYÉS—TEMPORARY WAGE REGULATION.

1. Congress, confronted with the imminent interruption of interstate commerce by a threatened general strike of railway employees, the outcome of a dispute over a wage standard, could, in the exercise of its power over commerce, fix such a permanent standard working day for employees engaged in the operation of trains upon interstate railway carriers, and make such a temporary wage regulation, as is done by the Act of September 3, 5, 1916 (39 Stat. at L. 721, chap. 436), which establishes a permanent eight-hour standard for a day's work by such employees, creates a commission to observe during a period of not less than six nor more than nine months the operation and effect of such standard workday and to report its findings to the President and Congress within thirty days thereafter, and forbids the carriers, pending such report, and for a period of thirty days thereafter, to pay such employees for eight hours' work a wage less than the existing standard day's wage, with pro rata pay for all necessary overtime.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

CONSTITUTIONAL LAW — 238(2)—EQUAL PROTECTION OF THE LAWS—CLASSIFICATION—REGULATION OF INTERSTATE COMMERCE—EXEMPTION OF SHORT LINE AND ELECTRIC RAILWAYS.

2. The exemption of railways independently owned and operated, not exceeding 100 miles in length, electric street railways and electric interurban railways, from the operation of the provisions of the Act of September 3, 5, 1916 (39 Stat. at L. 721, chap. 436), fixing a permanent eight-hour standard working day for employees engaged in the operation of trains upon interstate railway carriers, and temporarily regulating the wages of such employees, does not invalidate the act as denying the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 689, 690, 706-708.]

CONSTITUTIONAL LAW — 238(2) — EQUAL PROTECTION OF THE LAWS—CLASSIFICATION—REGULATION OF INTERSTATE COMMERCE—RESTRICTION TO TRAIN-OPERATING EMPLOYÉS.

3. Singling out employees engaged in the movement of trains, as is done by the

Act of September 3, 5, 1916 (39 Stat. at L. 721, chap. 436), fixing a permanent eight-hour standard working day for such employees of interstate railway carriers, and temporarily regulating their wages, does not render the statute invalid as denying the equal protection of the laws, where such employees were those concerning whom alone a dispute as to wages existed, out of which arose the threat of the interruption of interstate commerce by a strike, to prevent which the statute was enacted.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 689, 690, 706-708.]

CONSTITUTIONAL LAW — 275(2)—DUE PROCESS OF LAW—ARBITRARY LEGISLATION—UNWORKABLE STATUTE — PRESCRIBING STANDARD WORKDAY FOR RAILWAY EMPLOYÉS—TEMPORARY WAGE REGULATION.

4. Interstate railway carriers are not denied the due process of law guaranteed by U. S. Const. 5th Amend., by the provisions of the Act of September 3, 5, 1916 (39 Stat. at L. 721, chap. 436), fixing a permanent eight-hour standard workday for employees engaged in the operation of trains upon such railways, creating a commission to observe during a period of not less than six nor more than nine months the operation and effect of such standard workday and to report its findings to the President and Congress within thirty days thereafter, and forbidding the carriers, pending such report, and for a period of thirty days thereafter, to pay such employees for eight hours' work a wage less than the existing standard day's wage, with pro rata pay for all necessary overtime.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 835, 844-846.]

[No. 797.]

Argued January 8, 9, and 10, 1917. Decided March 19, 1917.

APPEAL from the District Court of the United States for the Western District of Missouri to review a decree which enjoined the enforcement of a statute fixing an eight-hour workday for, and temporarily regulating the wages of, railway employees engaged in the operation of trains upon interstate railway carriers. Reversed and remanded, with directions to dismiss the bill.

The facts are stated in the opinion.

Solicitor General Davis, Messrs. Frank Hagerman, E. Marvin Underwood, and Attorney General Gregory for appellant.

Messrs. Walker D. Hines, John G. Johnson, and Arthur Miller for appellees.

*Mr. Chief Justice White delivered the opinion of the court:

Was there power in Congress, under the circumstances existing, to deal with the hours of work and wages of railroad employees engaged in interstate commerce, is the principal question here to be considered.

Its solution, as well as that of other questions which also arise, will be clarified by a brief statement of the conditions out of which the controversy arose.

Two systems controlled in March, 1916, concerning wages of railroad employees; one, an eight-hour standard of work and wages with additional pay for overtime, governing on about 15 per cent of the railroads; the other, a stated mileage task of 100 miles to be performed during ten hours, with extra pay for any excess, in force on about 85 per cent of the roads. The organizations representing the employees of the railroads in that month made a formal demand on the employers that, as to all engaged in the movement of trains, except passenger trains, the 100-mile task be fixed for eight hours, provided that it was not so done as to lower wages, and provided that an extra allowance for overtime, calculated by the minute at one and one-half times the rate of the regular* hours' service, be established. The demand made this standard obligatory on the railroads, but optional on the employees, as it left the right to the employees to retain their existing system on any particular road if they elected to do so. The terms of the demand were as follows, except the one which reserved the option, which is in the margin,¹ and others making article 1 applicable to yard and switching and hostling service.

"Article 1. (a) In all road service 100 miles or less, eight hours or less will constitute a day except in passenger service. Miles in excess of 100 will be paid for at the same rate per mile.

"(b) On runs of 100 miles or less overtime will begin at the expiration of eight hours.

"(c) On runs of over 100 miles overtime will begin when the time on duty exceeds the miles run divided by $1\frac{1}{2}$ miles per hour.

"(d) All overtime to be computed on the minute basis and paid for at time and one-half times the pro rata rate.

"(e) No one shall receive less for eight hours or 100 miles than they now receive for a minimum day or 100 miles for the class of engine used or for service performed.

"(f) Time will be computed continuously from time required for duty until release from duty and responsibility at end of day or run."

¹"Article 4. Any rates of pay, including excess mileage or arbitrary differentials that are higher, or any rules or conditions of employment contained in individual schedules in effect January 1, 1916, that are more favorable to the employees, shall not be modified or affected by any settlement reached in connection with these proposals. The general committee representing the employees on each railroad will determine

*The employers refused the demand, and the employees, through their organizations, by concert of action, took the steps to call a general strike of all railroad employees throughout the whole country.

The President of the United States invited a conference between the parties. He proposed arbitration. The employers agreed to it and the employees rejected it. The President then suggested the eight-hour standard of work and wages. The employers rejected this and the employees accepted it. Before the disagreement was resolved the representatives of the employees abruptly called a general strike throughout the whole country, fixed for an early day. The President, stating his efforts to relieve the situation, and pointing out that no resources at law were at his disposal for compulsory arbitration, to save the commercial disaster, the property injury and the personal suffering of all, not to say starvation, which would be brought to many among the vast body of the people if the strike was not prevented, asked Congress, first, that the eight-hour standard of work and wages be fixed by law, and second, that an official body be created to observe during a reasonable time the operation of the legislation, and that an explicit assurance be given that if the result of such observation established such an increased cost to the employers as justified an increased rate, the power would be given to the Interstate Commerce Commission to authorize it. Congress responded by enacting the statute whose validity, as we have said, we are called upon to consider. Act of September 3, 5, 1916, 39 Stat. at L. 721, chap. 436. The duty to do so arises from the fact that the employers, unwilling to accept the act, and challenging the constitutional power of Congress to enact it, began this typical suit against the officers of certain labor unions and the United States District Attorney to enjoin the enforcement of the statute. The law was made to take effect only on the 1st of January, 1917. To expedite the*final decision before that date, the representatives of the labor unions were dropped out, agreements essential to hasten were made, and it was stipulated that, pending the final disposition of the cause, the carriers would keep accounts of the wages which would have been earned if the statute was en-

which is preferable and advise the officers of their company. Nothing in the settlement that may be reached on the above submitted articles is to be construed to deprive the employees on any railroad from retaining their present rules and accepting any rates that may be agreed upon or retaining their present rates and accepting any rules that may be agreed upon."

forced so as to enable their payment if the law was finally upheld. Stating its desire to co-operate with the parties in their purpose to expedite the cause, the court below, briefly announcing that it was of opinion that Congress had no constitutional power to enact the statute, enjoined its enforcement, and, as the result of the direct appeal which followed, we come, after elaborate oral and printed arguments, to dispose of the controversy.

All the propositions relied upon and arguments advanced ultimately come to two questions: first, the entire want of constitutional power to deal with the subjects embraced by the statute, and second, such abuse of the power, if possessed, as rendered its exercise unconstitutional. We will consider these subjects under distinct propositions separately.

1. The entire want of constitutional power to deal with the subjects embraced by the statute.

To dispose of the contentions under this heading calls at once for a consideration of the statute, and we reproduce its title and text so far as is material.

An Act to Establish an Eight-hour Day for Employees of Carriers Engaged in Interstate and Foreign Commerce, and for Other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the Act of February fourth, eighteen hundred and eighty-seven, entitled "An Act to Regulate Commerce," as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, . . .

Sec. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common car-

riers and employees during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; . . .

Sec. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this act for a standard eight hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

Sec. 4. That any person violating any provision of this act shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$100 and not more than \$1,000, or imprisoned not to exceed one year, or both.

There must be knowledge of the power exerted before determining whether, as exercised, it was constitutional, and we must hence settle a dispute on that question before going further. Only an eight-hour standard for work*and wages was provided, is the contention on the one side, and, in substance, only a scale of wages was provided, is the argument on the other. We are of the opinion that both are right and in a sense both wrong in so far as it is assumed that the one excludes the other. The provision of § 1 that "eight hours shall . . . be deemed a day's work and the measure or standard of a day's work" leaves no doubt about the first proposition. As to the second, this is equally true because of the provision of § 3, forbidding any lowering of wages as a result of applying the eight-hour standard established by § 1 during the limited period prescribed in § 2. Both provisions are equally mandatory. If it be said that the second, the depriving of all power to change the wages during the fixed period, is but ancillary to the first command, the standard of eight hours, that would not make the prohibition as to any change of wages any the less a fixing of wages. It certainly would not change the question of power unless it could be assumed that the legislative power to fix one thing, the standard of hours, could be enforced by exerting the power to do another, fix the wages, although there was no legislative authority to exert the latter power. The doing of one thing which is authorized cannot be made the source of an authority to do another thing which there is no power to do. If to deprive employer and employee of the right to contract for wages

and to provide that a particular rate of wages shall be paid for a specified time is not a fixing of wages, it is difficult to see what would be.

However, there is this very broad difference between the two powers exerted. The first, the eight-hour standard, is permanently fixed. The second, the fixing of the wage standard resulting from the prohibition against paying lower wages, is expressly limited to the time specified in § 2. It is, therefore, not permanent but temporary, leaving the employers and employees free as to *the subject of wages to govern their relations by their own agreements after the specified time. Concretely stated, therefore, the question is this: Did Congress have power, under the circumstances stated, that is, in dealing with the dispute between the employers and employees as to wages, to provide a permanent eight-hour standard and to create by legislative action a standard of wages to be operative upon the employers and employees for such reasonable time as it deemed necessary to afford an opportunity for the meeting of the minds of employers and employees on the subject of wages? Or, in other words, did it have the power, in order to prevent the interruption of interstate commerce, to exert its will to supply the absence of a wage scale resulting from the disagreement as to wages between the employers and employees, and to make its will on that subject controlling for the limited period provided for?

Coming to the general considerations by which both subjects must be controlled, to simplify the analysis for the purpose of considering the question of inherent power, we put the question as to the eight-hour standard entirely out of view, on the ground that the authority to permanently establish it is so clearly sustained as to render the subject not disputable.²

That common carriers by rail in interstate commerce are within the legislative power of Congress to regulate commerce is not subject to dispute.³ It is equally certain that where a particular subject is within such authority, the extent of regulation depends on the nature and character of the subject and what is appropriate to its regulation.⁴ The powers possessed by government to deal with *a subject are neither inordinately enlarged or greatly dwarfed be-

cause the power to regulate interstate commerce applies. This is illustrated by the difference between the much greater power of regulation which may be exerted as to liquor and that which may be exercised as to flour, dry-goods, and other commodities. It is shown by the settled doctrine sustaining the right by regulation absolutely to prohibit lottery tickets, and by the obvious consideration that such right to prohibit could not be applied to pig iron, steel rails, or most of the vast body of commodities.

What was the extent of the power, therefore, of Congress to regulate, considering the scope of regulation which government had the right to exert with reference to interstate commerce carriers, when it came to exercise its legislative authority to regulate commerce, is the matter to be decided. That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business, and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and Federal, and is illustrated by such a continuous exertion of state and Federal legislative power, as to leave no room for question on the subject. It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed-on standard is not subject to be controlled or prevented by public authority. But, taking all these propositions as undoubted, if the situation which we have described and with which the act of Congress dealt be taken into view,—that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened,⁵ and the infinite injury to the public interest which was imminent,—it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation, which included the power to deal with the dispute, to provide by appropriate action for a standard of wages to fill the want of one caused by

² *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. C. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112, 58 L. ed. 144, 34 Sup. Ct. Rep. 26.

³ *United States ex rel. Atty. Gen. v. Delaware & H. Co.* 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

⁴ *McCulloch v. Maryland*, 4 Wheat. 316,

421-423, 4 L. ed. 579, 605; *Interstate Commerce Commission v. Brinson*, 154 U. S. 447, 472, 38 L. ed. 1047, 1055, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Clark Distilling Co. v. Western Maryland R. Co.* 242 U. S. 311, 61 L. ed. 326, 37 Sup. Ct. Rep. 180.

the failure to exert the private right on the subject, and to give effect by appropriate legislation to the regulations thus adopted. This must be unless it can be said that the right to so regulate as to save and protect the public interest did not apply to a case where the destruction of the public right was imminent as the result of a dispute between the parties and their consequent failure to establish by private agreement the standard of wages which was essential; in other words, that the existence of the public right and the public power to preserve it was wholly under the control of the private right to establish a standard by agreement. Nor is it an answer to this view to suggest that the situation was one of emergency, and that emergency cannot be made the source of power. *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281. The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce, may be by anticipation legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce, threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce.

But, passing this, let us come to briefly recapitulate some of the more important of the regulations which have been enacted in the past in order to show how necessarily the exertion of the power to enact them manifests the existence of the legislative authority to ordain the regulation now before us, and how completely the whole sys-

tem of regulations adopted in the past would be frustrated or rendered unavailing if the power to regulate under the conditions stated, which was exerted by the act before us, was not possessed. That regulation gives the authority to fix for interstate carriage a reasonable rate, subject to the limitation that rights of private property may not be destroyed by establishing them on a confiscatory basis, is settled by long practice and decisions.⁵ That the power to regulate also extends to many phases of the business of carriage, and embraces the right to control the contract power of the carrier in so far as the public interest requires such limitation, has also been manifested by repeated acts of legislation as to bills of lading, tariffs, and many other things too numerous to mention.⁶ Equally certain is it that the power has been exercised so as to deal not only with the carrier, but with its servants, and to regulate the relation of such servants not only with their employers, but between themselves.⁷ Illustrations of the latter are afforded by the Hours of Service Act, the Safety Appliance Act, and the Employers' Liability Act. Clear* also is it that an obligation* rests upon a carrier to carry on its business, and that conditions of cost or other obstacles afford no excuse and exempt from no responsibility which arises from a failure to do so, and also that government possesses the full regulatory power to compel performance of such duty.⁸

In the presence of this vast body of acknowledged powers there would seem to be no ground for disputing the power which was exercised in the act which is before us so as to prescribe by law for the absence of a standard of wages, caused by the failure to exercise the private right as a result of the dispute between the parties,

⁵ *Chicago, B. & Q. R. Co. v. Iowa* (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 161, 24 L. ed. 94, 95; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Interstate Commerce Commission v. Chicago, R. I. & P. R. Co.* 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651; *Minnesota Rate Cases* (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

⁶ *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 863,

L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593.

⁷ *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; *Employers' Liability Cases* (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; *Second Employer's Liability Cases* (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

⁸ *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 26, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 278, 54 L. ed. 472, 479, 30 Sup. Ct. Rep. 330.

—that is, to exert the legislative will for the purpose of settling the dispute, and bind both parties to the duty of acceptance and compliance, to the end that no individual dispute or difference might bring ruin to the vast interests concerned in the movement of interstate commerce, for the express purpose of protecting and preserving which the plenary legislative authority granted to Congress was reposed. This result is further demonstrated, as we have suggested, by considering how completely the purpose intended to be accomplished by the regulations which have been adopted in the past would be rendered unavailing or their enactment inexplicable if the power was not possessed to meet a situation like the one with which the statute dealt. What would be the value of the right to a reasonable rate if all movement in interstate commerce could be stopped as a result of a mere dispute between the parties or their failure to exert a primary private right concerning a matter of interstate commerce? Again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service if there was no power in government to prevent all service from being destroyed? Further yet, what benefits would flow to society by recognizing the right, because of the public interest, to regulate the relation of employer and employee and of the employees among themselves, and to give to the latter peculiar and special rights safeguarding their persons, protecting them in case of accident, and giving efficient remedies for that purpose, if there was no power to remedy a situation created by a dispute between employers and employees as to rate of wages, which, if not remedied, would leave the public helpless, the whole people ruined, and all the homes of the land submitted to a danger of the most serious character? And finally, to what derision would it not reduce the proposition that government had power to enforce the duty of operation if that power did not extend to doing that which was essential to prevent operation from being completely stopped by filling the interregnum created by an absence of a conventional standard of wages, because of a dispute on that subject between the employers and employees, by a legislative standard binding on employers and employees for such a time as might be deemed by the legislature reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties?

We are of opinion that the reasons stated conclusively establish that, from the point of view of inherent power, the act which is

before us was clearly within the legislative power of Congress to adopt, and that, in substance and effect, it amounted to an exertion of its authority under the circumstances disclosed to compulsorily arbitrate the dispute between the parties by establishing as to the subject matter of that dispute a legislative standard of wages operative and binding as a matter of law upon the parties,—a power none the less efficaciously exerted because exercised by direct legislative act instead of by the enactment of other and appropriate means providing for the bringing about of such result. If it be conceded that the power to enact the statute was in effect the exercise of the right to fix wages where, by reason of the dispute, there had been a failure to fix by agreement, it would simply serve to show the nature and character of the regulation essential to protect the public right and safeguard the movement of interstate commerce, not involving any denial of the authority to adopt it.

And this leaves only to be generally considered whether the right to exercise such a power under the conditions which existed was limited or restrained by the private rights of the carriers or their employees.

(a) As to the carrier.—As engaging in the business of interstate commerce carriage subjects the carrier to the lawful power of Congress to regulate irrespective of the source whence the carrier draws its existence, and as also, by engaging in a business charged with a public interest, all the vast property and every right of the carrier become subject to the authority to regulate possessed by Congress to the extent that regulation may be exerted, considering the subject regulated and what is appropriate and relevant thereto, it follows that the very absence of the scale of wages by agreement, and the impediment and destruction of interstate commerce which was threatened, called for the appropriate and relevant remedy,—the creation of a standard by operation of law, binding upon the carrier.

(b) As to the employee.—Here again it is obvious that what we have previously said is applicable and decisive, since whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them, and, by concert of action, to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress is applied, and the resulting right to fix, in case of disagreement and dispute, a standard

of wages, as we have seen, necessarily obtained.

In other words, considering comprehensively the situation of the employer and the employee in the light of the obligations arising from the public interest and of the work in which they are engaged, and the degree of regulation which may be lawfully exerted by Congress as to that business, it must follow that the exercise of the lawful governmental right is controlling. This results from the considerations which we have previously pointed out and which we repeat, since, conceding that, from the point of view of the private right and private interest, as contradistinguished from the public interest, the power exists between the parties, the employers and employees, to agree as to a standard of wages free from legislative interference, that right in no way affects the lawmaking power to protect the public right and create a standard of wages resulting from a dispute as to wages and a failure therefore to establish by consent a standard. The capacity to exercise the private right free from legislative interference affords no ground for saying that legislative power does not exist to protect the public interest from the injury resulting from a failure to exercise the private right. In saying this, of course, it is always to be borne in mind that, as to both carrier and employee, the beneficent and ever-present safeguards of the Constitution are applicable, and therefore both are protected against confiscation and against every act of arbitrary power which, if given effect to, would amount to a denial of due process, or would be repugnant to any other constitutional right. And this emphasizes that there is no question here of purely private right, since the law is concerned only with those who are engaged in a business charged with a public interest, where the subject dealt with as to all the parties is one involved in that business, and which we have seen comes under the control of the right to regulate to the extent that the power*to do so is appropriate or relevant to the business regulated.

Having thus adversely disposed of the contentions as to the inherent want of power, we come to consider all the other propositions which group themselves under a common heading; that is:

II. Such an abuse of the power, if possessed, as rendered its exercise unconstitutional.

We shall consider the various contentions which come under this heading under separate subdivisions.

(a) Equal protection of the laws and penalties.

The want of equality is based upon two considerations. The one is the exemption of certain short line and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions.⁹ The second rests upon the charge that unlawful inequality results because the statute deals not with all, but only with the wages of employees engaged in the movement of trains. But such employees were those concerning whom the dispute as to wages existed, growing out of which the threat of interruption of interstate commerce arose,—a consideration which establishes an adequate basis for the statutory classification.

As to the penalties, it suffices to say that in this case a recovery of penalties is not asked, and consequently the subject may well be postponed until it actually arises for decision.¹⁰

* (b) Want of due process resulting from the improvidence with which the statute was enacted and the impossibility in practice of giving effect to its provisions; in other words, as stated in the argument, its "unworkability."

The contention virtually is that, conceding the legislative power under the circumstances stated to fix a standard of wages, such authority necessarily contemplates consideration before action, and not a total and obvious disregard of every right of the employer and his property,—a want of consideration and a disregard which, it is urged, appear on the face of the statute, and which cause it therefore to amount to a decision without a hearing, and to a mere arbitrary bestowal of millions by way of wages upon employees, to the injury not only of the employer, but of the public, upon

⁹ *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 *Inters. Com. Rep.* 56, 8 *Sup. Ct. Rep.* 1028; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 55 L. ed. 290, 31 *Sup. Ct. Rep.* 275; *Omaha & C. B. Street R. Co. v. Interstate Commerce Commission*, 230 U. S. 324, 57 L. ed. 1501, 46 *L.R.A. (N.S.)* 385, 33 *Sup. Ct. Rep.* 890; *Chesapeake & O. R. Co. v. Conley*, 230 U. S. 513, 522-524, 57 L. ed. 1597, 1603, 1604, 33 *Sup. Ct. Rep.* 985; *St. Louis, I. M. & S. R. Co. v. Arkansas*, 240 U. S. 518, 60 L. ed. 776, 36 *Sup. Ct. Rep.* 443.

¹⁰ *United States ex rel. Atty. Gen. v. Delaware & H. Co.* 213 U. S. 366, 417, 53 L. ed. 836, 852, 29 *Sup. Ct. Rep.* 527; *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 443, 54 L. ed. 826, 831, 30 *Sup. Ct. Rep.* 535; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 120, 54 L. ed. 688, 692, 30 *Sup. Ct. Rep.* 496; *Western U. Teleg. Co. v. Richmond*, 224 U. S. 160, 172, 56 L. ed. 710, 717, 32 *Sup. Ct. Rep.* 449; *Chesapeake & O. R. Co. v. Conley*, 230 U. S. 513, 522, 57 L. ed. 1597, 1603, 33 *Sup. Ct. Rep.* 985.

whom the burden must necessarily fall. Upon the assumption that unconstitutionality would result if there be ground for the propositions,¹¹ let us test them. In the first place, as we have seen, there is no room for question that it was the dispute between the parties, their failure to agree as to wages, and the threatened disruption of interstate commerce, caused by that dispute, which was the subject which called for the exertion of the power to regulate commerce, and which was dealt with by the exertion of that power which followed. In the second place, all the contentions as to want of consideration sustaining the action taken are disposed of by the history we have given of the events out of which the controversy grew, the public nature of the dispute, the interposition of the President, the call by him upon Congress for action, in conjunction with the action taken,—all demonstrating not unwitting action or a failure to consider, whatever may be the room, if any, for a divergence of opinion as to the want of wisdom shown by the action taken.

But to bring the subject to a closer analysis, let us briefly recall the situation, the conditions dealt with, and the terms of the statute. What was the demand made by the employees? A permanent agreement as to wages by which the period should be shortened in which the fixed mileage task previously existing should be performed, and an allowance to be made of extra pay by the minute at one and one-half times the regular pay for any overtime required to perform the task if it was not done in the reduced time, with a condition that no reduction in wages should occur from putting the demands into effect, and also that, in that event, their operation should be binding upon the employers and optional on the employees. What was the real dispute? The employers insisted that this largely increased the pay, because the allotted task would not be performed in the new and shorter time, and a large increase for overtime would result. The employees, on the other hand, insisted that, as the task would be unchanged and would be performed in the shorter hours, there would be no material, or, at all events, no inordinate, increase of pay. What did the statute do in settling these differences? It permanently applied an eight-hour standard for work and wages which existed and had been in practice on about 15 per cent of the railroads. It did not fix the amount of the task to be done during those hours, thus leaving that to the will of the parties. It yielded in

part to the objections of the employers by permitting overtime only if "necessary," and it also absolutely rejected, in favor of the employers and against the employees, the demand for an increased rate of pay during overtime, if there was any, and confined it to the regular rate, and it moreover rejected the option in favor of the employees by making the law obligatory upon both parties. In addition, by the provision prohibiting a lower rate of wages under the new system than was previously paid, it fixed the wages for such period. But this was not a permanent fixing, but, in the nature of things, a temporary one which left the will*of the employers and employees* to control at the end of the period, if their dispute had then ceased.

Considering the extreme contentions relied upon in the light of this situation, we can discover no basis upon which they may rest. It certainly is not afforded because of the establishment of the eight-hour standard, since that standard was existing, as we have said, on about 15 per cent of the railroads, had already been established by act of Congress as a basis for work on government contracts, and had been upheld by this court in sustaining state legislation.¹² It certainly cannot be said that the act took away from the parties, employers and employees, their private right to contract on the subject of a scale of wages, since the power which the act exerted was only exercised because of the failure of the parties to agree, and the resulting necessity for the lawmaking will to supply the standard rendered necessary by such failure of the parties to exercise their private right. Further, in view of the provisions of the act narrowing and limiting the demands made, the statute certainly affords no ground for the proposition that it arbitrarily considered only one side of the dispute, to the absolute and total disregard of the rights of the other, since it is impossible to state the modifications which the statute made of the demands without, by the very words of the statement, manifesting that there was an exertion of legislative discretion and judgment in acting upon the dispute between the parties. How can this demonstration fail to result if it be stated that the scope of

¹¹ *McCray v. United States*, 195 U. S. 27, 63, 49 L. ed. 78, 98, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561.

37 S. C.—20.

¹² *United States v. Martin*, 94 U. S. 400, 24 L. ed. 128; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Ellis v. United States*, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589; *United States v. Garbush*, 222 U. S. 257, 56 L. ed. 190, 32 Sup. Ct. Rep. 77; *Miller v. Wilson*, 236 U. S. 373, 59 L. ed. 628, L.R.A. 1915F, 829, 35 Sup. Ct. Rep. 342; *Bosley v. McLaughlin*, 236 U. S. 385, 59 L. ed. 632, 35 Sup. Ct. Rep. 345.

the task to be performed in the eight-hour period was not expressed, but was left, therefore, to adjustment between the parties; that overtime was only permitted if "necessary;" and that extra pay for overtime was rejected and regular rate of pay substituted?

Conceding that there would necessarily result from the enforcement of the statute an increase of pay during the period for which the statute forbade a reduction, such concession would not bring the statute within the grounds stated. The right to meet the situation caused by the dispute and to fix a standard which should be binding upon both parties included, of course, the legislative authority to take into consideration the elements of difference, and, in giving heed to them all, to express such legislative judgment as was deemed best under the circumstances.

From this it also follows that there is no foundation for the proposition that arbitrary action in total disregard of the private rights concerned was taken, because the right to change or lower the wages was left to be provided for by agreement between the parties after a reasonable period which the statute fixed. This must be unless it can be said that to afford an opportunity for the exertion of the private right of agreement as to the standard of wages was in conflict with such right.

When it is considered that no contention is made that, in any view, the enforcement of the act would result in confiscation, the misconception upon which all the propositions proceed becomes apparent. Indeed, in seeking to test the arguments by which the propositions are sought to be supported we are of opinion that it is evident that in substance they assert not that no legislative judgment was exercised, but that, in enacting the statute, there was an unwise exertion of legislative power, begotten either from some misconception or some mistaken economic view, or partiality for the rights of one disputant over the other, or some unstated motive which should not have been permitted to influence action. But to state such considerations is to state also the entire want of judicial power to consider them,—a view which therefore has excluded them absolutely from our mind, and which impels us as a duty to say that we have not in the slightest degree passed upon them. While it is a truism to say that the duty to enforce the Constitution is paramount and abiding, it is also true that the very highest of judicial duties is to give effect to the legislative will, and in doing so to scrupulously abstain from permitting subjects which are exclusively within the field of legislative discretion to in-

fluence our opinion or to control judgment.

Finally, we say that the contention that the act was void and could not be made operative because of the unworkability of its provisions is without merit, since we see no reason to doubt that if the standard fixed by the act were made applicable and a candid effort followed to carry it out, the result would be without difficulty accomplished. It is true that it might follow that in some cases, because of particular terms of employment or exceptional surroundings, some change might be necessary, but these exceptions afford no ground for holding the act void because its provisions are not susceptible in practice of being carried out.

Being of the opinion that Congress had the power to adopt the act in question, whether it be viewed as a direct fixing of wages to meet the absence of a standard on that subject, resulting from the dispute between the parties, or as the exertion by Congress of the power which it undoubtedly possessed to provide by appropriate legislation for compulsory arbitration,—a power which inevitably resulted from its authority to protect interstate commerce in dealing with a situation like that which was before it,—we conclude that the court below erred in holding the statute was not within the power of Congress to enact, and in restraining its enforcement, and its decree, therefore, must be and it is reversed and the cause remanded, with directions to dismiss the bill.

And it is so ordered.

* Mr. Justice McKenna, concurring:

It is the contention of the government that the act is an hours-of-service law, the intent of Congress being by its enactment "to proclaim a substantial eight-hour day." The opposing contention is that "the language of the act shows that it deals solely with the construction of contracts and with the standard and amount of compensation, and not with any limitation upon the hours of labor."

Upon these opposing contentions the parties respectively assert and deny the power of Congress to enact the law. The government, however, further contends that, even viewing the law as a wage law, Congress, under the commerce clause, had power to pass it.

My purpose is to deal with the meaning of the act. With the consideration of the power to pass it, I am satisfied with the opinion.

The title of the act (and to the title of an act we may resort to resolve ambiguity or to confirm its words) expresses its purpose to be "to establish an eight-hour day for employees of carriers engaged in inter-

state and foreign commerce, and for other purposes."

The description of the title was repeated in the House of Representatives by the chairman of the committee who reported the bill and from whom it has received its designation. Among other things, he said: "The law fixes an eight-hour day. We had previously a sixteen-hour day and a nine-hour day. We now have an eight-hour day. The only reference to wages is in the language used to hold in statu quo until the workings of the eight-hour law could be observed and all other features of the service adjusted to the eight-hour law." Explanations of like import were made in the Senate.

The words of the act, I think, support this characterization, and, it may be assumed, were accepted by Congress as expressing and securing it; and I think they do so with fair directness. Whatever involution there may be in them was caused by the situation to which they were addressed, derangement of which was sought to be avoided; the situation indeed made use of "features of the service adjusted" to the law.

The provision of § 1 is: "That, beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except . . ."

Nothing is fixed but the time of service,—the hours which shall be deemed a day's work,—the number to be eight. All else—compensation and conditions—is left to contract; only, whatever the compensation, it shall be for a service of eight hours reckoned (computed) or measured by such time as its determining factor. Except as so determined the compensation may be whatever the carriers and employees may agree upon. Their power of convention has no other limitation.

The distinction between what is left to the parties and what is fixed by the law is real. There is certainly a difference between the prescription of the time of service and the prescription of compensation for the service, and the difference is observed in the speech and conduct of men; it is observed in the regulations of legislation. It has never been supposed that the agitation for an eight-hour day for labor, or the legislation which has responded to it, was intended to fix or did fix the rate of wages to be paid.

Of course, in a sense, the two things are related. The time of service and the price

of service may be said to be the reciprocals of each other,—each the price of the other. There can be no real estimate of the wages one receives until it is understood what time one has worked to receive*them. They rise and fall with the increase or decrease of the time of service. One who works ten hours a day for \$5 may be said to get less than one who works eight hours for the same sum. The labor of the latter is of greater value to him than the labor of the ten-hour man is to him. And, correspondingly, the expense to the employer is greater in the one case than in the other, though the wages he pays, expressed in terms of money, are the same. It may be contended that there is no element, therefore, in the regulation of the price of labor that there is not in the regulation of the hours of labor. But, as I have said, in the practice of men and in the examples of legislation, regulation of one is not regarded as the regulation of the other. In certain hazardous employments the hours of labor have been prescribed. It has not been supposed, certainly not declared, that the power as exerted was the regulation of wages. The interest of the state has been assumed to terminate with the hours of service, and its compensation, therefore, has been left to the agreement of the parties.

As examples of legislation I may adduce *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, where a state law was sustained, and *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621, where a law of Congress was sustained. Both laws limited the hours of service, but neither the rate of wages. There may be also cited *Ellis v. United States*, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589; *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; *Bosley v. McLaughlin*, 236 U. S. 385, 59 L. ed. 632, 35 Sup. Ct. Rep. 345; *Miller v. Wilson*, 236 U. S. 373, 59 L. ed. 628, L.R.A.1915F, 829, 35 Sup. Ct. Rep. 342.

It may be contended that the power that can limit the hours of service can fix the wages for the service. To this I shall presently refer. My immediate purpose is the interpretation of the law under review, and I have only to point out that it is the sense of the practical world that prescribing the hours of labor is not prescribing the wages of labor, and Congress has kept the purposes distinct.

* I do not think that other provisions of the act militate against these views. Section 2 provides for the appointment of a commission to observe the operation of the law, and this for the reason I have expressed of

the dependence of the cost of the services upon the time they are rendered. The shorter hours may or may not involve an increase of expense to the roads, and may or may not require recompense by an increase of their rates.

Pending the report of the commission, and for thirty days thereafter, it is provided (§ 3) that compensation shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

In a sense, this may be considered as a prescription of wages. To those roads (85 per cent) that have a ten-hour standard the provision, so far as applicable, may be said to be a change of compensation. To those (15 per cent) having an eight-hour standard it is not a change. The effort of the law is to secure an eight-hour day service and the "penalty of payment for overtime service," to quote the government's brief, "is imposed in order to enforce obedience to the eight-hour provision, as far as practicable."

But even if § 3 be given a broader effect, it would not give character to the whole act and make it the exertion of power to establish permanently a rate of wages. To so consider it would, I think, be contrary to the intention of Congress, and convert the expediency for a particular occasion and condition into the rule for all occasions and conditions.

So far as the fate of the pending appeal is concerned, it is not of much importance whether the act be held to be an hours-of-service law or a wage-regulating law; but one may be regarded as having consequences that the other has not. To a carrier a wage law is but an item in its accounts, and requiring, it may be, an adjustment of its operations, the expense to be recompensed through its rates. If it be said that rates cannot be changed at will, but only by permission of authority, I cannot think that permission will not be given if it be necessary to fulfil the command of the law. Indeed, if not given, the law might encounter constitutional restriction.

To an employee a wage law may be of more vital consequence,—be of the very essence of his life,—involving factors, many and various, which he alone can know and estimate, and which, besides, might not have an enduring constancy and be submissive to a precedent judgment. There well might be hesitation to displace him and substitute the determination of the law for his action.

I speak only of intention; of the power I have no doubt. When one enters into interstate commerce, one enters into a service

in which the public has an interest, and subjects one's self to its behests. And this is no limitation of liberty; it is the consequence of liberty exercised, the obligation of his undertaking, and constrains no more than any contract constrains. The obligation of a contract is the law under which it is made, and submission to regulation is the condition which attaches to one who enters into or accepts employment in a business in which the public has an interest.

I concur in the answer of the opinion to the contentions of inequality of the law and the deprivation to the carriers of due process.

Mr. Justice Day, dissenting:

I am unable to agree with the opinion and judgment just pronounced. The very serious constitutional questions involved seem to warrant a statement of the reasons which constrain me to this action.

I am not prepared to deny to Congress, in view of its constitutional authority to regulate commerce among the states, the right to fix by lawful enactment the wages to be paid to those engaged in such commerce in the operation of trains carrying passengers and freight. While the railroads of the country are privately owned, they are engaged in a public service, and because of that fact are subject in a large measure to governmental control.

The regulatory power of Congress under the commerce clause of the Constitution is of a broad nature, but is subject to the applicable limitations of the Constitution.

I agree that upon the reasoning which sustained the power of Congress to regulate the hours of service of employees, and the degree of care which employers must observe to protect the safety of those engaged in the service, and in view of the enactments which are held to be lawful regulations of interstate transportation, Congress has the power to fix the amount of compensation necessary to secure a proper service and to insure reasonable rates to the public upon the part of the railroads engaged in such traffic. While this much must necessarily follow from the constitutional authority of Congress, in the light of the interpretation given to the commerce clause in decisions of this court, it is equally true that this regulatory power is subject to any applicable constitutional limitations. This power cannot, any more than others conferred by the Constitution, be the subject of lawful exercise when such exertion of authority violates fundamental rights secured by the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622;

United States v. Joint Traffic Asso. 171 U. S. 505, 571, 43 L. ed. 259, 288, 19 Sup. Ct. Rep. 25; Lottery Case (Champion v. Ames) 188 U. S. 321, 353, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

The power to legislate, as well as other powers conferred by the Constitution upon the co-ordinate branches of the government, is limited by the provisions of the 5th Amendment of the Constitution preventing deprivation of life, liberty, or property without due process of law.

*366 The phrase "due process of law" has been the subject of much discussion, and while its precise definition has not been attempted, and its limitations have been left to the gradual process of inclusion and exclusion, the binding force of its requirements is always conceded, and has been frequently enforced in cases as they have arisen. If the Constitution is not to become a dead letter the protection of the due process clause must be given to all entitled to this safeguard of rights which the Amendment intended to secure. The due process clause restrains alike every branch of the government, and is binding upon all who exercise Federal power, whether of an executive, legislative, or judicial character. It withholds from the executive the exercise of arbitrary authority, it prevents the judiciary from condemning one in his person or property without orderly methods of procedure adapted to the situation, and opportunity to be heard before judgment. We are now immediately concerned with its effect upon the exercise of legislative authority.

While every case must depend upon its peculiar circumstances, certain general principles are well settled; perhaps they have not been better stated than in the words of Mr. Justice Matthews, speaking for this court in *Hurtado v. California*, 110 U. S. 516, 531, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292, wherein he said: "The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, ex post facto laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation, which occur so frequently in English history, were never regarded as inconsistent with the law of the land. . . . The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons. In this country written constitutions were deemed essential to protect the rights and

liberties of the people against the encroachment of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial. . . . Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation." See *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. ed. 559; 2 Story, Const. 4th ed. § 1944; *Cooley*, Const. 241 et seq.; *McGehee*, Due Process of Law, pp. 22 et seq., and the illuminating discussion of the subject by Mr. Justice Moody in *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14.

It results from the principles which have been enforced in this court, and recognized by writers of authority, that due process of law, when applied to the legislative branch of the government, will not permit Congress to make anything due process of law which it sees fit to declare such by the mere enactment of the statute; if this were true, life, liberty, or property might be taken by the terms of the legislative act, depending for its authority upon the will or caprice of the legislature, and constitutional provisions would thus become a mere nullity. See the frequently quoted argument of Mr. Webster in the *Dartmouth College Case*, 4 Wheat. 518, 4 L. ed. 629; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *McGehee*, Due Process of Law, p. 30.

The underlying principle of the decisions which have constrained this court in rare instances to exercise its constitutional right to declare congressional enactments void is the protection intended to be afforded against legislation of an arbitrary character.

While it is true, as stated in the majority opinion, that it is the duty of courts to enforce lawful legislative enactments of Congress, it is equally their duty and sworn obligation when differences between acts of the legislature and the guaranties of the Federal Constitution arise, to govern their decisions by the provisions of that instrument which represents the will of all the people, and under the authority of which every branch of the government is enabled to discharge the duty imposed upon it.

The act in question must be brought to the test of these fundamental principles, and, if found to be violative of the Federal Constitution, it must be declared void.

Grave and important as the duty is, it cannot be avoided consistently with the obligations imposed by the Constitution upon every branch of the judiciary, Federal and state, and particularly upon this court, to which, under our system, is intrusted the ultimate decision of questions of this nature.

Applying these principles, in my opinion this act cannot successfully withstand the attack that is made upon it as an arbitrary and unlawful exertion of supposed legislative power. It is not an act limiting the hours of service. Nor is it, in my judgment, a legitimate enactment fixing the wages of employees engaged in such service. In one of its most important aspects, and in view of the mandatory provisions of § 3 of the act, it is one the effect of which is to increase the wages of certain employees in interstate commerce by the requirement that, pending investigation, the wages which have theretofore been paid for ten hours' service shall be given for eight hours' service of the same character. The increase of wages is to be in force only during the period of observation provided in the act. Before the passage of this enactment the wages of the character involved herein had been fixed by agreement, or determined by arbitration between the parties concerned. By this enactment the wage theretofore paid for a ten-hours service is required to be paid for an eight-hours service pending the investigation provided for in other parts of the law. In other words, Congress, upon the face* of the enactment, expresses its inability to fix, in advance of investigation, a just and proper wage for the employees concerned. It inevitably follows that the cost of the experiment, measured by the increase in wages, amounting, it is stated, to many millions of dollars, and certain to cost a very large sum, must be paid, not by the public, nor be equally borne by the contracting parties, but, by legislative edict, is made to fall entirely upon one of the parties, with no provision for compensation should the subsequent investigation establish the injustice or impropriety of the temporary increase.

An examination of the history of the legislation, and public documents submitted for our consideration, amply support this conclusion. In submitting the matter to Congress, the President recommended: "Explicit approval by the Congress of the consideration by the Interstate Commerce Commission of an increase of freight rates to meet such additional expenditures by the railroads as may have been rendered necessary by the adoption of the eight-hour day, and which have not been offset by adminis-

trative readjustments and economies, should the facts disclosed justify the increase."

This recommendation was not followed in the enactment of the statute. The Senate Committee having the subject under consideration expressed a desire for investigation and consideration before enacting a law of this character. Such was not had, and the law in its present form was speedily passed.

In fixing wages, conceding the power of Congress for this purpose, that body acts having in mind the rights of the public, of the owners of railroads, and of the employees engaged in their service. Inherently, such legislation requires that investigation and deliberation shall precede action. In fixing rates Congress has itself recognized this principle and has delegated its power to a Commission which acts only upon full investigation and an opportunity to be heard, wherein the interest of the public, the carrier, and the shipper may be given ample consideration.

Conceding that every presumption exists in favor of the legitimate exercise of legislative power, and that there is no authority in the courts to inquire into the motives which may have influenced legislators, and that every such enactment presupposes the possession of proper motives and sufficient information and knowledge to warrant the action taken, nevertheless Congress has in this act itself declared the lack of the requisite information for definite action, and has directed an experiment to determine what it should do, imposing in the meantime an increase of wages peremptorily declared, the expense of which is to be borne entirely by the carrier, without recompense if the investigation proves the injustice or impropriety of the increase.

Such legislation, it seems to me, amounts to the taking of the property of one and giving it to another, in violation of the spirit of fair play and equal right which the Constitution intended to secure in the due process clause to all coming within its protection, and is a striking illustration of that method which has always been deemed to be the plainest illustration of arbitrary action,—the taking of the property of A and giving it to B by legislative fiat. *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. ed. 616, 619.

It may be taken to be true, as stated in the majority opinion, that, but for this legislation, a strike of employees engaged in interstate commerce would have been precipitated, disastrous in its consequences to the commerce of the country.

If I am right in the conclusion that this legislation amounted to a deprivation of property without due process of law, no

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emergency and no consequence, whatever their character, could justify the violation of constitutional rights. The argument of justification by emergency was made and answered in this court in *Ex parte Milligan*,*4 Wall. 2, 18 L. ed. 281, decided more than fifty years ago, in which it was held that not even the perils of war could impair the right of a resident of a loyal state, not connected with the military service, and where the courts were open, and in the proper exercise of their jurisdiction, to be tried, convicted, or sentenced only by the ordinary courts of law, with trial by jury and with the safeguards intended to secure a fair trial in the courts of law. Speaking of the purposes which controlled in the adoption of the Federal Constitution, and animated those who framed that instrument, this court said, page 120: "Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

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This principle is equally applicable to-day. Constitutional protection is more essential in times of unrest and agitation than it can be in the security of less turbulent periods. The Constitution intended to protect the citizen*against encroachments upon his rights impelled by existing emergencies, or supposed necessity of prompt and vigorous action. Constitutional rights, if they are to be available in time of greatest need, cannot give way to an emergency, however immediate, or justify the sacrifice of private rights secured by the Constitution.

I agree that a situation, such as was presented to Congress at this time, properly called for the exertion of its proper author-

ity to avert impending calamity. I cannot agree that constitutional rights may be sacrificed because of public necessity, nor taken away because of emergencies which might result in disaster or inconvenience to public or private interests. If this be not so, the constitutional limitations for the protection of life, liberty, and property are of little value, and may be taken away whenever it is supposed that the public interest will be promoted by the sacrifice of rights which the framers of the Constitution intended should be forever protected from governmental invasion by any branch of the government.

There are certain matters in the opinion of the majority which I am unable to approve by silent acquiescence. I am not prepared to admit that Congress may, when deemed necessary for the public interest, coerce employees, against their will, to continue in service in interstate commerce. Nor do I think it necessary to decide, as declared in the majority opinion, that in matters of this kind Congress can enact a compulsory arbitration law. These questions are not involved in this case, and their decision need not be anticipated until they actually arise.

The reasons which I have outlined impel me to the conclusion that the enactment under consideration necessarily deprives the complaining railroad companies of rights secured to them, as well as to others, by one of the most essential of the protections guaranteed by the Federal Constitution. In this view I am constrained to dissent from the opinion and judgment in this case.

* Mr. Justice Pitney, dissenting:

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I am constrained to dissent from the decision just announced and from the reasoning upon which it is based. I am convinced that the statute under consideration (Act of September 3, 5, 1916, chap. 436, 39 Stat. at L. 721) is not within the constitutional power of Congress. The infirmity that I find in it is so fundamental that, for the sake of brevity, I lay aside all minor grounds upon which it is attacked, and hence may begin by setting forth the title and essential provisions of the act, so as to render plain its true effect and operation, omitting portions not necessary to a consideration of the main questions. I quote as follows:

An Act to Establish an Eight-hour Day for Employees of Carriers Engaged in Interstate and Foreign Commerce, and for Other Purposes.

Be it enacted . . . That beginning January first, nineteen hundred and seven-

teen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, . . . which is subject to the provisions of the Act of February fourth, eighteen hundred and eighty-seven, entitled "An Act to Regulate Commerce" [24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563], as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, . . . from any state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, etc.

Sec. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; . . .

Sec. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

Sec. 4. That any person violating any provision of this act shall be guilty of a misdemeanor, etc.

It is, I think, too plain for argument that the act departs from its title, in that it does not establish eight hours as the limit of a day's work. There is no prohibition of service in excess of eight hours per day, nor any penalty for overtime work, for this is to be paid for only pro rata. There is no language evincing an intent to repeal or modify the Sixteen Hour Act of March 4, 1907, chap. 2939, 34 Stat. at L. 1415, Comp. Stat. 1913, § 8677. It is a matter of common knowledge that railroad train service must be arranged according to the distances between terminals or "division points," and a change from a sixteen-hour limit to an eight-hour limit would be so revolutionary that a purpose to make such a change is not to be lightly inferred. This act affords no

basis for such an inference. What it prescribes is that "eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services." It defines the terms of contracts for service and prescribes a measure only for the purpose of reckoning compensation. This is the whole effect of the 1st section. To shorten the discussion, I will concede, arguendo, that this section of itself is not in conflict with the Constitution. This being assumed, the 2d section evidently is unexceptionable.

Serious difficulty appears, however, when we come to consider the operation and effect of the 3d section in connection with the 1st and 2d. It provides that, pending the report of the commission, and for thirty days thereafter, "the compensation of railway employees subject to this act for a standard eight-hour workday shall not be reduced below the present standard day's wage," etc. This, of course, is to be practically enforced by means of prosecutions under § 4. The "present standard day's wage" in effect upon the railroad represented by appellees in this case and upon most of the other railroads of the country is a term not easily defined. Accepting the paraphrase employed in the brief for the United States, the standard may be expressed as follows: "One hundred miles or less, ten hours or less, shall constitute a day." The effect of § 3 is that during a period of from seven to eleven months the carriers shall pay as much for eight hours' work as previously was paid for ten hours' work; the excess over eight hours to be paid pro rata on the eight-hour basis. The effect is to increase wages in a large but undefined amount upon the railroad represented in this suit, and in the amount of many millions of dollars, considering all the railroads that are affected.

The legislation is attempted to be sustained solely as an exercise of the power of Congress to regulate interstate and foreign commerce. Evidently it can find no other support, for Congress has no authority over the Missouri, Oklahoma, & Gulf Railway Company, whose receivers are appellees here, or over the other companies affected by this law, except by reason of its power to regulate commerce; and it possesses this authority only because those corporations voluntarily have chosen to engage in commerce among the states. A contention that Congress has power to compel the railroads and their employees to continue to carry on such commerce at all costs will be dealt with hereafter.

If, therefore, the act be not, in a real and substantial sense, a regulation of com-

merce, it is in excess of the constitutional power of Congress. "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated." *Adair v. United States*, 208 U. S. 161, 178, 52 L. ed. 436, 444, 28 Sup. Ct. Rep. 277, 12 Ann. Cas. 764. And, though it be a regulation of commerce, it is void if it conflicts with the provisions of the 5th Amendment, that no person shall be "deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; *United States v. Lynah*, 183 U. S. 445, 471, 47 L. ed. 539, 549, 23 Sup. Ct. Rep. 349; *Adair v. United States*, 208 U. S. 161, 180, 52 L. ed. 436, 445, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *United States v. Cress*, decided March 12, 1917 [243 U. S. 316, 61 L. ed. 746, 37 Sup. Ct. Rep. 380].

I am convinced, in the first place, that the act cannot be sustained as a regulation of commerce, because it has no such object, operation, or effect. It removes no impediment or obstruction from the way of traffic or intercourse, prescribes no service to the public, lays down no rule respecting the mode in which service is to be performed, or the safeguards to be placed about it, or the qualifications or conduct of those who are to perform it. In short, it has no substantial relation to or connection with commerce,—no closer relation than has the price which the carrier pays for its engines and cars or for the coal used in propelling them.

The suggestion that it was passed to prevent a threatened strike, and in this sense to remove an obstruction from the path of commerce, while true in fact, is immaterial in law. It amounts to no more than saying * that it was enacted to take care of an emergency. But an emergency can neither create a power nor excuse a defiance of the limitations upon the powers of the government. *Ex parte Milligan*, 4 Wall. 2, 121, 18 L. ed. 281, 295.

The simple effect of § 3 is to increase, during the period of its operation, the rate of wages of railroad trainmen employed in interstate commerce. It comes to this,—that whereas the owners of the railroads have devoted their property to the movement of interstate as well as intrastate commerce, and whereas the trainmen have accepted employment in such commerce, and thus employers and employees are engaged together in a quasi public service, the act steps in and prescribes how the money earned in the

public service shall be divided between the owners of the railroads and these particular employees. This, in my view, is a regulation not of commerce, but of the internal affairs of the commerce carriers,—precisely as if an act were to provide that the rate of interest payable to the bondholders must be increased and the dividend payments to the stockholders correspondingly decreased,—and is not only without support in the commerce clause of the Constitution, but, as I shall endeavor to show, transgresses the limitations of the 5th Amendment.

The oft-quoted declaration of Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70, that the power to regulate commerce among the states, like all others vested in Congress, "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution," means that the exercise of the power is not dependent on, and is not to be hampered by, the action of the states, and is unrestrained by any qualification other than such as are contained in the fundamental law. To say that the power "acknowledges no limitations" is not to say that it is limitless in extent, for it is confined by the very definition of the subject matter. The power is vast, but is not vague, and*error inevitably must result from treating it as nebulous.

The act stands wholly without precedent in either state or national legislation. Let it be admitted that mere novelty is not a ground of constitutional objection, since it is the appropriate function of a legislature to change the law. This act, however, differs not only in degree, but in kind, from any and all that have preceded it. It is now nearly thirty years since Congress entered the field of direct regulation of interstate railway carriers. Before that the entire field was open to the states, and since the year 1887 the regulation of their internal commerce has still remained open to them. This has been a period of intense and widespread activity and progress in commerce regulation, and, as it happens, of equal progress respecting legislation in the interest of workingmen. The fact that no law fixing the rate of compensation for railroad employees ever was proposed until this act was brought forward a very few days before its passage, and then only under the coercive influence of a threatened public calamity, is the strongest evidence that, in the judgment of executives and legislators, state and national, measures of this sort were not within the bounds of permissible regulation of commerce.

As already stated, the act has not the effect of imposing any limit to the number of hours that a trainman may work in a

day, nor any penalty for overtime work. Therefore, it cannot be sustained upon the ground on which the court sustained the Act of March 4, 1907 (34 Stat. at L. 1415, chap. 2939, Comp. Stat. 1913, § 8677), limiting the hours of service of employees engaged in interstate commerce,—a ground epitomized in *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 619, 55 L. ed. 878, 883, 31 Sup. Ct. Rep. 621, as follows: "The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. . . . In its power suitably to provide for the safety of employees* and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train despatchers, telegraphers, and other persons embraced within the class defined by the act."

The Safety Appliance Acts are as evidently distinguishable, they likewise being designed to secure the safety of employees and travelers, as this court repeatedly has held. *Johnson v. Southern P. Co.* 196 U. S. 1, 17, 49 L. ed. 363, 369, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; *Southern R. Co. v. United States*, 222 U. S. 20, 26, 56 L. ed. 72, 74, 32 Sup. Ct. Rep. 2, 3, N. C. C. A. 822; *Texas & P. R. Co. v. Riggsby*, 241 U. S. 33, 41, 60 L. ed. 874, 878, 36 Sup. Ct. Rep. 482.

Nor does the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), furnish a precedent for the present legislation. The constitutionality of that act was sustained in *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, upon grounds very clearly set forth in the opinion, thus (p. 48): "Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged;" and again (pp. 50, 51): "The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates

and defines; and, as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution."

Progressive as has been the legislation of Congress and*the states enacted during the past thirty years for the regulation of common carriers, I have found none at all analogous to that now under consideration. Besides the acts already referred to, laws have been passed respecting tariffs, bills of lading, through routes, joint rates, the exchange of traffic, terminal charges, locomotive headlights, and a multitude of other matters; but each and all of these have some direct and substantial relation to commerce itself.

The suggestion that an increase in the wages of trainmen will increase their contentment, encourage prompt and efficient service, and thus facilitate the movement of commerce, is altogether fanciful. The increase effected is not at all conditioned upon contented or efficient service. It benefits alike those who are efficient and those who are not. It does not equalize wages, but applies proportionately in all cases; making the least increase upon railroads whose rates of pay are the lowest, the greatest where wages are the highest. As a measure for improving the quality of railroad locomotives, a law requiring the companies to pay 25 per cent more than before for each locomotive, without stipulating for any improvement in the quality, would be absurdly ineffective. Equally futile, as a measure for improvement of the quality of railway supplies, would be a provision of law compelling the roads to pay 25 per cent more than formerly for rails, cross-ties, fuel, and the like, irrespective of the question of quality. In each of these instances the natural effect of the regulation as an aid to commerce would be precisely the same as that of the act under consideration—that is, nil.

The attempt is made to sustain the act as analogous to the exercise of the power to fix rates of freight and fare for the carriage of commodities and passengers, or as a branch of that power. This, in my judgment, is a false analogy. The origin and basis of the governmental power to regulate rates are in the right of the public to demand*and secure the services of the common carrier on reasonable and equal terms, and without haggling as to rates or other terms. Every member of the public is entitled to be served, and rates are established by public authority in order to protect the public against oppression and discrimination. But

there is no common or other right on the part of the trainmen to demand employment from the carriers, nor any right on the part of the carriers to compel the trainmen to serve them. The employment is a matter of private bargaining between the parties, in which each has a constitutional right to exact such terms as he may deem proper. *Adair v. United States*, 208 U. S. 161, 172, 173, 52 L. ed. 436, 441, 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Coppage v. Kansas*, 236 U. S. 1, 20, 59 L. ed. 441, 448, L.R.A.1915A, 960, 35 Sup. Ct. Rep. 240. Thus the sole foundation of the governmental power to fix rates is absent in the case of wages, and the asserted power to fix the latter is inconsistent with the constitutional rights of employer and employee to agree between themselves respecting the terms of the employment.

But, further, the interest of the public in the regulation of rates lies in limiting the carrier to a reasonable compensation for his services. Incidentally, such a regulation may exert an indirect influence upon wages, as upon other expenditures of the carrier. Thus, the Interstate Commerce Commission has held that undue cost of operation or management cannot stand as a justification for unreasonably high rates. *Milk Producers' Protective Assn. v. Delaware, L. & W. R. Co.* 7 Inters. Com. Rep. 92, 164; *Society of American Florists v. United States Exp. Co.* 12 Inters. Com. Rep. 120, 127. But whatever concern the public authorities, as regulators of commerce, have in the cost of operation or management (including the rates of wages), is in the direction of lowering—not increasing—expenses. The present act has for its purpose and necessary effect the raising of wages; and, whatever may be its justification from the humanitarian standpoint, it cannot seriously be regarded as a regulation of commerce because incidental to a regulation of rates. It is, indeed, the very antithesis of such a regulation. If it reduced wages, it would be much more easily supportable on this theory.

The primary and fundamental constitutional defect that I find in the act now under consideration is precisely this: that it undertakes to regulate the relations of common carriers by railroad to their employees in respect to a particular matter—an increase of wages—that has no real and substantial connection with the interstate commerce in which the carriers and their employees are engaged. Certainly the amount of wages that shall be paid to a trainman has no more substantial relation to commerce than the matter which was under consideration in *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28

Sup. Ct. Rep. 277, 13 Ann. Cas. 764, that is, the right of an employee to retain his employment notwithstanding his membership in a labor organization. In that case this court, by Mr. Justice Harlan, used the following language (p. 178): "But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services."

It proves nothing to say that the increase of pay was or is necessary, in the judgment of Congress, to prevent all railroad service in interstate commerce from being suspended. As a law to prevent a strike, the act is quite intelligible; but, as we have seen, the emergency conferred no power upon Congress to impose the burden upon the carriers. If the public exigency required it, Congress perhaps might have appropriated public moneys to satisfy the demands of the trainmen. But there is no argument for requiring the carriers to pay the cost that would not equally apply to renewed demands, as often as made, if made by men who had the power to tie up traffic. I cannot believe that this is regulation of commerce, within the meaning of the Constitution.

But, secondly, as already remarked, and as shown in the above quotation from 223 U. S. p. 49, the power of Congress to regulate commerce among the states is "subject always to the limitations prescribed in the Constitution," and, among others, to the inhibition of the 5th Amendment against the deprivation of liberty or property without due process of law and the taking of private property for public use without just compensation. This has been held so often that it hardly is necessary to cite cases. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; *United States v. Lynah*, 188 U. S. 445, 471, 47 L. ed. 539, 549, 23 Sup. Ct. Rep. 349; *Adair v. United States*, 208 U. S. 161, 180, 52 L. ed. 436, 445, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *United States v. Cress*, decided March 12, 1917 [243 U. S. 316, 61 L. ed. 746, 37 Sup. Ct. Rep. 380].

I am convinced that the act transgresses this provision of the Amendment in two respects; first, in that it exceeds the bounds of proper regulation, and deprives the owners of the railroads of their fundamental rights of liberty and property; and, secondly, in that Congress, although confessedly not in possession of the information nec-

essary for intelligent and just treatment of the pending controversy between the carriers and the trainmen (for the act itself, in its second section, provides for the very investigation that the history of the legislation shows was imperatively necessary), arbitrarily imposed upon the carriers the entire and enormous cost of an experimental increase in wages, without providing for any compensation to be paid in case the investigation should demonstrate the impropriety of the increase.

Upon the first of these points, I repeat that the sole authority of Congress to regulate these railroad corporations, including that company which is represented in the present action, arises from the fact that they voluntarily have devoted their property to the service of interstate commerce. I am unable to find in the Constitution any authority on the part of Congress to commandeer the railroads, or the services of the trainmen. The cases that are referred to as sustaining the supposed obligation of the carrier to carry on its business regardless of cost, and the authority of government to compel performance of that obligation (*Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 27, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 279, 54 L. ed. 472, 479, 30 Sup. Ct. Rep. 330; see also *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 302, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115), were decisions sustaining the power of state governments to enforce obligations arising out of the grant by the state to the railroad company of the right of existence and the franchise to operate its road; and they were decided upon the authority of a line of decisions in the state courts (*Worcester v. Norwich & W. R. Co.* 109 Mass. 103, 113; *People ex rel. Kimball v. Boston & A. R. Co.* 70 N. Y. 569, 571; *People v. New York, L. E. & W. R. Co.* 104 N. Y. 58, 67, 58 Am. Rep. 484, 9 N. E. 856; *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.* 176 Ill. 512, 524, 35 L.R.A. 656, 45 N. E. 824, 52 N. E. 292) that based the right of control upon the power of the state to enforce the charter obligation and the reserved power to alter or amend the charter in the public interest. The relation of the Federal government to railroad companies not chartered by it is altogether different, being dependent entirely upon the fact that the companies have seen fit to engage in interstate transportation,—a branch of business from which, in my opinion, they are at liberty to withdraw at any time, so far as any authority of the Federal government to prevent it is

concerned, however impracticable such withdrawal may be.

The extent to which regulation properly can go under such circumstances was defined very clearly by this court in the great case of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, where Mr. Chief Justice Waite, speaking for the court, said (p. 126): "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." The control there referred to was a regulation by the state of the service performed by public warehouses, and a limitation of the charges for that service. The opinion made it plain that the interest of the public was not in the property, but in the use of it; that not its management or disposition in general, but only the manner of its use in the service of the public, was subject to control.

The same limitation upon the authority of the public has been variously expressed in many decisions. Thus, in *Interstate Commerce Commission v. Chicago G. W. R. Co.* 209 U. S. 108, 118, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493, the court, by Mr. Justice Brewer, said: "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager." In *Southern P. Co. v. Interstate Commerce Commission*, 219 U. S. 433, 444, 55 L. ed. 283, 287, 31 Sup. Ct. Rep. 288, reference was made to the unwarranted assertion by the Commission of "a power which, if it obtained, would open a vast field for the exercise of discretion, to the destruction of rights of private property in railroads, and would, in effect, assert public ownership without any of the responsibilities which ownership would imply." And, in the *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 433, 57 L. ed. 1511, 1555, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, it was said: "The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged"

—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge for the service rendered. But the state has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title, but to the right to receive just compensation for the service given to the public.”

The case last mentioned was one of alleged confiscation resulting from a state law limiting rates of freight, and the language quoted was appropriate to that topic. But the right to immunity from confiscation is not the only right of property safeguarded by the 5th Amendment. Rights of property include something more than mere ownership and the privilege of receiving a limited return from its use. The right to control, to manage, and to dispose of it, the right to put it at risk in business, and by legitimate skill and enterprise to make gains beyond the fixed rates of interest,—the right to hire employees, to bargain freely with them about the rate of wages, and from their labors to make lawful gains,—these are among the essential rights of property, that pertain to owners of railroads as to others. The devotion of their property to the public use does not give to the public an interest in the property, but only in its use.

This act, in my judgment, usurps the right of the owners of the railroads to manage their own properties, and is an attempt to control and manage the properties rather than to regulate their use in commerce. In particular, it deprives the carriers of their right to agree with their employees as to the terms of employment. Without amplifying the point, I need only refer again to *Adair v. United States*, 203 U. S. 161, 174, 178, 52 L. ed. 436, 442, 444, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

*387. I wholly dissent from the suggestion, upon which great stress is laid in the opinion of the majority of the court,*that the admittedly private right of the carriers and their employees to fix by agreement between themselves the standard of wages to control their relations—a right guaranteed by the “due process of law” clause, as this court repeatedly has held—can be set at naught or treated as waived in the present instance because the parties have failed to agree, or that legislative interference can be justified on that ground. The right to contract is the right to say by what terms one will be bound. It is of the very essence of the right that the parties may remain in disagreement if either party is not content with any term proposed by the other. A

failure to agree is not a waiver but an exercise of the right,—as much so as the making of an agreement.

To say that the United States has such a relation to interstate traffic and the transportation of the mails that it may interfere directly, by force, or indirectly, through the courts, to remove obstructions placed by wrongdoers in the way of such transportation (*Re Debs*, 158 U. S. 564, 582, 586, 39 L. ed. 1092, 1101, 1103, 15 Sup. Ct. Rep. 900), is not to say that, when obstruction is threatened, Congress, without taking over the railroads and paying just compensation to the owners, may exercise control of the revenues and dispose of them for the purpose of buying peace, either by direct intervention or through coercive legislation. To do this is to ignore the distinction between meum and tuum, to safeguard which was one of the objects of the 5th Amendment.

The logical consequences of the doctrine now announced are sufficient to condemn it. If Congress may fix wages of trainmen in interstate commerce during a term of months, it may do so during a term of years, or indefinitely. If it may increase wages, much more certainly it may reduce them. If it may establish a minimum, it may establish a maximum. If it may impose its arbitral award upon the parties in a dispute about wages, it may do the same in the event of a dispute between the railroads and*the coal miners, the car build-^{ers,} or the producers of any other commodity essential to the proper movement of traffic.

That the act is a wide departure from all previous legislation for regulating commerce has been shown. The bearing of this upon the present point is obvious, since it is a safe assertion that every dollar of the thousands of millions that are invested in railroads in this country has been invested without any anticipation or reason for anticipating that a law of this character would be adjudged to be permissible, either as a regulation of commerce or on any other ground.

Upon the second ground, of repugnancy to the 5th Amendment, I need not dwell, since it is dealt with fully in the dissenting opinion of Mr. Justice Day, with whose views upon that question I entirely agree.

Mr. Justice Van Devanter concurs in this dissent, including that portion of Mr. Justice Day's dissenting opinion just mentioned.

Mr. Justice McReynolds, dissenting:

Whatever else the Act of September 3, 5, 1916 [39 Stat. at L. 721, chap. 436], may

do, it certainly commands that during a minimum period of seven months interstate common carriers by railroads shall pay their employees engaged in operating trains for eight hours' work a wage not less than the one then established for a standard day,—generally ten hours.

I have not heretofore supposed that such action was a regulation of commerce within the fair intendment of those words as used in the Constitution; and the argument advanced in support of the contrary view is unsatisfactory to my mind. I cannot, therefore, concur in the conclusion that it was within the power of Congress to enact the statute.

*But, considering the doctrine now affirmed by a majority of the court as established, it follows as of course that Congress has power to fix a maximum as well as a minimum wage for trainmen; to require compulsory arbitration of labor disputes which may seriously and directly jeopardize the movement of interstate traffic; and to take measures effectively to protect the free flow of such commerce against any combination, whether of operatives, owners, or strangers.

(243 U. S. 157)

ENTERPRISE IRRIGATION DISTRICT
et al., Plffs. in Err.,

v.

FARMERS MUTUAL CANAL COMPANY
et al.

COURTS ⇨394(10)—ERROR TO STATE COURT
—DECISION ON NON-FEDERAL GROUND.

1. A decision of the highest court of a state adverse to the contention that, consistently with the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., an adjudication of the state board of irrigation in favor of the asserted right of a canal company, under an alleged priority of appropriation, to divert through its canal a certain amount of water from a stream, could not be treated as binding upon those claiming under other appropriations, because it was made without lawful notice or opportunity to be heard, is not reviewable in the Federal Supreme Court on writ of error, where the state court also decided that the canal company was entitled to prevail for the reason that its adversaries were estopped by their own conduct to question the canal company's claims.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1056.]

COURTS ⇨394(10) — ERROR TO STATE COURT — FEDERAL QUESTION — LOCAL LAW.

2. The contention that the highest court of a state, in disposing of some of the questions involved in a clause, including that of a defense of an estoppel in pais, misconceived or misapplied the statute and common law of the state, and thereby infringed the due process of law and equal

protection of the laws clauses of U. S. Const. 14th Amend.,—presents no Federal question which will sustain a writ of error from the Federal Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1056.]

[No. 48.]

Argued January 22 and 23, 1917. Decided
March 6, 1917.

IN ERROR to the Supreme Court of the State of Nebraska to review a decree which reversed a decree of the District Court of Scotts Bluff County, in that state, adverse to the right of a canal company to divert the waters of a stream in excess of a certain number of second feet, under an alleged priority of appropriation. Dismissed for want of jurisdiction.

See same case below, 92 Neb. 121, 138 N. W. 171.

The facts are stated in the opinion.

Messrs. Harry N. Haynes, Thomas M. Morrow, William Morrow, and Harold D. Roberts for plaintiffs in error.

Messrs. Will R. King, Fred A. Wright, and Carl C. Wright for defendants in error.

*Mr. Justice Van Devanter delivered the opinion of the court:

In form this was a suit to determine the relative rights of the parties to divert the waters of the North Platte river, in western Nebraska, for purposes of irrigation; but the only controversy disclosed was over the extent and priority of the right of the Farmers Mutual Canal Company, the principal defendant. Another defendant, the Tri-State Land Company, was interested as a stockholder of the canal company, and need be noticed only in another relation.

The Canal Company claimed a right to divert through its canal 1,142½ cubic feet of water per second of time,—usually spoken of as second feet,—under an appropriation dating from September 16, 1887, and the other parties severally claimed rights to divert specific amounts under later appropriations. In so far as the Canal Company's claim exceeded 28 second feet, with a priority dating from September 16, 1887, it was challenged on the grounds that the appropriation upon which it rested had not been perfected with reasonable diligence; that this was the situation when the appropriations under which the others were claiming were made and perfected; that if the claim subsequently was enlarged it could not, as to the enlargement, take priority over the intervening rights of others, and that if it originally covered 1,142½ second feet, which was disputed, all right to more than 28 feet had been lost by nonuser.*

But the Canal Company asserted the validity of its entire claim, denied any loss by lack of diligence or nonuser, and contended, among other things, that the State Board of Irrigation had sustained its entire claim in 1897, when the board was engaged under the state law (Laws 1895, chap. 69, §§ 16-27) in adjudicating claims to the waters of the North Platte river, and that the other parties were estopped from questioning its right by reason of their attitude and conduct after 1904, when its predecessor in interest was completing the canal and diverting works at enormous cost. The other parties denied that there was any ground for an estoppel, and insisted that, consistently with the due process and equal protection provisions of the 14th Amendment, the claimed adjudication by the State Board of Irrigation could not be treated as in any way binding upon them, because (a) the law under which the board acted made no provision for notice, and (b) the board had proceeded without notice and without affording an opportunity to be heard. Other contentions were advanced, but no purpose would be served by stating them here.

It was conceded that during portions of the irrigation season the flow of the stream had not been sufficient to satisfy all of these claims, and that the State Board of Irrigation recently had recognized the Canal Company's claim by refusing to restrict its diversion in time of low water to less than 1.142 $\frac{1}{2}$ second feet.

The cause was submitted on the pleadings and on a "stipulation of facts" covering 84 printed pages and containing much that was purely evidential, and not in the nature of a statement of ultimate facts.

The stipulation disclosed that the Canal Company's canal was about 80 miles in length, was completed in October, 1910, and was capable of irrigating 80,000 acres; that in 1895 it had cost about \$100,000 and was capable of irrigating 30,000 acres; that by reason of financial difficulties, a foreclosure suit and other litigation, the work of construction was practically suspended from 1895 to 1905; that the work was actively resumed in 1905 and continued with vigor until October, 1910, when it was completed; that the cost of the work from 1905 to 1910 was in excess of \$1,500,000, and more than \$950,000 of this was expended before August, 1909, when this suit was begun; that the work done after 1905 included a needledam across the river, costing \$27,869.20, an additional headgate of concrete and reinforced steel, costing \$52,113.20, and a wastegate or spillway of similar construction, costing \$42,253.46; and that the number of acres actually reclaimed and ir-

rigated by the canal was being rapidly increased, being less than 2,000 acres in 1905, and 20,000 acres in 1910.

The trial court held that the canal company's right, although prior in time, did not extend to more than 28.57 second feet of the water, and entered a decree to that effect. An injunction was also granted restraining the company from taking more than was thus accorded to it. In the supreme court the decree was reversed and the suit was dismissed on the merits so far as it concerned the Canal Company and the Tri-State Land Company, and without prejudice in respect of any controversy between the other parties. 92 Neb. 121, 138 N. W. 171.

The supreme court, recognizing that the case was of great importance to the parties and to all who were interested in irrigated lands in the state, and that any decision therein would almost inevitably result in serious loss to one or more of the parties, proceeded in a painstaking way to state, discuss, and determine all the questions presented. Among other things, it sustained the authority of the State Board of Irrigation under the Act of 1895 to adjudicate claims like those to the waters of the North Platte river; described the board's power in that regard as quasi judicial and its adjudications as final*unless appealed*¹⁰¹ from to the district court; held that the right to due notice and a reasonable opportunity to be heard was implied in the act; and reaffirmed its decision in *Farmers Canal Co. v. Frank*, 72 Neb. 136, 100 N. W. 286, made in 1904, that the board's action upon the Canal Company's claim amounted to an unconditional adjudication of the extent and priority of the claim, and that a leading purpose of the Act of 1895 was to create a state board "whose records would evidence the priorities of title to the appropriation of water in such a public manner that no one might be misled."

As respects the notice actually given to the other parties, the opportunity which they had for opposing or contesting the Canal Company's claim before the board, and the knowledge of the board's action which they reasonably should be regarded as possessing, the court found, in substance, that before the board began to inquire into the claims to the waters of the North Platte, it gave due notice of its purpose so to do; that under that notice all the parties to this suit, or their predecessors in interest, appeared before the secretary of the board, at the times and places indicated in the notice, and presented such evidence as they deemed appropriate in support of their respective claims,—the evidence being preserved and becoming a part of the rec-

ord in that proceeding; that the board's printed rules, which were duly brought to the attention of all the parties, permitted any claimant to contest the claim of another, but no one sought to contest the Canal Company's claim; that in ordinary course, after the evidence was presented, the claims were adjudicated,—a separate opinion upon each claim being prepared by the secretary, who was the state engineer, and afterwards adopted by the board; that each claimant was specially notified of the decision upon his own claim, but not of the decisions upon the claims of others; that the decision upon the Canal Company's claim, in addition to being entered in the records of the state board, was shown in a list of established claims regularly appearing in the biennial reports of the board which the state required to be made and published, and was recorded in 1905 in the office of the county clerk of the county where the appropriation was made.

In these circumstances the court concluded that the contention that the board had proceeded without adequate notice to the parties, or without affording them a reasonable opportunity to be heard, had no real foundation. It also concluded that, in view of the nature of the enterprise, the large expenditures required, and the circumstances surrounding the temporary suspension of the work, the contention that part of the Canal Company's claim had been lost through lack of diligence or non-user was highly inequitable and untenable.

Then, coming to the question of estoppel, the court held that, even if the other questions were decided against the Canal Company, it was entitled to prevail upon the ground that its adversaries were estopped by reason of their own conduct. In the course of its opinion the court referred at length to the admissions in the pleadings and stipulation, and found, as matter of fact, that shortly after the decision in *Farmers Canal Co. v. Frank*, supra, the Tri-State Land Company, the Canal Company's immediate predecessor in interest, actively took up the work of completing the canal and diverting works and proceeded therewith in good faith and with vigor, relying upon that decision and the state board's adjudication, and openly claiming the amount of water and priority specified in the latter, and that the other parties, with knowledge of that claim and situation, made no claim of superior right to the water, but remained silent for four years while the work, which the court described "as comparable only to the construction of a railroad," was being carried to completion at enormous cost, and the water was being diverted and used through the canal in in-

creasing volume. And, having thus passed upon the questions of fact, the court said:

"Under these circumstances, and having this knowledge, it would be contrary to the plainest principles of equity if plaintiffs might stand silently by, seeing the defendants engage in such a monumental work under claim of right, and utter no word of warning as to their own claims, which, if eventually established, would deprive defendants of the water which the canal was built to carry, condemn the whole enterprise to failure, and result in the absolute loss of the money expended. It would be manifestly inequitable and unjust to allow the plaintiffs, after the works were practically finished and the money expended, to insist upon claims which, had they been asserted in good time, would at least have put the defendants upon their guard and have given them cause to pause and hesitate in their expenditures until the validity of their title had been determined." [92 Neb. 158.]

Concise stated, the assignments of error complain that the supreme court infringed the due process and equal protection provisions of the 14th Amendment, first, by giving decisive effect to the state board's decision, instead of holding that it was made without lawful notice or opportunity to be heard, and therefore was void, and, second, by misconceiving or misapplying the statute and common law of the state in disposing of other questions.

Our jurisdiction is disputed and must be considered, as, indeed, it should be, even if not challenged. As has been shown, several questions were presented to the supreme court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the 14th Amendment, and another was whether the defense of estoppel in pais was well grounded. The first was plainly a Federal question and the other as plainly non-Federal. Both were resolved in favor of the canal company. The other questions, none of which was Federal, may be put out of view in this connection. Thus we are concerned with a judgment placed upon two grounds, one involving a Federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it. *Hammond v. Johnston*, 142 U. S. 73, 78, 35 L. ed. 941, 942, 12 Sup. Ct. Rep. 141; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct.

Rep. 131; *Berea College v. Kentucky*, 211 U. S. 45, 53, 53 L. ed. 81, 85, 29 Sup. Ct. Rep. 33; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 112, 116, 53 L. ed. 431, 433, 29 Sup. Ct. Rep. 227; *Gaar, S. & Co. v. Shannon*, 223 U. S. 468; 56 L. ed. 510, 32 Sup. Ct. Rep. 236; *Southern P. Co. v. Schuyler*, 227 U. S. 601, 610, 57 L. ed. 662, 668, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277. It has been so held in cases where the judgment was rested upon a Federal ground and also upon an estoppel. *Pierce v. Somerset R. Co.* 171 U. S. 641, 648, 43 L. ed. 316, 319, 19 Sup. Ct. Rep. 64; *Lowry v. Silver City Gold & S. Min. Co.* 179 U. S. 196, 45 L. ed. 151, 21 Sup. Ct. Rep. 104, 21 Mor. Min. Rep. 113.¹ But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. See *Moran v. Horsky*, 178 U. S. 205, 208, 44 L. ed. 1038, 1039, 20 Sup. Ct. Rep. 856; *Creswill v. Grand Lodge, K. P.* 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822. And this is true also where the non-Federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question. *Leathe v. Thomas*, 207 U. S. 93, 99, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30; *Vandalia R. Co. v. Indiana*, 207 U. S. 359, 367, 52 L. ed. 246, 248, 28 Sup. Ct. Rep. 130. But, where the non-Federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-Federal questions. *Murdock v. Memphis*, 20 Wall. 590, 635, 22 L. ed. 429, 444; *Eustis v. Bolles*, 150 U. S. 369, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Leathe v. Thomas*, *supra*; *Arkansas Southern R. Co. v. German Nat. Bank*, 207 U. S. 270, 275, 52 L. ed. 201, 203, 28 Sup. Ct. Rep. 78.

It does not, as we think, admit of doubt that the estoppel in pais is made an independent ground of the judgment. Instead of being interwoven with the validity of the state board's adjudication, which is the other ground, it is distinct from it, and is so treated in the court's opinion. In taking up the question of estoppel, as also in concluding its discussion of the subject, the court plainly shows that it is then indulg-

ing an assumption that the other ground is not tenable. True, the board's proceedings and adjudication are referred to as having some bearing upon the good faith of the Canal Company, and upon the knowledge which the other parties had of that company's claim, but in this the court neither departs from the assumption indulged nor confuses the two grounds of the judgment. Even if invalid, the board's proceedings and adjudication could well have a real bearing upon the matters indicated.

In view of the facts before recited we think it cannot be said that the ruling upon the question of estoppel is without fair support, or so unfounded as to be essentially arbitrary, or merely a device to prevent a review of the other ground of the judgment. We therefore are not at liberty to inquire whether the ruling is right or wrong. And it may be well to add that the question did not originate with the court. It was presented by the pleadings, was in the minds of the parties when the stipulation was made, and was dealt with by counsel and court as a matter of obvious importance.

It is not urged, nor could it well be, that, as a ground of decision, the estoppel is not broad enough to sustain the judgment.

The claim that the court, in disposing of some of the questions, including that of the estoppel, misconceived or misapplied the statutory and common law of the state, and thereby infringed the due process and equal protection clauses of the 14th Amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. *Sayward v. Denny*, 158 U. S. 180, 186, 39 L. ed. 941, 943, 15 Sup. Ct. Rep. 777; *Central Land Co. v. Laidley*, 159 U. S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80; *Castillo v. McConico*, 168 U. S. 674, 683, 684, 42 L. ed. 622, 625, 626, 18 Sup. Ct. Rep. 229. The questions presented, other than those relating to the validity of the state board's adjudication, all turned exclusively upon the law of the state, and the state court's decision of them is controlling. *Preston v. Chicago*, 226 U. S. 447, 57 L. ed. 293, 33 Sup. Ct. Rep. 177; *St. Louis & K. C. Land Co. v. Kansas City*, 241 U. S. 419, 427, 60 L. ed. 1072, 1077, 36 Sup. Ct. Rep. 647; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 116, 57 L. ed. 1410, 1416, 33 Sup. Ct. Rep. 967. The reference to the equal protection clause evidently is inadvertent, for there is no claim of unwarranted or arbitrary discrimination.

It results from what has been said that

¹ See also *Sherman v. Grinnell*, 144 U. S. 198, 202, 36 L. ed. 403, 405, 12 Sup. Ct. Rep. 574; *Gillis v. Stinchfield*, 159 U. S. 658, 680, 40 L. ed. 295, 296, 16 Sup. Ct. Rep. 131; *Hale v. Lewis*, 181 U. S. 473, 479, 480, 45 L. ed. 959, 962, 21 Sup. Ct. Rep. 677.

the judgment is one which is not open to review by this court.

Whit of error dismissed.

(243 U. S. 166)

CITY OF OWENSBORO, Appt.,
v.

OWENSBORO WATER WORKS COM-
PANY.

WATERS AND WATER COURSES ¶188(3)—
FRANCHISE OF WATERWORKS COMPANY—
TERM—LIFE OF CORPORATION — EXTEN-
SION.

1. A franchise for the corporate life of the grantee as lawfully extended by a subsequent renewal, and not merely for the primary term named in the company's charter, is what was given by a municipal grant to a waterworks company purchasing an existing plant, of the franchise and license to maintain, complete, and operate waterworks in the municipality, and to use its public highways for that purpose "for and during the existence of the said corporation," where the company's charter limited its corporate life to twenty-five years, "subject to such extensions of its term of existence as by law provided," and the local law authorized renewals of such term by vote of the stockholders.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 287.]

CORPORATIONS ¶37—TERM OF EXISTENCE — EXTENSION.

2. The declared purpose of an amendment to a corporate charter, made conformably to Ky. Gen. Stat. 1888, chap. 56, § 7; Ky. Stat. 1903, §§ 540, 559, and 574, to extend the Company's corporate life for twenty-five years, was not defeated merely because the primary term of twenty-five years expired on May 31, 1914, and the amendment to the charter stated that the extension for another twenty-five years would begin "from and after June 1, 1914."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 105.]

WATERS AND WATER COURSES ¶188(3)—
FRANCHISE OF WATERWORKS COMPANY—
TERM—PRACTICAL CONSTRUCTION.

3. The parties to a municipal grant to a newly formed waterworks company of a franchise "for and during the existence of the said corporation," made by an ordinance which accepted the grantee as the successor of an earlier company in respect of a twenty-five years' contract for hydrant rental then existing between the municipality and such other company, cannot be deemed to have recognized that such franchise was for the grantee's corporate life of twenty-five years, unaffected by any extension of its corporate existence, merely because subsequent ordinances accepted by the company, requesting the extension of pipe lines, declared that the city thereby rented the hydrants along such extension "for the unexpired term of the franchise of the said water company," but the word "franchise," as used in this connection, must be deemed to refer to the hydrant contract with the earlier company, made for a definite term,

which both parties understood was to terminate in twenty-five years from its date.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 287.]

ESTOPPEL ¶3(2)—BY RECORD — RECITAL IN PLEADING.

4. A corporation is not estopped to claim that its franchise granted "for and during the existence of the said corporation" was extended by a renewal of its corporate life beyond the primary term of twenty-five years for another twenty-five years, merely because some years before the primary period expired it described its franchise in two suits against the municipality as granted for a term of twenty-five years, where in neither suit was it material whether the life of the franchise was strictly limited to that period, or subject to prolongation by an extension of the company's corporate existence, and such question was not adjudicated in either suit, and in both suits the franchise was also described by the company as granted for "the whole period of its corporate existence."

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 3.]

[No. 79.]

Argued November 8, 1916. Decided March 6, 1917.

A PPEAL from the District Court of the United States for the Western District of Kentucky to review a decree enjoining a municipality from obstructing and preventing the maintenance and operation of an existing waterworks plant. Affirmed.

The facts are stated in the opinion.

Messrs. George W. Jolly, Ben D. Ringo, La Vega Clements, and John A. Dean, Jr., for appellant.

Messrs. William T. Ellis and James J. Sweeney for appellee.

*Mr. Justice Van Devanter delivered the opinion of the court:

This is a suit to enjoin the city of Owensboro, in the state of Kentucky, from obstructing and preventing the maintenance and operation of an existing waterworks plant in that city. The plaintiff relies upon a franchise from the city which the latter insists has expired. In the district court the franchise was held to be still in force, and the city was enjoined from giving effect to an ordinance and a resolution impairing the same.

By an ordinance of September 10, 1878, the city granted to the Owensboro Water Company, its successors and assigns, the privilege of constructing and operating waterworks within the city, and of using its public highways for that purpose. In its 1st section the ordinance described this grant as made "for the duration of the said company," and in another section expressly

limited it to "twenty-five years* from the passage of this ordinance." Other provisions required the water company to lay and maintain pipe lines in certain streets with a fire hydrant at each street intersection, and obligated the city to rent and pay for the hydrants "for the term of twenty-five years from the passage of this ordinance." Availing itself of the privilege so granted the water company constructed a waterworks plant in the city, and operated the same until June 3, 1889, when it sold the plant to the Owensboro Water Works Company, the plaintiff in this suit. This company is a Kentucky corporation whose original articles of association stated that its existence was to begin on June 1, 1889, and terminate at the end of twenty-five years, "subject to such extensions of its term of existence as by law provided." On June 3, 1889, shortly before the plaintiff's purchase, the city adopted an ordinance containing the following provision, among others:

"Sec. 1. That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the waterworks of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and its successors and assigns, for and during the existence of the said corporation, to maintain, complete, and operate waterworks in the city of Owensboro for supplying the city of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the city of Owensboro, the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants, and other apparatus for the supply of water."

By the 2d section the city accepted the plaintiff "as the successor" of the other company in respect of "the contract for hydrant rental" then existing between the city and the other company "as fully as if such existing contract had been originally made" by the city with the plaintiff "without the intervention" of the other company; and by the 3d section the city gave its consent to "the consummation of the said purchase of the said waterworks."

*The plaintiff accepted the provisions of this ordinance, relied upon them in consummating the purchase, and ever since has maintained and operated the waterworks and used the public highways of the city in that connection.

On May 6, 1914, the plaintiff's articles of association were amended, conformably to the state law (Ky. Gen. Stat. 1888, chap.

56, § 7; Ky. Stat. 1903, §§ 540, 550, 574), by adding a provision the declared purpose of which was to extend the plaintiff's corporate existence for the period of twenty-five years.

Whether the plaintiff now has a franchise from the city turns chiefly upon the construction and effect of the Ordinance of June 3, 1889. By it the city then said that "the franchise and license" to maintain, complete, and operate waterworks in the city and to use its public highways for that purpose "are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation." Now the city claims, first, that by the ordinance it merely assented to the purchase by the plaintiff of the rights of the other company under the Ordinance of 1878; second, that if a franchise was granted to the plaintiff, it was only for the life of the other company; and, third, that even if a franchise was granted to the plaintiff for the period of its own existence, it was not to endure beyond the primary term of twenty-five years, named in the plaintiff's articles of association. But none of these claims has any support in the ordinance. Its terms are direct and its meaning plain. In apt words its 1st section not only grants a franchise to the plaintiff, but makes the life of the franchise coextensive with the plaintiff's existence; and we find nothing in the ordinance which suggests that the words fixing the duration of the franchise are to be taken as comprehending anything less than the full corporate existence of the plaintiff. The right to extend its existence beyond the primary term was given by statute and expressly reserved in the articles of association, and so it is reasonable to believe that had there been a purpose to limit the franchise to that term it would have been plainly expressed, as was done in the ordinance of 1878. The reasonable implication from the inclusion of such a limitation in the earlier ordinance and its omission from the later one is that the franchise granted by the latter was not to be thus limited.

Of the suggestion that, under this view, the franchise may be made perpetual by repeated extensions of the plaintiff's corporate life, it is enough to say that we are here concerned with but a single extension already effected. The statute permitting such extensions may not be in force when the present twenty-five-year period expires, and, if it be in force, nothing may be done under it.

Because the primary term—the first twenty-five years—expired May 31, 1914, and the amendment to the articles of asso-

ciation stated that the extension for another twenty-five years would begin "from and after" June 1, 1914, the city insists there was a hiatus of one day between the two periods and that in consequence the extension never became effective. We are not impressed with this contention. While in the computation of time that begins to run "from and after" a day named it is usual to exclude that day and begin with the next (Sheets v. Selden, 2 Wall. 177, 190, 17 L. ed. 822, 826), this is not done where it will obviously defeat the purpose of those whose words are being construed or applied. The purpose of the amendment was to extend or prolong the plaintiff's corporate existence for another twenty-five years. It was adopted almost a month in advance of the expiration of the first twenty-five years, and, notwithstanding the use of the words "from and after," it shows very plainly that the second period was to begin where the first ended. Of course those words were not happily chosen, but as the amendment otherwise makes it certain that the extension was to be effective on and after June 1, 1914, we think the amendment accomplished its purpose and that there was no hiatus.

By the Ordinance of 1878, as before shown, the other company and the city entered into a contract respecting fire hydrants which was to be in force for twenty-five years from the date of the ordinance. One provision of that contract was to the effect that, if the company should make any extensions of its pipe lines at the city's request "during the said term of twenty-five years," the city would rent and pay for one hydrant at each street intersection along such extensions "for the unexpired term of said franchise." By a special provision in the ordinance of 1889, as we have seen, the plaintiff succeeded to the rights and duties of the other company under that contract as if it "had been originally made" by the city with the plaintiff; and this meant that the succession was only for the unexpired term of the contract. Acting under the contract, the city, from 1890 to 1895, adopted seven ordinances wherein it requested that particular extensions of the pipe lines be made by the plaintiff, and declared that it (the city) thereby rented the hydrants along such extensions "for the unexpired term of the franchise of the said Water Company." The plaintiff accepted these ordinances and complied with the requests made in them. The city now claims that in what was thus done both parties plainly recognized that the franchise granted to the plaintiff was for a definite and known term of years, and was not to be affected by any extension of

the plaintiff's corporate existence. But we think this claim disregards what was intended by the word "franchise" in the seven ordinances. They not only related to the same subject as did the contract of 1878, which was the maintenance and renting of fire hydrants, but they closely followed its words. That contract was made for a definite term, twenty-five years, and twelve of these had expired when the seven ordinances were adopted. In adopting and accepting them the parties were not making a new hydrant contract, but acting under the one already in existence. It and the plaintiff's franchise were not coterminous and should not be confused. The contract covered the old hydrants, of which there were many, as well as the new ones, and was to expire as to all at the same time, that is, on September 10, 1903, twenty-five years after the contract was made. That the city so understood—indeed, that both parties so understood—is affirmatively and clearly alleged in the city's answer, from which we excerpt the following:

"Defendant city says that after the passage of said [seven] ordinances the complainant Water Company did lay the mains required therein and attach the fire hydrants as provided in said ordinance and the defendant city paid it rentals in pursuance to said contract until September 10, 1903, at which time the complainant ceased to collect and the city ceased to pay rentals for said hydrants as provided in said ordinance and contracts, and said ordinances and contracts were construed to and did expire on September 10, 1903, and since that date the city has not paid to the complainant any hydrant rental under any of said rental contracts, or at all."

The plaintiff's franchise, as before shown, was granted June 3, 1889, and, of course, did not expire September 10, 1903. What did expire on that day was the contract made September 10, 1878, whereby the city agreed to rent and pay for the hydrants for the term of twenty-five years from that date. It is plain, therefore, that what was intended by the word "franchise" in the seven ordinances was that contract. There was nothing else to which it reasonably could refer.

The city further contends that the plaintiff is estopped from claiming a franchise extending beyond May 31, 1914, because in 1903 and 1904, in two suits against the city, it described its franchise as granted for a term of twenty-five years, beginning June 1, 1889. But in neither suit was it material whether the life of the franchise was strictly limited to that period or was subject to prolongation by an extension of the plaintiff's corporate existence; and it is not

claimed that this question was adjudicated in either suit. At that time nine or ten years of the primary period still remained, and there was as yet no occasion to elect or determine whether the privilege of effecting an extension would be exercised. Besides, in both suits the franchise was also described by the plaintiff as granted for "the whole period of its corporate existence." Thus no basis is shown for an estoppel by conduct or by judgment.

Other objections are made to the decree, but they are of less merit and do not require special mention.

Decree affirmed.

Mr. Justice Clarke, dissenting:

This case presents for decision the single but very important question whether the city of Owensboro, Kentucky, by ordinance passed on June 3, 1889, granted to the Owensboro Water Works Company a franchise renewable indefinitely, and therefore in effect perpetual, or only a franchise for twenty-five years, "to maintain, complete, and operate" waterworks in that city.

A perpetual right to the use of the streets of a city is such a serious burden upon a community that, though very reluctant to do so, I am impelled by an imperative sense of duty to place on record my reasons for concluding that the construction given by a majority of the court to the grant involved in this case is a mistaken one which can be reached only by violating two rules of construction which this court has repeatedly declared to express "sound doctrine which should be vigilantly observed and enforced."

*The facts essential to an understanding and to a determination of the claim made in the record are as follows:

On the 9th day of September, 1878, a corporation named the "Owensboro Water Company" was incorporated under the laws of the state of Kentucky, and, on the next day, the city of Owensboro granted to that corporation the right and franchise to construct and operate in that city a waterworks plant, using the streets and alleys in the customary manner.

Section 1 of this ordinance grants to the Water Company the right to construct and operate waterworks within the city "for the duration of the said company."

Afer many details as to construction, service, and rentals of hydrants by the city, § 13 provides: "The rights, privileges, and franchises hereby granted to and vested in said company shall remain in force and effect for twenty-five years from the passage of this ordinance." Thus it is too clear for discussion that the expression "for the duration of the said company" in § 1 of this ordinance of September 10, 1878, was

deemed, both by the city granting it and by the company accepting it, as meaning a term of twenty-five years.

The Water Company constructed a waterworks plant and operated it until the year 1889, when, for the purpose of making larger capital available, a new corporation, bearing the name "Owensboro Water Works Company," was organized, with a charter which contained in paragraph 6 this provision: "The time of commencement of the said corporation is the first day of June, in the year one thousand eight hundred and eighty-nine, and it shall terminate twenty-five years thereafter, subject to such extensions of its term of existence as by law provided."

On June 3d, 1889, the council of the city of Owensboro passed an ordinance, which was accepted by the new corporation, which, after reciting that the new corporation desired to purchase the waterworks of the old one,*together with its existing contracts for supplying the city and its inhabitants with water; that the new company desired a grant of a franchise and license "to maintain, complete, and operate waterworks in the city," and that the city should accept the new company as the successor of the old to the contracts for hydrant rentals, proceeds to ordain:

Section 1. That the franchise and license to maintain, complete, and operate waterworks in the city of Owensboro "are hereby granted to the Owensboro Water Works Company, and to its successors and assigns for and during the existence of said corporation;"

Section 2. That the new company shall be accepted by the city "as the successor to the contract for hydrant rental now existing between the city of Owensboro and the Owensboro Water Company as fully as if such existing contracts had been originally made by the city of Owensboro with the said Owensboro Water Works Company, without the intervention of the said Owensboro Water Company."

The Kentucky General Statutes of 1883, chap. 56, § 7, p. 548, under which the Water Works Company was organized in 1889, contained this provision:

"Corporations for the construction of any work of internal improvement may be formed to endure for fifty years; those formed for other purposes shall not exceed twenty-five years in duration; but in either case they may be renewed from time to time for periods not greater than was at first permissible if three fourths of the votes cast at any regular election held for that purpose shall be in favor of such renewal."

While the plaintiff in error disputes it, we conclude that it is clear that, by ap-

propriate action taken on the 6th of May, 1914, the Water Works Company amended its articles of incorporation by amending article 6 thereof (hereinbefore quoted) so that, as amended, this section* became: *"The time of the commencement of said corporation is the first day of June, 1889, and it shall terminate twenty-five years thereafter,"* subject to such extension of its terms as by law provided, and same is now, by these amended articles of incorporation, *extended for the period of twenty-five years from and after the first day of June, 1914."*

Since confessedly the Water Works Company is not a corporation organized for the construction of "any work of internal improvement," if we read together the charter of the Water Company dated May 30, 1889, the ordinance of the city of Owensboro dated June 3, 1889, and the statute of Kentucky, which we have quoted, limiting the duration of corporations to twenty-five years, we see that the question for decision is narrowed to this, viz.:

Does the grant to the Water Works Company of the franchise and license "to maintain, complete, and operate" waterworks "for and during the existence of said corporation" confer on the company a franchise in effect perpetual to use the streets of the city for waterworks purposes, or is it limited to twenty-five years?

The limitation of the grant to the twenty-five years "duration" of the corporation would be beyond question were it not for the provision of the charter that the termination of the life of the company after twenty-five years shall be subject to such extensions as are provided for by law, and for the provision, of the statute quoted "that they (such corporations) may be renewed from time to time for periods not greater than was at first permissible,"—in this case for an additional twenty-five years. The conclusion of the majority of the court is that this authority given to the stockholders to renew "the duration" of the corporation (a discretionary power which is found in the charter, not in the grant, and which might or might not be exercised) expanded and extended the expression of the grant "during the existence of the corporation" so as to make it as if it read, "*during the existence of the said corporation,"* and also for such "renewals" of such existence as the stockholders of the company may, by appropriate action, favor some time in the future,—thereby making the grant in effect a perpetual one.

The two rules for the construction of such grants, which have been referred to, have been firmly established by decisions of many courts, but no court has been more definite and resolute than this court has been in the

emphasis with which it has announced and applied them. These rules are:

(1) As announced by this court most clearly, and with full consideration of the authorities in *Blair v. Chicago*, 201 U. S. 400-463, 50 L. ed. 801-827, 26 Sup. Ct. Rep. 427: "It is a firmly established rule . . . that one who asserts private rights in public property under grants of the character of those under consideration [city ordinances] must, if he would establish them, come prepared to show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied." And the court gives as the sound reason for this rule that "it is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed." And from *Cooley* on Constitutional Limitations is quoted with approval this statement: "The just presumption in every such case is that the state has granted in express terms all that it designed to grant at all. . . . This is sound doctrine, and should be vigilantly observed and enforced." Continuing to give to the rule the emphasis which it so richly deserves, the opinion continues and quotes from earlier decisions of this court, declaring that "any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. . . . The principle is this, that all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption." The discussion concludes with the statement, quoted from *Slidell v. Grandjean*, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475, that it is a wise doctrine because "it serves to defeat any purpose concealed by the skilful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies."

(2) The second rule to which we have referred finds clear expression in *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594, as follows: "In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only

by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

This rule was approved in terms in *Topliff v. Topliff*, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057, and it has been repeatedly announced as the settled doctrine of this court.

Applying these rules in the reverse order of their statement I shall now give my reasons for concluding that the interpretation by the parties to it of the grant under consideration limits it to a life of twenty-five years.

The Ordinance of 1878, in the part of it assumed by the Water Works Company by its acceptance of the Ordinance of 1889, provided that "if extensions of pipe shall be made by said company during the said term of twenty-five years at the instance or request of said city," the city should be bound to rent and pay \$50 a year for one hydrant at each street intersection. Under this provision, beginning on October 6, 1890 (a little more than a year after the grant was made), and continuing, certainly as the record shows, until September 16, 1895, the city, by ordinance, made seven distinct demands upon the Water Works Company to lay additional pipes in the streets, and in each ordinance provided: "The city of Owensboro hereby rents of the said Water Company the above named hydrants for the unexpired term of the franchises of the said Water Company," and promises to pay, etc. Here is a plain declaration, seven times repeated, by the city, the first made, as we have stated, very shortly after the grant was made, that the city understood that the grant was not an unlimited or perpetual one, for it promises to pay only "for the unexpired term of the franchises of the said Water Company." By the acceptance of each one of these seven ordinances, the Water Company just as plainly assented to this construction of the grant. This is highly persuasive against the Water Company because such construction was so distinctly against its interest. The record shows that these ordinances bear dates as follows: (1) September 6, 1890; (2) February 2d, 1891; (3) November 7, 1892; (4) December 5, 1892; (5) October 1st, 1894; (6) May 7, 1894; and (7) September 16, 1895.

The most persuasive comment I think that can be made upon this construction of this grant by both of the parties to it is contained in the last sentence of the quotation we made from *Chicago v. Sheldon*, supra: "But in an executory contract, and

where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

But much more is to be found in the record as to what the parties—particularly as to what the Water Works Company—thought was the term of this grant.

On the 21st day of September, 1903, the Water Works Company instituted a suit in the circuit court of the United States for the eastern district of Kentucky, in an effort to enjoin the city from issuing bonds and spending money for the purpose of constructing a municipal water plant, and in the bill filed in the case it alleges that it is a corporation, with power conferred upon it to supply the defendant city and its inhabitants with water "for the fixed period of twenty-five years from the date of its incorporation;" it alleges that the grant to it was "extended during the period of its corporate existence, a period of twenty-five years from the 1st of June, 1889," and that by the contract created by the ordinance of June 3d, 1889, as well as by the contracts existing between the city and the earlier company, the Water Works Company "acquired and now has conferred upon it and vested in it the sole and exclusive right, franchise, and privilege during the period of twenty-five years from and after June 1st, 1889, to maintain, complete, and operate waterworks in the city of Owensboro," etc. Again it alleges in this bill that the said contract conferred upon it the exclusive privilege of furnishing water through the hydrants to the said city for twenty-five years from the 1st of June, 1889; that it has in all things complied with the requirements of the Ordinance of 1889, "and that it is ready, willing, and able to continue to carry out its said contract and to continue to perform and do all the things of it required therein until the expiration of the said contract on June 1st, 1914." Yet again it alleges that the city did by the ordinance aforesaid (of 1889) make and enter into a valid and binding contract with this complainant, wherein and whereby an obligation was created on the part of this complaint to lay pipes, conduits, and hydrants in and along the streets and to furnish for the period of twenty-five years from the 1st of June, 1889, water for public and private purposes, etc., and it solemnly avers that the purpose of the city to establish a municipal waterworks would result in a violation of this contract, which is within the protection of § 10, article 1 of the Constitution of the United States, which prohibits the passage of any "law impairing the obligation of contracts."

This elaborate bill, filed by the Water Company, concludes with the prayer for an injunction, restraining the city "from constructing, equipping, operating, or maintaining a system of waterworks in said city at any time until after the 1st day of June, 1914."

This bill is sworn to by the president of the Water Works Company and significant enough is signed by the same counsel who sign the bill in the pending case.

But the Water Company, continuing of the same mind as to the meaning of the grant under consideration, in a petition filed in the circuit court of Daviess county, Kentucky, almost a year later, on the 27th day of May, 1904, in a case in which the company was seeking to collect rentals for hydrants, again alleged that by the grant of 1889 the franchise of the company was "extended during the whole period of its corporate existence, a period of twenty-five years from and after the 1st of June, 1889," and that this same ordinance "conferred upon and vested in it the sole and exclusive right, franchise, and privilege during the period of twenty-five years from and after June 1st, 1889, to maintain, complete, and operate waterworks in the city of Owensboro," etc.

In this petition plaintiff specifically sets up the ordinances to which we have referred, calling upon the Water Company to construct extensions, and which were accepted by the company, and adds two others of the same purport, one dated May 15, 1899, and one July 25, 1900; alleges that in each of these the city requested the company to extend the lines and place hydrants "for the unexpired term of the franchise of this petition," and that within sixty days from the passage of said ordinances it filed its acceptance of them with the clerk of the city.

It is difficult to imagine an interpretation of a contract by the parties to it more specific or controlling than is to be found in the declarations in these court proceedings, made deliberately and under the advice of counsel.

In the presence of this record I cannot doubt that it was understood and intended in the beginning by the untechnical men of affairs who composed the city council and by the company that this grant was a limited one, extending for not to exceed twenty-five years from June 1st, 1889, and that this conviction continued in the minds of all the parties concerned in it, finding frequent expression in the conduct of business between them for full fifteen years, certainly until 1904, when the company is found claiming in the courts that the grant expired on June 1, 1914; and therefore I can-

not assent to the conclusion that it is in effect a perpetual grant of the right to use the streets of the city, convinced, as I am, that such result cannot be reached without doing violence to the rule referred to, so firmly established by this court, which has been penetratingly condensed into the expression, "Show me what men have done under a contract and I will tell you what it means." And, I may add, without running also counter to the decision of this court in *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645, in which it is declared that, in construing contracts springing from statutes, the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted.

But, turning now from the interpretation placed upon this ordinance by the parties to it, and confining our attention strictly to the language used in making the grant, let us ask ourselves whether it can reasonably be said, upon the facts presented by this record, that a franchise in effect perpetual was granted in the streets of the city "in plain terms," "in express terms," without "ambiguity," as is required by the first of the rules for the construction of such grants, which we have seen is so fully approved by this court.

If the pertinent parts of the grant, of the charter of the company, and of the Kentucky statute, be written together, we shall have this paragraph:

The city of Owensboro grants to the company the right to maintain and operate a waterworks plant during the existence of that corporation, which existence is declared in its charter to commence on June 1st, 1889, and to terminate twenty-five years thereafter, subject to such extensions as the law provides, and is also limited by the state statute, under which it was created, to a duration of twenty-five years, with the privilege of renewal for a like period if a three-quarters vote of its stockholders "shall be in favor of such renewal."

I cannot doubt that others than skilled lawyers (and we cannot assume that all of the members of the city council were skilled lawyers), reading such a paragraph as this, would understand that the existence of the life of the Water Works Company, and so of the grant, was for the declared twenty-five year period between the "commencement of the life" of the corporation and the time when it must "terminate." To give it any other meaning is to magnify the subordinate provision for a possible extension of the life of the corporation so as to make that control the definite, specific, clearly expressed limitation of the charter.

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But specific should always control general provisions in a contract where they conflict,—definite and clearly expressed limitations should dominate indefinite and discretionary privileges. To declare this grant perpetually renewable is to make its duration dependent upon the discretion of the grantee corporation, to be exercised twenty-five years after the grant was made, and* it is not difficult to conceive of circumstances under which the required three fourths of the stockholders of the company would not favor an extension of its corporate life,—if, for instance, its business were a failing one because of competition with a city-owned plant, or if the stockholders differed in opinion as to the wisdom of making a possible sale of its property. This is a result which the court should accept only under sheer coercion—I can designate it by no milder term—of the “plain,” “express,” and “unambiguous” provision in the grant, and very certainly it is a result which should not be derived from ingenious construction of a narrow and optional clause in the charter of the grantee (not in the grant), which was probably inserted for the purpose of providing for the contingency of a new grant to the company, to be made at the expiration of the one for twenty-five years, rather than in an attempt to automatically make an extension of that grant. *When to this it is added that the provision for extending the life of the corporation is not to be found anywhere in the ordinance making the grant, which the councilmen had before them, but only in the charter of the corporation and in the statute of the state, which they probably never saw, I not only cannot bring myself to assent to the conclusion that, resolving, as we must, every doubt in favor of the public, a franchise in effect perpetual in the streets of the city was given to the Water Works company “in plain,” “in express,” and in “unambiguous” terms, but, on the contrary, I am very clear that the language used in making this grant limits it, as we have seen that all of the parties thought that it limited it, to the term of twenty-five years.*

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This conclusion has been arrived at without the application of narrow distinctions to the words used in the charter of the Water Company and in the statute of Kentucky. But sufficient to turn the case, if it be thought a close one, might very well be found in significant distinctions with* respect to the words used in the provision of the charter of the company, on which the opinion of the majority of the court turns, viz.: that the twenty-five-year limitation so clearly expressed is “subject to such extensions of its terms of existence as by law provided.”

These distinctions are, first, that the state law did not provide for “extensions” of the corporate existence. The most that can be said of the law is that it provided a method by which the stockholders of the company—not the law—might, in their discretion, “renew” the charter for an additional term after the expiration of the twenty-five-year period which the law provided for. The second distinction is that the authority to “renew” the corporate existence of the company, given by the statute, becomes in the charter, as written by the company, “extensions . . . by law provided,” which gives to the corporation the advantage which many courts and writers have found in the distinction between the right of “extension” and the right of “renewal” of a contract, the latter indicating an intention to resort to a new grant for the future, while the former contemplates “a prolongation, a lengthening out,” of a grant previously made. This distinction is perhaps too subtle to serve the ends of substantial justice in practical affairs, but apparently the authors of the charter which we are considering thought it a refinement which it was worth their while to lay hold upon. *Whalen v. Manley*, 68 W. Va. 328, 69 S. E. 843; *Leavitt v. Maykel*, 203 Mass. 506, 133 Am. St. Rep. 323, 89 N. E. 1056, and authorities cited.

The district court finds its conclusive authority for holding the grant to be, in effect, a perpetual one in *Owensboro v. Cumberland Teleph. & Teleg. Co.* 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988. An inspection of the ordinance there considered shows that there was no attempt whatever in terms to limit the duration of the grant; that no reference was made in the ordinance to the life of the corporation to which the grant was made, and that by express* terms the grant is declared not to be exclusive, and to be subject to alteration and amendment. While it is true that the members of this court differed as to the effect of the provision for alteration and amendment of the ordinance, yet the effect of these distinctions when grouped together is such, it seems to me, as to render the decision in that case wholly inapplicable to an ordinance such as we are considering here.

It may be that the settled conviction which I have that no legislator, congressman, or councilman would knowingly consent to grant perpetual rights in public streets to a private corporation has so darkened my understanding that I cannot properly appreciate the point of view of my associates and the reasons advanced in support of it; but, however this may be, the reasons stated in this opinion convince me that the grant under discussion was not

in effect a perpetual grant, but was for the period of twenty-five years, which expired on the 1st day of June, 1914.

Mr. Justice Brandeis concurs in this opinion.

Mr. Justice Day concurs in this dissent, upon the ground that, applying the well-settled rule that grants of the character here in question are to be given strict construction, and doubts as to their meaning resolved in favor of the public, and ambiguities are to be resolved in like manner, it is by no means clear that the city intended to grant to the Water Company a franchise for its then corporate life of twenty-five years and for subsequent renewals thereof, as the stockholders might determine; and he is of the opinion that the franchise expired at the end of the twenty-five-year period for which its charter provided when the grant was made.

(243 U. S. 108)

C. E. GANNON, Plff. in Err.,
v.

D. R. JOHNSTON and Wilburn Wolfe.

INDIANS $\S$ 15(1)—ALLOTMENTS—RESTRICTIONS ON ALIENATION—SURPLUS LANDS IN POSSESSION OF HEIRS.

1. Surplus lands when in the hands of the heirs of a Chickasaw allottee, as well as when in the ownership of the original allottee, are bound by all the restrictions on alienation imposed by §§ 15 and 16 of the Supplemental Agreement between the United States and the Choctaw and Chickasaw Indians, approved by the Act of July 1, 1902 (32 Stat. at L. 641, chap. 1362), which forbid the sale of lands allotted to members of those tribes except as provided in the act, and make the land alienable after the issuance of patent, except as to the homestead, one fourth in acreage in one year, one fourth in three years, and the balance in five years from the date of patent, with a proviso that the lands shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than the appraised value.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 37.]

COURTS $\S$ 394(16) — ERROR TO STATE COURT—SCOPE OF REVIEW—QUESTION OF LOCAL LAW.

2. A ruling of the highest state court adverse to the contention that a deed from an heir of a Chickasaw allottee was champertous does not involve the denial of a Federal right, so as to be reviewable in the Federal Supreme Court on writ of error.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1065.]

[No. 131.]

Argued and submitted December 22, 1916.
Decided March 6, 1917.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Jefferson County, in that state, in favor of plaintiffs in an action to recover certain lands originally allotted to a Chickasaw Indian. Affirmed.

See same case below, 40 Okla. 695, 140 Pac. 430, Ann. Cas. 1915D, 522.

The facts are stated in the opinion.

Messrs. H. A. Ledbetter, F. M. Adams, D. M. Bridges, and John Vertress for plaintiff in error.

Messrs. A. C. Cruce, F. E. Kennamer, Charles A. Coakley, Guy Green, and Cham Jones for defendants in error.

Mr. Justice Day delivered the opinion of the court:

The case in the state court was begun in the district court of Jefferson county, Oklahoma, in 1911, by D. R. Johnston, against C. E. Gannon, for the recovery of certain lands, originally allotted in 1903 to Agnes Wolfe, a full-blood Chickasaw Indian. Afterwards, by amended petition, Wilburn Wolfe was made a party plaintiff. To this amended petition answer was filed by Gannon, asserting his title, and upon issues being made up judgment was rendered in favor of Johnston and Wolfe as to the "surplus allotment" of said Agnes Wolfe, and of Gannon as to the "homestead allotment." Upon writ of error, the supreme court of Oklahoma affirmed the judgment (40 Okla. 695, 140 Pac. 430, Ann. Cas. 1915D, 522), and the case is here upon writ of error to the last-named court. The decision as to the surplus lands is all that is called in question.

The lands in controversy were allotted to Agnes Wolfe, the certificate of allotment bearing date July 7th, 1903; the patent was signed by the governor September 12th, 1905, and approved by the Secretary of the Interior October 7th, 1905. Upon her death, in 1903, the title passed to her brother and sole heir at law, Wilburn Wolfe, defendant in error here. The supreme court finds that it fairly appears from the record that the allotment was selected in the lifetime of Agnes Wolfe.

Upon October 13th, 1903, for a consideration of \$1,050, Wilburn Wolfe executed and delivered to one A. J. Waldock a warranty deed for the lands; several transfers of this title were made through various persons and corporations until, on November 30th, 1907, it was acquired, by warranty deed, and for a good and valuable consideration, by C. E. Gannon, plaintiff in error. Since

that date he has been in possession and control of the lands and has received the profits therefrom, either personally or by agents and tenants.

Upon January 4th, 1909, Wilburn Wolfe executed and delivered to D. R. Johnston a warranty deed for the lands in controversy, which deed was approved by the county judge of Pontotoc county, Oklahoma, on March 23d, 1909, and by the Secretary of the Interior on July 2d, 1910, in accordance with the laws of Congress, and it is through this deed that Johnston asserts his title.

The correctness of the decision of the supreme court of Oklahoma turns upon the question whether, when Wilburn Wolfe made his deed to A. J. Waldock, Wolfe was competent to convey title to the surplus lands, it being conceded that the title of the plaintiff in error was derived through the grantee in the Waldock deed.

This inquiry involves a consideration of §§ 11, 12, 15, and 16 of the supplemental agreement between the United States and the Choctaw and Chickasaw Indians, approved July 1st, 1902 (32 Stat. at L. 641, chap. 1362). Section 11 provides for allotting to each member of these tribes land equal in value to 320 acres of the average allottable land, and to each freedman land equal in value to 40 acres of the average allottable land. Section 12 provides that at the time of the selection each member of the tribes shall designate as a homestead out of such allotment 160 acres, which shall be inalienable "during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead." Sections 15 and 16 are as follows:

"15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided.

"16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One fourth in acreage in one year, one fourth in acreage in three years, and the balance in five years; in each case from date of patent: Provided, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw*and Chickasaw tribal governments for less than its appraised value."

The provisions of these sections, it seems to us, lead to the conclusion that Congress

intended to make them binding upon the surplus lands not only in the lifetime of the allottee, but as well during the periods named when the lands might descend as in this case to and be owned by a member of the tribe. Section 15 is positive in its requirement that lands allotted to members shall not be sold except as in the act provided. Section 16 makes the land alienable after the issuance of patent, except as to the homestead, not involved here, one fourth in acreage in one year, one fourth in three years, and the balance in five years from the date of the patent, and provides that the lands shall not be alienable by the allottee "or his heirs" at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than the appraised value.

It seems quite clear that in thus enacting a statute for the protection of a dependent people, Congress intended to bind the surplus lands in the hands of the heirs as well as when in the ownership of the original allottee, and to make such land inalienable during the periods named. Congress intended to prevent improvident sales of the lands, and distributed the right of alienation over a period of years, giving the right to sell at the appraised value and in the quantities named. In view of the positive provision of § 15, and its prohibition of alienation except as permitted in the act, we think Congress manifested its intention to make any other alienation void.

Counsel for plaintiff in error rely very much in support of their contentions upon the case of Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494. But that case dealt with an allotment of lands under § 22, where provision is made for allotment in the right of a member of the tribe who has died subsequently to the ratification of the agreement*and before receiving an allotment. Because of the difference between § 22 and the other sections it was held that there was no restriction upon the right of the heirs to make the conveyance in question.

The later case of Bowling v. United States, 233 U. S. 528, 58 L. ed. 1080, 34 Sup. Ct. Rep. 659, dealt with restrictions like those under consideration now. The Secretary of the Interior was authorized to make an allotment to each member of the tribe, subject to the restriction that the land should not be subject to alienation for the period of twenty-five years from the date of the issuance of the patents, and that the patents should recite in the body thereof that the land described and conveyed should not be alienated for twenty-five years from its date, and that any contract or agreement to sell or convey such allotments so patented, en-

tered into before the expiration of said term of years, should be null and void. Of such restrictions, Mr. Justice Hughes, who also wrote the opinion in the Mullen Case, speaking for the court, said, at page 535:

"The question, then, is, whether the restriction imposed by the act of 1889 was a merely personal one, operative only upon the allottee, or ran with the land, binding his heirs as well. This must be answered by ascertaining the intent of Congress as expressed in the statute. The restriction was not limited to 'the lifetime of the allottee,' as in *Mullen v. United States*, 224 U. S. 448, 453, 56 L. ed. 834, 839, 32 Sup. Ct. Rep. 494, nor was the prohibition directed against conveyances made by the allottee personally. Congress explicitly provided that 'the land so allotted' should not be subject to alienation for twenty-five years from the date of patent. 'Said lands so allotted and patented' were to be exempt 'from levy, sale, taxation, or forfeiture for a like period of years.' The patent was expressly to set forth that 'the land therein described and conveyed' should not be alienated during this period, and all contracts 'to sell or convey such land' which should be entered into 'before the expiration of said term of years' were to be absolutely void. These reiterated statements of the restriction clearly define its scope and effect. It bound the land for the time stated, whether in the hands of the allottee or of his heirs."

We think this principle is controlling here, and that it was the intention of Congress to make a restriction which should bind the surplus lands, whether in the hands of the original allottee in his lifetime or of his heirs after the decease of the original allottee during the periods named. The restriction was upon alienation of the lands as

such, and was not merely personal to the allottee any more than it was in the *Bowling Case*.

In the Act of 1906, validating conveyances made by the members of the Five Civilized Tribes (34 Stat. at L. 137, chap. 1876), where it was provided that conveyances made by members of the Five Civilized Tribes subsequent to selection of allotment and removal of restrictions, where patents thereafter issue, should not be declared invalid solely because the conveyances were made prior to the issuance and delivery of the patents, it was nevertheless provided that deeds executed or contracts entered into before the removal of restrictions should be null and void.

A contention that many investments have been made upon a construction of the law differing from that given in this case by the supreme court of Oklahoma, and that such construction and the common understanding of the bar have operated to establish a rule of property which cannot be changed, was denied by the supreme court of Oklahoma, and rightly so. The matters relied upon were inadequate to overcome the meaning of the statutory provisions in question.

A contention that the deed from Wolfe to Johnston was champertous within the statute of the state was considered and decided by the supreme court of Oklahoma* in the light of its own and other decisions, and the holding of the court did not, in our opinion, involve the denial of a Federal right such as would make that ruling reviewable here.

We think the Federal questions involved were correctly decided, and affirm the judgment of the Supreme Court of Oklahoma.

Affirmed.

(243 U. S. 114)

CHARLES H. BAKER, Algernon S. Norton, and Seattle Water Front Realty Company, Appts.,

v.

JOHN W. SCHOFIELD, as Receiver of the Merchants' National Bank of Seattle.

APPEAL AND ERROR ⇨1008(1) — **REVIEW OF FACTS—CONCURRENT FINDINGS.**

1. Concurrent findings of the two lower courts as to the establishment of a secret trust will not be disturbed by the Federal Supreme Court unless clearly shown to be erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3960.]

BANKS AND BANKING ⇨287(3)—**RECEIVERS—NATIONAL BANK—BREACH OF DUTY—SECRET TRUST.**

2. A secret trust reserved by the receiver of an insolvent national bank in his own favor when assigning, as such receiver, a contract by which the bank undertook to purchase certain lands from the state, is fraudulent, and a gross breach of the receiver's duty.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1094-1096.]

ESTOPPEL ⇨59—**RECEIVER—PROFITING BY OWN WRONG.**

3. A receiver of an insolvent national bank, who, acting upon the assumption that the bank owned a contract for the purchase of certain lands from the state, undertook to assign such contract ostensibly for the benefit of the bank, under an order of court invoked by him, but reserving a secret trust in his own favor, cannot question the authority of the bank to make the purchase, or of the Comptroller of the Currency to approve it, or of the court to order its sale.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 146, 147.]

BANKS AND BANKING ⇨287(4)—**NATIONAL BANKS — RECEIVERS — LACHES — KNOWLEDGE—FRAUD.**

4. There can be no laches in failing to bring suit founded upon the acquisition of property by the former receiver of a national bank by virtue of a secret trust reserved in his own favor when assigning, as such receiver, a contract by which the bank undertook to purchase certain lands from the state, until knowledge of this fraudulent transaction, or facts equivalent thereto, is brought home to those authorized to act.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1097-1104, 1126, 1127.]

ADVERSE POSSESSION ⇨84—**COLOR OF TITLE—GOOD FAITH.**

5. The seven years' limitation prescribed by Rem. & Bal. Code (Wash.) § 789, in favor of persons in the actual and notorious possession of land under claim of title in good faith, has no application to a former receiver of a national bank who has acquired title by virtue of a secret trust reserved in his own favor when assigning, as such receiver, a contract by which the bank undertook to purchase certain lands from the state.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 488-500.]

[No. 133.]

Submitted January 15, 1917. Decided March 6, 1917.

APPPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the District Court for the Western District of Washington in favor of the receiver of a national bank in an action to establish a trust in certain real property in his favor as such receiver, and to compel a conveyance thereof. Affirmed.

See same case below, 136 C. C. A. 320, 221 Fed. 322.

The facts are stated in the opinion.

Messrs. B. S. Grosscup and Corwin S. Shank for appellants.

Messrs. Frederick Bausman, R. P. Oldham, and R. C. Goodale for appellee.

* Mr. Justice Day delivered the opinion of the court:

This is an action by John W. Schofield, as receiver of the Merchants' National Bank of Seattle, Washington, insolvent since 1895, against Charles H. Baker, receiver of the bank from 1895 to 1899, and others, seeking a decree declaring the defendants to be holders of certain real property in Seattle in trust for the plaintiff, and asking a conveyance thereof to the plaintiff.

The property in controversy is block 430 of Seattle tide lands, a tract of some 12 acres, and the leasehold of the harbor area lying in front of that block. In conformity with the provisions of the state law, the Merchants' National Bank had, prior to its failure, made application to purchase these lands. After the failure and the appointment of Charles H. Baker, receiver, this application was accepted by the State Board of Land Commissioners, and upon January 12, 1897, a contract was entered into between the state of Washington and the bank, through the receiver, by which the state agreed to sell and the bank to purchase block 430 of Seattle tide lands for \$1,488, payable in ten annual instalments,

*subject to all liens for filling, and all taxes and assessments that might be levied or assessed on the land, and with a forfeiture clause in case the bank should fail to pay any of the amounts, either principal, interest, taxes, or assessments, when the same should become due and for six months thereafter. Permission to make this contract was obtained by the receiver from the Comptroller of the Currency, and thereafter partial payments were made upon the contract.

Upon October 6, 1897, by order of the United States circuit court, upon the receiver's petition to that effect, he was authorized to sell at private sale certain doubtful personal assets of the defunct

bank, and thereafter, Baker, as receiver, assigned to S. G. Simpson the contract above mentioned for the consideration of \$198.30, the transfer being approved by the Commissioner of Public Lands.

The assignment authorized the state of Washington to receive from Simpson, or his assigns, the performance of all covenants and agreements specified in the contract to be performed by the bank, and upon such performance to execute to him a patent for such tide land. By virtue of the ownership by Simpson of the contract to purchase tide lands block No. 430, he became entitled, under the laws of the state of Washington, to the preference right to lease certain harbor area adjacent and appurtenant to block No. 430. Upon the purchase by Simpson of the contract to purchase the tide lands, there was issued to him by the state of Washington a certain lease, designated "harbor lease No. 181," covering the harbor area appurtenant to the block.

In March, 1899, the contract between the bank and the state of Washington for the purchase of block No. 430, together with the harbor lease, was transferred by Simpson to Baker in his personal capacity, the record title continuing in the name of Simpson. On August 11, 1905, Simpson, acting for and on behalf of Baker, assigned the contract for the purchase of block No. 430, together with harbor lease No. 181, to one Norton, the consideration named being \$1. This assignment contained the same authorization as to the patent to be issued by the state as was contained in the assignment to Simpson. On October 16, 1905, the state of Washington issued to Norton a patent covering block No. 430, with the exception of a strip of land, 30 feet wide, which had been granted to a railroad company. In August, 1907, there was organized under the laws of the state of Washington the Seattle Water Front Realty Company. Upon incorporation of this company, Norton conveyed to it block No. 430, together with harbor lease No. 181, in payment for the issue of its capital stock of \$250,000. About 95 per cent of the stock was issued to Baker, or to others, who held for him.

In April, 1899, and a month after receiving the assignment from Simpson, Baker resigned as receiver; whereupon A. W. Frater was appointed receiver. On February 12, 1913, Frater resigned, and the present plaintiff was appointed receiver in his stead, and this suit was immediately begun.

Under this state of facts, the district court entered a decree adjudging that the assignment by Baker to Simpson was fraudulent, and was made for the sole use and benefit of Baker, and that the assign-

ment of the contract to the defendant Norton by Simpson, and the conveyance of Norton to the Seattle Water Front Realty Company, were null and void. The decree provided that the Realty Company should execute and deliver to the clerk of the court below, for the benefit of the plaintiff, as receiver, a deed covering its interest in block No. 430 and the assignment of harbor lease No. 181, and the receiver was directed to pay to the clerk of the court, for the Realty Company, the sum of \$10,977.13, being the amount of the payment, with interest, made by the defendants to the state of Washington under the contract for the purchase of block No. 430, and upon the harbor lease, and for taxes. 212 Fed. 504. Upon appeal, this decree was affirmed by the circuit court of appeals for the ninth circuit. 136 C. C. A. 320, 221 Fed. 322.

Both the district court and the circuit court of appeals found that the sale from Baker to Simpson was only colorable, and that Simpson purchased the property for Baker. Our consideration of the evidence must be governed by the well-settled rule in this court that, when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous. *Stuart v. Hayden*, 169 U. S. 1, 14, 42 L. ed. 639, 643, 18 Sup. Ct. Rep. 274; *Baker v. Cummings*, 169 U. S. 189, 198, 42 L. ed. 711, 715, 18 Sup. Ct. Rep. 367; *Towson v. Moore*, 173 U. S. 17, 24, 43 L. ed. 597, 600, 19 Sup. Ct. Rep. 332; *Ily-Yu-Tse-Mil-Kin v. Smith*, 194 U. S. 401, 412, 48 L. ed. 1039, 1045, 24 Sup. Ct. Rep. 676; *Dun v. Lumbermen's Credit Assn.* 209 U. S. 20, 23, 52 L. ed. 663, 665, 28 Sup. Ct. Rep. 335, 14 Ann. Cas. 501; *Texas & P. R. Co. v. Railroad Commission*, 232 U. S. 338, 339, 58 L. ed. 630, 34 Sup. Ct. Rep. 438; *Washington Securities Co. v. United States*, 234 U. S. 76, 78, 58 L. ed. 1220, 1222, 34 Sup. Ct. Rep. 725; *Gilson v. United States*, 234 U. S. 380, 383, 58 L. ed. 1361, 1362, 34 Sup. Ct. Rep. 778. The concurrent decisions of the courts upon the establishment of a trust is a question of fact, which will be followed unless shown to be clearly erroneous. *Brainard v. Buck*, 184 U. S. 99, 46 L. ed. 449, 22 Sup. Ct. Rep. 458.

The various defenses urged in the court below and involved in the points argued in this court for the appellants must be considered, in view of this finding of fact as to the nature of the transfer of Baker, as receiver, to Simpson.

That the secret arrangement between Baker and Simpson was fraudulent and a gross breach of the receiver's duty is too plain to require detailed consideration. *Michoud v. Girod*, 4 How. 503, 555, 11 L.

ed. 1076, 1099; *Magruder v. Drury*, 235 U. S. 106, 119, 59 L. ed. 151, 156, 35 Sup. Ct. Rep. 77.

*119 It is urged that the contract of purchase was ultra vires the corporate powers of the bank. The court of appeals, in deciding this point, referred to the decisions of this court which have held that objections to the passing of title in conveyances to national banks, although made in excess of any legal authority given the bank by the law, can only be made by the government in a direct proceeding, and will not defeat the vesting of the title in the bank when it takes a conveyance in good faith, for a valuable consideration. *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Reynolds v. First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66; *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. Rep. 129.

But, without questioning the correctness of this conclusion, we are of opinion that the authority of the bank to make this purchase, or of the Comptroller to approve of it, or of the court to order the sale of this asset upon the petition of Baker, as receiver, need not necessarily be considered in determining the right to recover in this proceeding.

Upon the plainest principles governing the relation of the parties here, in view of the finding that there was a secret trust in Baker's favor in the transfer to Simpson, Baker could not be heard to question the authority by which he acquired the property ostensibly for the benefit of his trust, but in reality for himself, in breach of his trust. To sanction this would be to permit Baker to take advantage of his own wrong. It is not for him to say that he can acquire title in fraud of his trust because the bank could not legally acquire it, or the Comptroller approve or the court authorize, its sale. As the facts are found, Baker assumed to act upon the understanding that the bank owned the contract of purchase, and under an order invoked by him, he undertook to sell it for the benefit of the trust, but in reality conveyed it to one who secretly held it for him. Under such circumstances, the trustee can take nothing by his wrongful act, and can be compelled to restore the property to the authorized representative of the trust estate

*120 *Plaintiff relies greatly upon *Case v. Kelly*, 133 U. S. 21, 33 L. ed. 513, 10 Sup. Ct. Rep. 216, where certain officers of a railroad had procured conveyances of lands

intended to be used in the construction of the road, and had taken title to themselves personally, and the railroad was seeking to recover the lands, although forbidden by its charter to take and hold title to such lands. In this case, Mr. Justice Miller, speaking for the court, said:

"We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids."

But the present case is not so. Here the state has parted with its title, and made the contract to convey to the bank at the instance of the receiver, who now seeks to hold the title for his own benefit, in breach of his trust.

As to the defense of laches, both courts below found that the facts show entire want of knowledge on the part of the present plaintiff or his predecessor in office of the secret arrangement by which Baker acquired the title to the contract of purchase. Until knowledge of this fraudulent transaction, or facts equivalent thereto, was brought home to those authorized to act, there could be no laches in the failure to prosecute the suit.

Nor do we find merit in the contention that the seven-year Statute of Limitations (Rem. & Bal. Code [Wash.] § 789) in favor of persons in the actual and notorious possession of lands, under claim of title in good faith, has any application here. Under the facts found Baker does not come within the class protected by this statute

Other points are urged, but it is enough to say that we find no error in the decree of the Circuit Court of Appeals, and it is affirmed.

(243 U. S. 121)

WILLIAM R. STAATS COMPANY and
Title Insurance & Trust Company, Appts.,
v.

SECURITY TRUST & SAVINGS BANK,
as Trustee, etc.

BANKRUPTCY — 456—CIRCUIT COURT OF
APPEALS—BANKRUPTCY CASE.

No appeal can be taken to the Federal Supreme Court from a decree of a circuit court of appeals in a suit by a trustee in bankruptcy under the Bankrupt Act of July 1, 1898 (30 Stat. at L. 562, chap. 541, Comp. Stat. 1913, § 9644), § 60b, to set aside a conveyance from the bankrupt as an unlawful preference, since the passage of the Act of January 28, 1915 (38 Stat. at L. 804, chap. 22), making final (except for a possible review by certiorari), "the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the Bankruptcy Act, and in all controversies arising in such proceedings and cases."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 916.]

[No. 608.]

Submitted January 10, 1917. Decided March 6, 1917.

APPPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which reversed a decree of the District Court for the Southern District of California, dismissing the complaint in a suit by a trustee in bankruptcy to set aside a conveyance from the bankrupt as an unlawful preference, and remanded the case, with directions to enter judgment in favor of the complainant. Dismissed for want of jurisdiction.

See same case below, 147 C. C. A. 400, 233 Fed. 514.

Messrs. H. W. O'Melveny, Alexander Britton, and Evans Browne for appellants.

Messrs. Jefferson P. Chandler and W. T. Craig for appellee.

* Memorandum opinion, by direction of the court, by Mr. Justice Day:

This is a motion to dismiss the appeal in a suit brought originally in the United States district court for the southern district of California by the Security Trust & Savings Bank, as trustee in bankruptcy of the estate of Fielding J. Stilson Company, against William R. Staats Company and Title Insurance & Trust Company, the complaint alleging that the Stilson Company was adjudged a bankrupt on October 24th, 1912; that the Stilson Company made and delivered to the Title Insurance & Trust Company a deed of trust for certain realty, situated in the city of Los Ange-

les, to secure an indebtedness in the sum of \$3,870, due by the Stilson Company to the Staats Company; that the effect of this conveyance was to enable the Staats Company to receive a greater percentage of its indebtedness than other creditors of the same class, and that the conveyance was made with a view to giving a preference, in violation of the Bankruptcy Act, and a decree was prayed declaring the conveyance void and of no effect.

The suit was brought by authority of § 60b of the Bankruptcy Act of 1898 [30 Stat. at L. 562, chap. 541, Comp. Stat. 1913, § 9644]. On issues made, the case was referred to a special master, who found the conveyance by the Stilson Company to the Tile Insurance & Trust Company to have been made and received as security for an indebtedness in the sum of \$3,870, then due by the Stilson Company to the Staats Company, and that the same was an unlawful preference within the meaning*of the Bankruptcy Act. Upon exceptions to the master's report, the district court overruled some exceptions and sustained others, and dismissed the complaint. An appeal was taken to the circuit court of appeals for the ninth circuit, which court reached the conclusion that the conveyance in question was a preference within the meaning of the Bankruptcy Act, reversed the decree of the district court, and remanded the case to that court with directions to enter a judgment in favor of the complainant. 147 C. C. A. 400, 233 Fed. 514. Afterwards an appeal from this decree of the circuit court of appeals was allowed to this court.

We think it is plain that this appeal must be dismissed. The decree of the circuit court of appeals was made final by the Act of Congress of January 28, 1915 (38 Stat. at L. 804, chap. 22), and the only right of review in this court is by writ of certiorari. This act provides: "That the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceedings and cases shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such proceeding, case, or controversy unless the petition therefor is presented to the Supreme Court within three months from the date of such judgment or decree."

The language of this act is very comprehensive, and embraces proceedings and cases

arising under the Bankruptcy Act and controversies arising in such proceedings, and provides that the judgments and decrees of the circuit court of appeals in such controversies, proceedings, and cases shall be final.

* The case now under consideration is a controversy arising in a bankruptcy proceeding. *Hewitt v. Berlin Mach. Works*, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; *Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; *Tefft, W. & Co. v. Munsuri*, 222 U. S. 114, 56 L. ed. 118, 32 Sup. Ct. Rep. 67; *Barnes v. Pampel*, 113 C. C. A. 81 (C. C. A. 6th C.) 192 Fed. 525.

We find no merit in the contention that, after the passage of the Act of 1915, appellate proceedings in this court in such suits as this should continue to be controlled by the general provisions of the Judicial Code. This statute manifested the purpose of Congress to relieve this court from the necessity of considering cases of this character, except when brought here by writ of certiorari. *Central Trust Co. v. Lueders*, 239 U. S. 11, 60 L. ed. 119, 36 Sup. Ct. Rep. 1; *Shattuck v. Title Guaranty & Surety Co.* 239 U. S. 637, 60 L. ed. 480, 36 Sup. Ct. Rep. 446.

It follows that the motion to dismiss this appeal for want of jurisdiction must be granted.

Appeal dismissed.

(243 U. S. 124)

HANS BERG, Prize Master in Charge of the Prize Ship Appam, and L. M. von Schilling, Vice Consul of the German Empire, Appts.,

v.

BRITISH & AFRICAN STEAM NAVIGATION COMPANY. (No. 650.)

HANS BERG, Prize Master in Charge of the Prize Ship Appam, and L. M. von Schilling, Vice Consul of the German Empire, Appts.,

v.

HENRY G. HARRISON, Master of the Steamship Appam (No. 722.)

WAR ⚔16—VIOLATION OF NEUTRALITY — MAKING NEUTRAL PORT ASYLUM FOR PRIZE.

1. The neutrality of the United States, under the principles of international law, was violated by the action of a belligerent in bringing a prize captured at sea into a port of the United States under a prize crew, for the purpose of laying her up there indefinitely.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 80-84.]

WAR ⚔16—NEUTRALITY — VIOLATION— MAKING NEUTRAL PORT ASYLUM FOR PRIZE.

2. The failure of the United States to proclaim that its ports were not open to the reception of captured prizes does not

warrant the attempted use of one of its ports by a belligerent as a place in which to store a prize indefinitely,—especially where no means of taking it out are shown except by augmentation of the crew, which would be a clear violation of established rules of neutrality.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 80-84.]

WAR ⚔16—NEUTRALITY — VIOLATION— MAKING NEUTRAL PORT ASYLUM FOR PRIZE—EFFECT OF TREATY.

3. The bringing of a prize captured at sea by a German cruiser into a neutral port of the United States under a prize crew, for the purpose of laying her up there indefinitely, was not justified by the provision of art. 19 of the Treaty of July 11, 1799 (8 Stat. at L. 172), with Prussia, that vessels of war, public and private, of both parties, shall carry freely wheresoever they please the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others, and that such prizes shall not be arrested, searched, or put under legal process when they come to and enter the ports of the other party, but may freely be carried out again by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 80-84.]

WAR ⚔16—ADMIRALTY JURISDICTION — VIOLATION OF NEUTRALITY — RESTITUTION.

4. The admiralty courts of the United States have jurisdiction to order restitution to the private owners of a vessel and cargo brought into a port of the United States by a prize crew of a belligerent nation, for the purpose of laying her up there indefinitely, in violation of the rights of the United States as a neutral.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 80-84.]

WAR ⚔16 — ADMIRALTY JURISDICTION— VIOLATION OF NEUTRALITY—RESTITUTION —PENDENCY OF PROCEEDINGS IN FOREIGN PRIZE COURT.

5. The institution in a prize court of the captor nation of proceedings for the condemnation as a prize of a vessel brought into a port of the United States by a prize crew, for the purpose of laying her up there indefinitely, cannot oust the jurisdiction of an admiralty court of the United States to order restitution of the vessel and cargo to the private owners for such a violation of the rights of the United States as a neutral.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 80-84.]

[Nos. 650 and 722.]

Argued January 15 and 16, 1917. Decided March 6, 1917.

TWO APPEALS from the District Court of the United States for the Eastern

District of Virginia to review decrees for the restitution to the private owners of a vessel and cargo brought into a port of the United States in violation of the rights of the United States as a neutral. Affirmed.

See same case below, 234 Fed. 389.

The facts are stated in the opinion.

Messrs. Frederick W. Lehmann, John W. Clifton, Norvin R. Lindheim, Robert M. Hughes, and Walter S. Penfield, for appellants.

Messrs. Frederic R. Coudert, James K. Symmers, Howard Thayer Kingsbury, Herbert Barry, Floyd Hughes, Ralph James Bullowa, and Munroe Smith for appellees.

* Mr. Justice Day delivered the opinion of the court:

These are appeals from the district court of the United States for the eastern district of Virginia, in two*admiralty cases. No. 650 was brought by the British & African Steam Navigation Company, Limited, owner of the British steamship Appam, to recover possession of that vessel. No. 722 was a suit by the master of the Appam to recover possession of the cargo. In each of the cases the decree was in favor of the libellant.

The facts are not in dispute, and from them it appears: That during the existence of the present war between Great Britain and Germany, on the 15th day of January, 1916, the steamship Appam was captured on the high seas by the German cruiser, Moewe. The Appam was a ship under the British flag, registered as an English vessel, and is a modern cargo and passenger steamship of 7,800 tons burden. At the time of her capture she was returning from the West Coast of Africa to Liverpool, carrying a general cargo of cocoa beans, palm oil, kernels, tin, maize, sixteen boxes of specie, and some other articles. At the West African port she took on 170 passengers, eight of whom were military prisoners of the English government. She had a crew of 160 or thereabouts, and carried a 3-pound gun at the stern. The Appam was brought to by a shot across her bows from the Moewe, when about a hundred yards away, and was boarded without resistance by an armed crew from the Moewe. This crew brought with them two bombs, one of which was slung over the bow and the other over the stern of the Appam. An officer from the Moewe said to the captain of the Appam that he was sorry he had to take his ship, asked him how many passengers he had, what cargo, whether he had any specie, and how much coal. When the shot was fired across the bows of the Appam, the captain instructed the wireless operator not to touch the wireless instrument, and his officers not to let anyone touch the gun on board. The officers

and crew of the Appam, with the exception of the engine room force, thirty-five in number, and the second officer, were ordered on board the Moewe. The captain, officers, and crew of the Appam were sent below, where they were held until the evening of the 17th of January, when they and about 150 others, officers and crews of certain vessels previously sunk by the Moewe, were ordered back to the Appam and kept there as prisoners. At the time of the capture, the senior officer of the boarding party told the chief engineer of the Appam he was now a member of the German navy; if he did not obey orders his brains would be blown out, but if he obeyed, not a hair of his head should be touched. The Appam's officer was instructed to tell his staff the same thing, and if they did not obey orders they would be brought to the German officer and shot. Inquiries were made by the German officer in command of the Appam as to revolutions of the engines, the quantity of coal on hand and the coal consumption for different speeds, and instructions were given that steam be kept up handy, and afterwards the engineer was directed to set the engines at the revolutions required, and the ship got under way.

Lieutenant Berg, who was the German officer in command of the Appam after its capture, told the engineer on the second morning that he was then in charge of the ship, asked of him information as to fuel consumption, and said that he expected the engineer to help him all he could, and the more he did for him the better it would be for everybody on the ship. The engineer said he would, and did so. The engines were operated with a bomb secured to the port main injector valve, and a German sailor stationed alongside the bomb with a revolver. There was a guard below of four or five armed Germans, who were relieved from time to time, but did not interfere with the working of the ship. The German officer, Lieutenant Berg, gave directions as to working the engines, and was the only officer on board who wore a uniform.

*On the night of the capture, the specie in the specie room was taken on board the Moewe. After Lieutenant Berg took charge of the Appam, bombs were slung over her bow and stern, one large bomb, said to contain about 200 pounds of explosive, was placed on the bridge, and several smaller ones in the chart room. Lieutenant Berg informed the captain of the Appam, pointing to one of the bombs, "That is a bomb; if there is any trouble, mutiny, or attempt to take the ship, I have orders to blow up the ship instantly." He also said, "There are other bombs about the ship; I do not want to use them, but I shall be compelled to if there is any trouble." The bombs were kept

in the positions stated until the ship arrived at the Virginia Capes, when they were removed. Lieutenant Berg, on reaching Hampton Roads, asked the crew of the Appam to drop the anchor, as he had not men to do it.

During the trip to the westward, the officers and crew of the Appam were not allowed to see the ship's compass to ascertain her course, and all lights were obscured during the voyage. The German prisoners, with the exception of two who went on board the Moewe, were armed and placed over the passengers and crew of the Appam as a guard all the way across. For two days after the capture, the Appam remained in the vicinity of the Moewe, and then was started westward. Her course for the first two or three days was southwesterly, and afterwards westerly, and was continued until her arrival at the Virginia Capes on the 31st of January. The engine-room staff of the Appam was on duty operating the vessel across to the United States; the deck crew of the Appam kept the ship clean, and the navigation was conducted entirely by the Germans, the lookouts being mostly German prisoners.

At the time of the capture, the Appam was approximately distant 1,590 miles from Emden, the nearest German port; from the nearest available port, namely ^{*146}Punchello, in the Madeiras, 130 miles; from Liverpool, 1,450 miles; and from Hampton Roads, 3,051 miles. The Appam was found to be in first-class order, seaworthy, with plenty of provisions, both when captured and at the time of her arrival in Hampton Roads.

The order or commission delivered to Lieutenant Berg by the commander of the Moewe is as follows:

"Information for the American Authorities. The bearer of this, Lieutenant of the Naval Reserve, Berg, is appointed by me to the command of the captured English steamer Appam and has orders to bring the ship into the nearest American harbor and there to lay up. Kommando S. M. H. Moewe. Count Zu Dohna, Cruiser Captain and Commander. (Imperial Navy Stamp.) Kommando S. M. H. Moewe."

Upon arrival in Hampton Roads, Lieutenant Berg reported his arrival to the collector, and filed a copy of his instructions to bring the Appam into the nearest American port and there to lay up.

On February 2d, his Excellency, the German Ambassador, informed the State Department of the intention, under alleged treaty rights, to stay in an American port until further notice, and requested that the crew of the Appam be detained in the United States for the remainder of the war.

The prisoners brought in by the Appam

were released by order of the American government.

On February 16th, and sixteen days after the arrival of the Appam in Hampton Roads, the owner of the Appam filed the libel in case No. 650, to which answer was filed on March 3d. On March 7th, by leave of court, an amended libel was filed, by which the libellant sought to recover the Appam upon the claim that holding and detaining the vessel in American waters was in violation of the law of nations and the laws of the United States and of the neutrality of the United States. The answer of the respondents to the amended libel alleged that the Appam was brought in as a prize by a prize master, in reliance upon the Treaty of 1799 between the United States and Prussia [8 Stat. at L. 162]; that by the general principles of international law the prize master was entitled to bring his ship into the neutral port under these circumstances, and that the length of stay was not a matter for judicial determination; and that proceedings had been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the Appam as a prize of war; and averred that the American court had no jurisdiction.

The libel against the Appam's cargo was filed on March 13th, 1916, and answer filed on March 31st. During the progress of the case, libellant moved the court to sell a part of the cargo as perishable; on motion the court appointed surveyors, who examined the cargo and reported that the parts so designated as perishable should be sold; upon their report orders of sale were entered, under which such perishable parts were sold, and the proceeds of that sale, amounting to over \$600,000, are now in the registry of the court, and the unsold portions of the cargo are now in the custody of the marshal of the eastern district of Virginia.

The argument in this case has taken wide range, and orally and in printed briefs counsel have discussed many questions which we do not consider necessary to decide in determining the rights involved in these appeals.

From the facts which we have stated, we think the decisive questions resolve themselves into three: First, was the use of an American port, under the circumstances shown, a breach of this nation's neutrality under the principles of international law? Second, was such use of an American port justified by the existing treaties between the German government and our own? Third, was there jurisdiction and right to condemn the Appam and her cargo in a court of admiralty of the United States? ^{*148}

*It is familiar international law that the

usual course after the capture of the Appam would have been to take her into a German port, where a prize court of that nation might have adjudicated her status, and, if it so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port, nor to the nearest port accessible of a neutral power, but was ordered to, and did, proceed over a distance of more than 3,000 miles, with a view to laying up the captured ship in an American port.

It was not the purpose to bring the vessel here within the privileges universally recognized in international law, i. e., for necessary fuel or provisions, or because of stress of weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. The purpose for which the Appam was brought to Hampton Roads, and the character of the ship, are emphasized in the order which we have quoted, to take her to an American port and there lay her up, and in a note from his Excellency, the German Ambassador, to the Secretary of State, in which the right was claimed to keep the vessel in an American port until further notice (Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, Department of State, European War No. 3, page 331), and a further communication from the German Ambassador, forwarding a memorandum of a telegram from the German government concerning the Appam, (*Idem*, page 333), in which it was stated:

"Appam is not an auxiliary cruiser, but a prize. Therefore she must be dealt with according to article 19 of Prusso-American Treaty of 1799. Article 21 of Hague Convention concerning neutrality at sea is not applicable, as this convention was not ratified by England and is therefore not binding in present war according to article 28. The above-mentioned article 19 authorizes a prize ship to remain in American ports as long as she pleases. Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to English."

In view of these facts, and this attitude of the Imperial government of Germany, it is manifest that the Appam was not brought here in any other character than as a prize, captured at sea by a cruiser of the German navy, and that the right to keep her here, as shown in the attitude of the German government and in the answer to the libel, was rested principally upon the Prussian-American Treaty of 1799.

The principles of international law recognized by this government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents.

If such use were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

From the beginning of its history this country has been careful to maintain a neutral position between warring governments, and not to allow the use of its ports in violation of the obligations of neutrality; nor to permit such use beyond the necessities arising from the perils of the seas or the necessities of such vessels as to seaworthiness, provisions, and supplies. Such usage has the sanction of international law (*Dana's Note to Wheaton on International Law*, 1866, 8th Am. ed. § 391), and accords with our own practice (7 *Moore's Digest of International Law*, 936-938).

A policy of neutrality between warring nations has been maintained from 1793 to this time. In that year President Washington firmly denied the use of our ports to the French Minister for the fitting out of privateers to destroy English commerce. This attitude led to the enactment of the Neutrality Act of 1794, afterwards embodied in the Act of 1818, enacting a code of neutrality, which, among other things, inhibited the fitting out and arming of vessels; the augmenting or increasing of the force of armed vessels; or the setting on foot in our territory of military expeditions; and empowering the President to order foreign vessels of war to depart from our ports, and compelling them so to do when required by the law of nations. 4 *Moore, International Arbitrations*, 3967 et seq.

This policy of the American government was emphasized in its attitude at the Hague Conference of 1907. Article 21 of the Hague Treaty provides:

"A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

Article 22 provides:

"A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in article 21."

To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations. They were not ratified by the British government. This government

refused to adhere to article 23, which provides:

"A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.

"If the prize is convoyed by a warship, the prize crew may go on board the convoying ship.

"If the prize is not under convoy, the prize crew are left at liberty."

And in the proclamation of the convention the President recited the resolution of the Senate adhering to it, subject to "the reservation and exclusion of its article 23, and with the understanding that the last clause of article 3 of the said convention implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." 36 Stat. at L. 2438.

While this treaty may not be of binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestered pending the decision of a prize court. From the history of the conference it appears that the reason for the attitude of the American delegates in refusing to accept article 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port. See Scott, Peace Conferences, 1899-1907, vol. 2, pp. 237 et seq.

Much stress is laid upon the failure of this government to proclaim that its ports were not open to the reception of captured prizes, and it is argued that, having failed to interdict the entrance of prizes into our ports, permission to thus enter must be assumed. But, whatever privilege might arise from this circumstance, it would not warrant the attempted use of one of our ports as a place in which to store prizes indefinitely, and certainly not where no means of taking them out are shown except by the augmentation of her crew, which would be a clear violation of established rules of neutrality.

As to the contention on behalf of the appellants that article 19 of the Treaty of

1799 [8 Stat. at L. 172] justifies bringing in and keeping the Appam in an American port, in the situation which we have outlined, it appears that, in response to a note from his Excellency, the German Ambassador, making that contention, the American Secretary of State, considering the treaty, announced a different conclusion (Diplomatic Correspondence with Belligerent Governments, supra, pages 335 et seq.); and we think this view is justified by a consideration of the terms of the treaty. Article 19 of the Treaty of 1799, using the translation adopted by the American State Department, reads as follows:

"The vessels of war, public and private, of both parties, shall carry [conduire] freely, wheresoever they please, the vessels and effects taken [pris] from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes [prises] be arrested, searched or put under legal process, when they come to and enter the ports of the other party, but may freely be carried [conduites] out again at any time by their captors [le vaisseau preneur] to the places expressed in their commissions, which the commanding officer of such vessel [le dit vaisseau] shall be obliged to show. (But conformably to the treaties existing between the United States and Great Britain, no vessel [vaisseau] that shall have made a prize [prise] upon British subjects shall have a right to shelter in the ports of the United States, but if [il est] forced therein by tempests, or any other danger, or accident of the sea, they [il sera] shall be obliged to depart as soon as possible.)" The provision concerning the treaties between the United States and Great Britain is no longer in force, having been omitted by the Treaty of 1828 [8 Stat. at L. 378]. See Compilation of Treaties in Force, 1904, pages 641 and 646.

We think an analysis of this article makes manifest that the permission granted is to vessels of war and their prizes, which are not to be arrested, searched, or put under legal process when they come into the ports of the high contracting parties, to the end that they may be freely carried out by their captors to the places expressed in their commissions, which the commanding officer is obliged to show. When the Appam came into the American harbor she was not in charge of a vessel of war of the German Empire. She was a merchant vessel, captured on the high seas and sent into the American port with the intention of being kept there indefinitely, and without any means of leaving that port for another, as contemplated in the treaty, and required to be shown in the commission of the vessel

bringing in the prize. Certainly such use of a neutral port is very far from that contemplated by a treaty which made provision only for temporary asylum for certain purposes, and cannot be held to imply an intention to make of an American port a harbor of refuge for captured prizes of a belligerent government. We cannot avoid the conclusion that in thus making use of an American port there was a clear breach of the neutral rights of this government, as recognized under principles of international law governing the obligations of neutrals, and that such use of one of our ports was in no wise sanctioned by the Treaty of 1799.

It remains to inquire whether there was jurisdiction and authority in an admiralty court of the United States, under these circumstances, to order restoration to an individual owner of the vessel and cargo.

The earliest authority upon this subject in the decisions of this court is found in the case of *Glass v. The Betsy*, 3 Dall. 6, 1 L. ed. 485, decided in 1794, wherein it appeared that the commander of the French privateer, *The Citizen Genet*, captured as a prize on the high seas the sloop *Betsy*, and sent the vessel into Baltimore, where the owners of the sloop and cargo filed a libel in the district court of Maryland, claiming restitution because the vessel belonged to subjects of the King of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The district court denied jurisdiction, the circuit court affirmed the decree, and an appeal was prosecuted to this court. The unanimous opinion was announced by Mr. Chief Justice Jay, holding that the district courts of the United States possessed the powers of courts of admiralty, whether sitting as an instance or as a prize court, and sustained the jurisdiction of the district court of Maryland, and held that that court was competent to inquire into and decide whether restitution should be made to the complainants conformably to the laws of nations and the treaties and laws of the United States.

The question came again before this court in the case of *The Santissima Trinidad*, decided in 1822, 7 Wheat. 283, 5 L. ed. 454. In that case it was held that an illegal capture would be invested with the character of a tort, and that the original owners were entitled to restitution when the property was brought within our jurisdiction. The opinion was delivered by Mr. Justice Story, and, after a full discussion of the matter, the court held that such an illegal capture, if brought into the jurisdiction of the courts of the United States, was subject to condemnation and restitution to the owners, and the learned justice said:

"If, indeed, the question were entirely

new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled that, as between the captors and the captured,* the question can never be litigated. It can arise only upon a claim of the neutral sovereign, asserted in his own courts or the courts of the power having cognizance of the capture itself for the purposes of prize. And, by analogy to this course of proceeding, the interposition of our own government right seem fit to have been required before cognizance of the wrong could be taken by our courts. But the practice from the beginning in this class of causes, a period of nearly thirty years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy." Page 349.

"Whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality; and if the goods are landed from the public ship in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge that, if illegally captured, they shall be exempted from the ordinary operation of our laws." Page 354.

In the subsequent cases in this court this doctrine has not been departed from. *L'Invincible*, 1 Wheat. 238, 258, 4 L. ed. 80, 84; *The Estrella*, 4 Wheat. 298, 308-311, 4 L. ed. 574, 577, 578; *La Amistad De Rues*, 5 Wheat. 385, 390, 5 L. ed. 115, 116.

It is insisted that these cases involve illegal captures at sea, or violations of neutral obligation, not arising because of the use of a port by sending in a captured vessel and keeping her there in violation of our rights as a neutral. But we are at a loss to see any difference in principle between such cases and breaches of neutrality of the character here involved in undertaking to make of an American port a depository of captured vessels with a view to keeping them there indefinitely. Nor can we consent to the insistence of counsel for appellant that the prize court of the German Empire has exclusive jurisdiction to determine the fate of the *Appam* as lawful prize. The vessel

was in an American port, and, under our practice, within the jurisdiction and possession of the district court, which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal, under such circumstances, could not oust the jurisdiction of the local court and thereby defeat its judgment. The Santissima Trinidad, *supra*, p. 355.

Were the rule otherwise than this court has frequently declared it to be, our ports might be filled, in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligation which have controlled this country from the beginning.

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It follows that the decree in each case must be affirmed.

(243 U. S. 90)

HENRY D. McDONALD, Plff. in Err.,
v.

F. A. MABEE.

CONSTITUTIONAL LAW § 309(2)—DUE PROCESS OF LAW — PERSONAL JUDGMENT AGAINST ABSENT DEFENDANT — SERVICE BY PUBLICATION.

A personal judgment for money against a person who has left the state not intending to return may not, consistently with due process of law, be rendered upon service by publication in a local newspaper, and such judgment is not merely voidable, but absolutely void.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930.]

[No. 135.]

Submitted January 31, 1917. Decided March 6, 1917.

IN ERROR to the Supreme Court of the State of Texas to review a judgment which reversed a judgment of the Court of Civil Appeals of that state, reversing a judgment of the County Court of Lamar County in favor of defendant in a suit upon a promissory note. Reversed.

See same case below, — Tex. —, 175 S. W. 676.

The facts are stated in the opinion.

Mr. Henry D. McDonald, in propria persona, and Mr. A. P. Park for plaintiff in error.

Mr. Joseph W. Bailey for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit upon a promissory note. The only defense now material is that the plaintiff had recovered a* judgment upon the same note in a previous suit in Texas which purported to bind the defendant personally as well as to foreclose a lien by which the note was secured. When the former suit was begun, the defendant, Mabbee, was domiciled in Texas, but had left the state with intent to establish a home elsewhere, his family, however, still residing there. He subsequently returned to Texas for a short time and later established his domicile in Missouri. The only service upon him was by publication in a newspaper once a week for four successive weeks after his final departure from the state, and he did not appear in the suit. The supreme court of the state held that this satisfied the Texas statutes, and that the judgment was a good personal judgment, overruling the plaintiff's contention that to give it that effect was to deny the constitutional right to due process of law. — Tex. —, 175 S. W. 676.

The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 353, 57 L. ed. 867, 874, 33 Sup. Ct. Rep. 550; *Pennsylvania F. Ins. Co. v. Gold Issue Min. & Mill. Co.* decided to-day [243 U. S. 93, 61 L. ed. 610, 37 Sup. Ct. Rep. 344]. No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice. *Douglas v. Forrest*, 4 Bing. 686, 700, 701, 130 Eng. Reprint, 933, 1 Moore & P. 663, 6 L. J. C. P. 157, 29 Revised Rep. 695; *Becquet v. MacCarthy*, 2 Barn. & Ad. 951, 959, 109 Eng. Reprint, 1396; *Maubourquet v. Wyse*, Ir. Rep. 1 C. L. 471, 481. And in states bound together by a Constitution and subject to the 14th Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close

adhesion to fact. *Baker v. Baker, E. & Co.* Jan. 8, 1917 [242 U. S. 394, 61 L. ed. 386, 37 Sup. Ct. Rep. 152].

* There is no dispute that service by publication does not warrant a personal judgment against a nonresident. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. *Riverside & D. River Cotton Mills v. Menefee*, 237 U. S. 189, 59 L. ed. 910, 35 Sup. Ct. Rep. 579. Some language of *Pennoyer v. Neff* would justify the extension of the same principle to absent parties, but we shall go no farther than the precise facts of this case require. When the former suit was begun, Mabee, although technically domiciled in Texas, had left the state, intending to establish his home elsewhere. Perhaps in view of his technical position and the actual presence of his family in the state, a summons left at his last and usual place of abode would have been enough. But it appears to us that an advertisement in a local newspaper is not sufficient notice to bind a person who has left a state, intending not to return. To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done. We repeat, also, that the ground for giving subsequent effect to a judgment is that the court rendering it had acquired power to carry it out; and that it is going to the extreme to hold such power gained even by service at the last and usual place of abode.

Whatever may be the rule with regard to decrees concerning status or its incidents (*Haddock v. Haddock*, 201 U. S. 562, 569, 632, 50 L. ed. 867, 869, 895, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1), an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the state as it is outside of it (201 U. S. 567, 568). If the former judgment had been sued upon in another state by the plaintiff, we think that the better opinion would justify a denial of its effect. If so, it was no more effective in Texas. *De la Montanya v. De la Montanya*, 112 Cal. 101, 32 L.R.A. 82, 53 Am. St. Rep. 105, 44 Pac. 345; *Boring v. Penniman*, 134 Cal. 514, 66 Pac. 739.

* The usual occasion for testing the principle to be applied would be such as we have supposed, where the defendant was denying the validity of the judgment against him. But the obligations of the judgment are reciprocal, and the fact that here the defendant is asserting and the plaintiff denying its personal effect does not alter the case. *Whittier v. Wendell*, 7 N. H. 257; *Rangely v. Webster*, 11 N. H. 299; *Middlesex Bank v. Butman*, 29 Me. 19. The personal judgment was not merely voidable, as was assumed in the slightly different case of

Henderson v. Staniford, 105 Mass. 504, 7 Am. Rep. 551, but was void. See *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429. In *Henderson v. Staniford* the absent defendant intended to return to his state.

Judgment reversed.

(243 U. S. 93)

PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA, Plf. in Err.,

v.

GOLD ISSUE MINING & MILLING COMPANY.

CONSTITUTIONAL LAW — 309(3) — INSURANCE — 810 — DUE PROCESS OF LAW — SERVICE ON FOREIGN CORPORATION — CAUSE OF ACTION ARISING OUTSIDE OF STATE.

1. A foreign insurance company which, in compliance with what is now Mo. Rev. Stat. 1909, § 7042, had filed with the superintendent of the state insurance department a power of attorney consenting that service of process upon that official should be deemed personal service upon the company so long as it should have any liabilities outstanding in the state, is not denied the due process of law guaranteed by U. S. Const. 14th Amend., merely because the consent is construed to render such service valid in causes of action arising in other states.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930.]

COURTS — 394(12) — ERROR TO STATE COURT — STATUTES — "DENIAL OF FULL FAITH AND CREDIT" — ERROR OF CONSTRUCTION.

2. Something more than a mere error in construing the statutes of a sister state is necessary in order to sustain the claim that there has been a denial of the full faith and credit to which such statutes, under U. S. Const. art. 4, § 1, are entitled,

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Full Faith and Credit.]

[No. 584.]

Argued January 29, 1917. Decided March 6, 1917.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Audrain County, in that state, in favor of plaintiff in a suit on a policy of fire insurance. Affirmed.

See same case below, 267 Mo. 524, 184 S. W. 999.

The facts are stated in the opinion.

Messrs. Fred Herrington, Mason A. Lewis, James B. Grant, and David H. Robertson for plaintiff in error.

Messrs. Patrick Henry Cullen, Thomas T. Fauntleroy, and Charles M. Hay for defendant in error.

* Mr. Justice Holmes delivered the opinion of the court:

This is a suit upon a policy of insurance issued in Colorado by the defendant, the plaintiff in error, to the defendant in error, an Arizona corporation, insuring buildings in Colorado. The defendant insurance company had obtained a license to do business in Missouri, and to that end, in compliance with what is now Missouri Rev. Stat. 1909, § 7042, had filed with the superintendent of the insurance department a power of attorney consenting that service of process upon the superintendent should be deemed personal service upon the company so long as it should have any liabilities outstanding in the state. The present suit was begun by service upon the superintendent. The insurance company set up that such service was insufficient except in suits upon Missouri contracts, and that if the statute were construed to govern the present case, it encountered the 14th Amendment by denying to the defendant due process of law. The supreme court of Missouri held that the statute applied and was consistent with the Constitution of the United States. 267 Mo. 524, 184 S. W. 999.

The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert. *O'Neil v. Northern Colorado Irrig. Co.* 242 U. S. 20, 26, 61 L. ed. 123, 37 Sup. Ct. Rep. 7. Other state laws have been construed in a similar way; e. g., *Bagdon v. Philadelphia & R. Coal & I. Co.* 217 N. Y. 432, L.R.A.1916F, 407, 111 N. E. 1075; *Johnston v. Trade Ins. Co.* 132 Mass. 432.

The defendant relies upon *Old Wayne Mut. Life Assn. v. McDonough*, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236, and *Simon v. Southern R. Co.* 236 U. S. 115, 59 L. ed. 492, 35 Sup. Ct. Rep. 255. But the distinction between those cases and the

one before us is shown at length in the judgment of the court below, quoting a brief and pointed statement in *Smolik v. Philadelphia & R. Coal & I. Co.* 222 Fed. 148,—a statement reinforced by *Cardozo, J.*, in *Bagdon v. Philadelphia & R. Coal & I. Co. supra*. In the above-mentioned suits the corporations had been doing business in certain states without authority. They had not appointed the agent as required by statute, and it was held that service upon the agent whom they should have appointed was ineffective in suits upon causes of action arising in other states. The case of service upon an agent voluntarily appointed was left untouched. 236 U. S. 129, 130. If the business out of which the action arose had been local, it was admitted that the service would have been good, and it was said that the corporation would be presumed to have assented. Of course, as stated by *Learned Hand, J.*, in 222 Fed. 148, 151, this consent is a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defense. Presumably the fiction was adopted to reconcile the intimation with the general rules concerning jurisdiction. *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 353, 57 L. ed. 867, 874, 33 Sup. Ct. Rep. 550. But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act. *The Eliza Lines*, 199 U. S. 119, 130, 131, 50 L. ed. 115, 120, 26 Sup. Ct. Rep. 8, 4 Ann. Cas. 406.

The insurance company also sets up that the supreme court of Missouri failed to give full faith and credit to the public acts of Colorado. The ground is that one condition of the policy was that the insured was the owner in fee simple of the land under the insured buildings; that when the plaintiff bought the land, as it did, it had not taken out a license to do business in Colorado, and that the laws of that state forbade the plaintiff to acquire any real or personal property until the license fees should have been paid. The Missouri court held that it was enough if the plaintiff had paid the fees and got the license before instituting this suit. There is nothing to suggest that it was not candidly construing the Colorado statutes to the best of its ability, and even if it was wrong, something more than an error of construction is necessary in order to entitle a party to come here under article 4, § 1. *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 496, 47 L. ed. 273, 275, 23 Sup. Ct. Rep. 194; *Finney v. Guy*, 189 U. S. 335, 47 L. ed. 839, 23

Sup. Ct. Rep. 558; *Allen v. Alleghany Co.* 196 U. S. 458, 464, 465, 49 L. ed. 551, 555, 556, 25 Sup. Ct. Rep. 311; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 51, 52, 54 L. ed. 921, 927, 928, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; *Western Life Indemnity Co. v. Rupp*, 235 U. S. 261, 275, 59 L. ed. 220, 225, 35 Sup. Ct. Rep. 37.

The plaintiff suggests that the whole controversy is *res judicata* by reason of the decision in *State ex rel. Fidelity-Phoenix F. Ins. Co. v. Barnett*, 239 Mo. 193, 143 S. W. 501, in which the insurance company is said to have been one of the relators, and which followed the decision in *State ex rel. Pacific Mut. L. Ins. Co. v. Grimm*, 239 Mo. 135, 143 S. W. 483. It also urges that the defendant waived any objection it might have had to the validity of this service by appearing and pleading to the merits. As the facts hardly appear, and as the state court discussed the merits of the case, we do not pass upon these matters, which, in a different state of the record, might need at least a few words.

Judgment affirmed.

(243 U. S. 97)

UNITED STATES, Petitioner,
v.

M. H. PULASKI COMPANY et al. (No. 149.)

UNITED STATES, Petitioner,
v.

R. B. HENRY COMPANY et al. (No. 150.)

UNITED STATES, Petitioner,
v.

JAMES ELLIOTT & COMPANY et al. (No. 151.)

UNITED STATES, Petitioner,
v.

J. WILE SONS & COMPANY. (No. 152.)

UNITED STATES, Petitioner,
v.

ROBERT MULLER & COMPANY. (No. 153.)

UNITED STATES, Petitioner,
v.

WOOD & SELICK et al. (No. 154.)

UNITED STATES, Petitioner,
v.

E. LA MONTAGNE'S SONS. (No. 155.)

UNITED STATES, Petitioner,
v.

ALBERT LORSCH & COMPANY et al. (No. 156.)

UNITED STATES, Petitioner,
v.

CULLMAN BROTHERS et al. (No. 157.)

UNITED STATES, Petitioner,
v.

G. W. FABER, Inc. (No. 158.)

UNITED STATES, Petitioner,
v.

LOUIS MEYERS & SON. (No. 159.)

UNITED STATES, Petitioner,
v.

WILLIAM OPENHYM & SONS et al. (No. 160.)

UNITED STATES, Petitioner,
v.

PARK & TILFORD. (No. 161.)

UNITED STATES, Petitioner,
v.

SELGAS & COMPANY. (No. 162.)

CUSTOMS DUTIES ~~§~~11—DISCOUNT—AMERICAN BOTTOMS—RECIPROcity TREATIES.

The 5 per cent tariff discount given to merchandise imported in American bottoms by the Act of October 3, 1913 (38 Stat. at L. 196, chap. 16, Comp. Stat. 1913, § 5311), § IV, J, subsec. 7, with the proviso that "nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation," is inoperative so long as the present reciprocity treaties with foreign countries remain in force.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 9.]

[Nos. 149–162.]

Argued February 25 and 28, 1916. Restored to docket for reargument March 6, 1916. Reargued February 2, 1917. Decided March 6, 1917.

FOURTEEN WRITS of Certiorari to the United States Court of Customs Appeals to review judgments which, on appeals from the Board of United States General Appraisers, sustained the rights of importers to a tariff discount. Reversed.

The facts are stated in the opinion.

Solicitor General Davis for petitioner.

Messrs. James M. Beck and Frederick W. Lehmann for respondents.

Mr. Thomas M. Lane for respondents in Nos. 149 and 160.

Messrs. Albert H. Washburn, George J. Puckhafer, and John A. Kratz for respondents in Nos. 150, 151, and 152.

Messrs. Henry J. Webster and John G. Duffy for respondent in No. 153.

Mr. Frederick W. Brooks, Jr., for respondents in Nos. 154 and 159.

Mr. B. A. Levett for respondents in Nos. 155 and 161.

Messrs. Rufus W. Sprague, Jr., Edward P. Sharretts, and Homer S. Cummings for respondents in Nos. 156 and 162.

Messrs. James L. Gerry and Edwin R. Wakefield for respondent in No. 157.

Mr. Allan R. Brown for respondent in No. 158.

Mr. William L. Wemple as *amicus curiæ*.

Messrs. Edward S. Hatch and Walter F. Welch in behalf of interested importers.

*¹⁰⁵ Mr. Justice Holmes delivered the opinion of the court:

In these cases the court of customs appeals has held that by § IV, J, subsec. 7, of the Act of October 3, 1913, chap. 16, 38 Stat. at L. 114, 196, Comp. Stat. 1913, §§ 5291, 5311, merchandise imported in the registered vessels of the United States, or in the registered vessels of other nations entitled by treaty to pay no higher duties than those levied upon vessels of the United States, is granted a discount of 5 per cent upon the duties imposed by the act. Following an enactment that, except as otherwise specially provided in the statute, duties should be levied upon all articles imported from any foreign country at the rates prescribed in the schedules, the above-mentioned subsec. 7 is as follows: "That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." More or less complete reciprocity is established by treaty with nearly all the commercial countries of the world, and the discount of 5 per centum was extended by the court of customs appeals to goods imported in vessels of Belgium, the Netherlands, Great Britain, Austria-Hungary, Germany, Italy, Spain, and Japan.

The government contends that while the subsection may indicate a reversal of the policy of reciprocity that has prevailed more or less for the better part of a century (Rev. Stat. § 4228, Comp. Stat. 1913, § 7825), it relies upon future negotiations to make the change effective, and suspends action while the present treaties remain in force, since it could not give the discount to merchandise in American bottoms alone without breaking the numerous treaties to which we have referred. The argument on the other side is that the words of the subsection are satisfied by extending the

discount to goods from all the treaty countries; whereas, by the construction contended for by the government, they are emptied of meaning, or at least of present effect. We are of opinion that the government is right; and, as the meaning of the words seems to us to be intelligible upon a simple reading, and to be fortified by the facts preceding their adoption, we shall spend no time upon generalities concerning the principles of interpretation.

We have a clear opinion as to what the subsection means if the words are taken in their natural, straightforward, and literal sense. It grants a discount only to goods imported in vessels registered under the laws of the United States, and conditions even that grant upon its not affecting treaties. There is a strong presumption that the literal meaning is the true one, especially as against a construction that is not interpretation, but perversion; that takes from the proviso its ostensible purpose to impose a condition precedent, in order to universalize a grant that purports to be made to a single class, and to do so notwithstanding the express requirement of the statute that specified rates should be paid. Nobody would express such an intent in such words unless in a contest of opposing interests, where the two sides both hoped to profit by an ambiguous phrase. But the section is not ambiguous on its face,^{*106} and there is no sufficient ground for creating an ambiguity from without, when it is considered that the purpose to favor American shipping was the manifest inducement for putting the subsection in.

The tariff bill as it first passed the House granted an exemption in favor of American shipping without the proviso. The clause was struck out by the Senate, and after it had been pointed out that such an enactment would violate many treaties, there was a conference which led to the passage of the subsection in its present form. It seems to us obviously more reasonable to suppose that Congress was content to indicate a policy to be pursued when possible than that, by circuitous and inapt language, it enacted that there should be a general discount from the rates specifically directed to be charged. That the subsection means what it says and no more seems to us still plainer when it is considered that, without going into nice calculations, the benefit to American shipping of such a general discount would be at least problematical and certainly would be relatively small. A grant in present terms, subject to a condition precedent, is familiar to the law, and is not unknown in grants of the present kind. *Dunlap v. United States*, 173 U. S. 65, 43 L. ed. 616, 19 Sup. Ct. Rep. 319.

There was some discussion at the bar and in the court below upon the question whether the treaties operated as laws or were simply executory contracts, but it seems to us superfluous. If the statute bore the meaning attributed to it below, it granted the discount to the nations having treaties of reciprocity, even if those treaties were only contracts. As, in our opinion, the subsection means what it says, it grants the discount to none.

Judgments allowing the discount of 5 per centum reversed.

Mr. Justice Day is of opinion that the statute was interpreted correctly by the Court of Customs Appeals, and therefore dissents.

(243 U. S. 52)

STATE OF NEW MEXICO, Complainant,
v.

FRANKLIN K. LANE, Secretary of the Interior of the United States, and Clay Tallman, Commissioner of the General Land Office of the United States.

UNITED STATES  125—IMMUNITY FROM
SUIT—SUIT AGAINST OFFICERS.

The state of New Mexico cannot maintain in the Supreme Court of the United States a bill against the Secretary of the Interior and the Commissioner of the General Land Office to establish the state's asserted title in fee simple to certain lands, under the School Land Grant Act of June 21, 1898 (30 Stat. at L. 484, chap. 489), and to restrain the Interior Department from disposing of such lands, where there is a question involved as to whether that statute had the quality as a grant of the land asserted of it, whether because of itself or because of its terms or their prior construction and its adoption,—indeed, whether there was such a prior construction or its adoption,—and a question of the fact of the character of the land at the time of the grant, and the evidence of it and the knowledge of it, since these are questions of law and fact upon which the United States would have to be heard.

[Ed. Note.—For other cases, see United States, Cent. Dig. §§ 113, 114.]

[No. 20, Original.]

Submitted January 8, 1917. Decided March 6, 1917.

ORIGINAL BILL filed by the State of New Mexico against the Secretary of the Interior and the Commissioner of the General Land Office to establish the state's asserted title to certain lands under the school land grant, and to restrain the Interior Department from disposing of such lands. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. Harvey M. Friend and Mr. Frank W. Clancy, Attorney General of New Mexico, for complainant.

Solicitor General Davis and Mr. S. W. Williams for defendant.

* Mr. Justice McKenna delivered the opinion of the court:

Bill for injunction, in which the state of New Mexico asserts title in fee simple to the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 16, township 15 N., R. 18 W., New Mexico principal meridian, under the school land grant of June 21, 1898, and prays to restrain the Interior Department from issuing a patent therefor to one Keepers.

The bill exhibits the grounds of suit as follows:

By § 1 of an act approved June 21, 1898, 30 Stat. at L. 484, chap. 489, there were granted to the territory of New Mexico sections 16 and 36 in every township in the state for the support of common schools. If such sections should be mineral, other lands were to be granted in lieu thereof, to be selected as provided in other sections of the act.

Section 6 of an act approved June 20, 1910, 36 Stat. at L. 557, 561, chap. 310, which was an act to enable the people of New Mexico to form a constitution and state government and be admitted into the Union, granted, in addition to sections 16 and 36, sections 2 and 32 in every township in the proposed state, not otherwise appropriated at the date of the passage of the act. This grant also was for the support of the common schools.

It was provided in § 10 that such lands and those theretofore granted were "expressly transferred and confirmed to the said state," and should "be by the state held in trust," etc.

By § 12, except as modified or repealed by the act, all grants of lands were ratified and confirmed to the state, subject to the provisions of the act.

On January 6, 1912, New Mexico was admitted to the Union on an equal footing with the other states, and became and is the beneficiary of the school land grant of June 21, 1898. Such grant had been held a grant in presenti, under which absolute title in fee to all sections 16 and 36 in the territory which were at that date identified passed to the territory at the date of the approval of the act, unless known to be mineral, and no certificate or patent was necessary to pass such title.

Township 15 N. of R. 18 was surveyed by the United States government in 1881. The survey was approved by the surveyor general of New Mexico November 30, 1881, and a township plat duly filed in the local land

office, and the land became subject to disposal July 21, 1882, which was many years prior to the grant of June 21, 1898.

Section 16 was not disposed of or otherwise reserved, and therefore passed to the territory by the grant of June 21, 1898, and the land described above was not at that time known to be mineral in character, and was not then known coal land under the interpretation of the coal-land law which had uniformly prevailed, in that at such date there had been no attempt on the part of anyone to discover or develop coal upon it, and no coal had been produced or extracted therefrom until 1911, thirteen years after the title in fee had vested in the territory.

The decision of the Department and of the Supreme Court (this court) was that land could not be held to be "known coal land" unless there had been a mine opened thereon and an actual production of coal in such quantity as to make the land more valuable on that account than for other purposes, and that such construction had become a rule of property, and title vested under it could not be divested by a change of construction.

*The construction was known to Congress when it passed the Act of June 21, 1898, was adopted by it when it enacted that act, and became the rule of construction for the future administration of the land, and the acceptance of the grant became an executed contract between the territory and the United States, to be construed and interpreted as then understood. Notwithstanding, the Commissioner of the General Land Office and the Secretary of the Interior have decided that a locator on the land, whose claim was filed in 1911, is entitled to have a patent for the tract above described, and they are about to issue a patent to him.

On May 12, 1911, one George A. Keepers filed in the local land office at Santa Fe, New Mexico, a coal declaratory statement under § 2348, Rev. Stat. Comp. Stat. 1913, § 4660, for the land in controversy, and three days thereafter he applied to purchase the same as coal land under § 2347, Rev. Stat. Comp. Stat. 1913, § 4659, and publication of notice thereof, as provided by the mining laws and regulations of the Interior Department, was duly had, beginning May 19, 1911, and ending June 16, 1911.

Within the period of publication protests were filed against the application, and the territory of New Mexico intervened, claiming the land under the Act of June 21, 1898, on the ground that it was not coal land at the date of the grant. A hearing was allowed to determine the land's character.

It is conceded that the Commissioner of the General Land Office had the right and authority to determine the question whether the land was known coal land at the date of the grant of June 21, 1898. Nevertheless in such determination that official was restricted to ascertaining the single fact whether, at the date of the grant, a mine had been opened on the land or coal produced therefrom, and this was the sole question that he could investigate. But, notwithstanding, he undertook and directed a hearing "to determine their true character" at the date of the hearing, which was in excess of his authority.

At the hearing by the local land office, testimony was taken, largely addressed to the geological condition of the land, and no testimony was adduced showing that any coal had ever been produced or extracted from the land prior to the date of the Act of June 21, 1898, or for many years thereafter and up until 1911. Nevertheless it was decided, upon developments made subsequently to that date and on other matters subsequently occurring, including the subsequent classification of the land as coal land by the Geological Survey of 1907, that the land contained coal at the date of act, and was for that reason known coal land at that date.

Upon appeal the ruling of the local officers was affirmed by the Commissioner and subsequently by the First Assistant Secretary of the Interior. There was no finding in his decision that the land was of known coal character at the date of the granting act, and the only fact relied upon was that certain "disclosures" *now*, not *then*, indicated that the Black Diamond coal bed underlay a portion of the tract, which, even if known, would not, under the law as then construed and interpreted, have rendered the land known coal land. The decision, therefore, was purely arbitrary.

The state duly filed a motion for rehearing, which was denied, and the decision promulgated, and the local officers directed to issue a final certificate to Keepers.

The bill avers "that when said final certificate shall be issued, as it undoubtedly has been, and upon its receipt at the General Land Office, the officials thereof, following the regulations of the Interior Department in such cases made and provided, will at once proceed to issue a patent to said Keepers, for said S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 16, unless restrained by this honorable court in the meantime, which said tract is owned by and belongs to your orator as a part of its school-land grant which was vested immediately in fee in the territory of New Mexico, at the date of said school-land grant of June 21, 1898, to which

right and title your orator has succeeded, as aforesaid, and such patent, if issued to said Keepers, will be a cloud upon the title of your orator to said tract, being an attempt, unlawfully, to deprive your orator of its title in fee simple thereto."

It is prayed that the Secretary of the Interior and the Commissioner of the General Land Office be subpoenaed to appear and answer the bill, but not under oath; that it be decreed that the title immediately vested in the territory of New Mexico at the date of the Act of June 21, 1898, and has become vested in the state as the successor of the territory; that the Secretary and Commissioner have not had, since the date of the act, or now have, authority to interfere with the state's title, and that they be enjoined from executing their orders and decision. General relief is also prayed.

A motion to dismiss the bill is made on the grounds: (1) The United States is a necessary party because it appears the title to the land involved is in the United States, and that it is the purpose of the defendants to dispose of the land in accordance with the provisions of the mineral land laws of the United States, and that if the defendants be enjoined from executing such purpose the United States would be deprived of the purchase price of the land. (2) It appears from the bill that the state has no title or interest in the land because it was known coal land at the date of the passage of the Act of June 21, 1898, and was not intended to be granted nor granted to the territory of New Mexico by that act nor any subsequent act. (3) That complete inquiry was made by the officers of the Land Department, and they found the fact to be that at the date of the act the land was known to be valuable for mineral purposes. (4) It appears that one Keepers had purchased the land and therefore was an indispensable party. (5) The bill is in other respects uncertain, informal, and insufficient, and does not state facts sufficient to entitle the state to any relief.

The motion should be granted on the ground that the suit is one against the United States, under the authority of *Louisiana v. Garfield*, 211 U. S. 70, 53 L. ed. 92, 29 Sup. Ct. Rep. 31. In that case a bill was brought in this court to establish the title of the state of Louisiana to certain swamp lands which it claimed under the statutes of the United States, and to enjoin the Secretary of the Interior and other officers of the Land Department from carrying out an order making different disposition of the land.

Under the statute, it was contended, the land vested in the state in fee simple; that

is, the act was contended to have the same character and efficacy as the Act of June 21, 1898, is asserted to have in the case at bar. And certain facts were necessary to be determined as elements of decision. This court said that in the case there were questions of law and of fact upon which the United States would have to be heard. So in the present case there is a question of law whether the Act of June 21, 1898, had the quality as a grant of the land, asserted of it, whether of itself or because of its terms or their prior construction and its adoption; indeed, whether there was such a prior construction or its adoption; and again, of the fact of the character of the land at the time of the grant, and the evidence of it and the knowledge of it.

It would seem, besides, that, under the averments of the bill, Keepers is an indispensable party, he having become, according to the bill, a purchaser of the land and paid the purchase price thereof. To make him a party would oust this court of jurisdiction, if he is a citizen of New Mexico, and the presumption expressed by defendants that he is complainant does not deny. *California v. Southern P. Co.* 157 U. S. 229, 39 L. ed. 683, 15 Sup. Ct. Rep. 591.

Dismissed.

(243 U. S. 59)

MARTIN E. DONOHUE, Plff. in Err.,

v.

BENJAMIN VOSPER, Fred H. Abbott, Maurice J. Tonkin, and the Buffalo Iron Mining Company.

COURTS ⇐394(7)—ERROR TO STATE COURT—FEDERAL QUESTION—EFFECT OF DECREE OF FEDERAL COURT.

1. A writ or error lies to the Federal Supreme Court from a decision of the highest court of a state where a decree of a Federal court was made an element in the decision against the plaintiff in error, and was claimed by him to be an element in his favor.

[Ed. Note.—For other cases, see *Courts, Cent. Dig.* § 1053.]

JUDGMENT ⇐725(4)—QUIETING TITLE IN THIRD PARTY—EFFECT — ESTOPPEL BY DEED—AFTER-ACQUIRED TITLE.

2. Whatever rights and obligations existed between the parties to a warranty deed, including the liability of the grantor to an estoppel by warranty in favor of the grantee in case of an after-acquired title, remained unaffected by a consent decree quieting title in a third party in a suit in which the issue was whether such third party had derived title to the property from the United States, or whether such grantor had thus acquired title, and to which suit the latter and his grantee were both parties, although such decree declared that it should "stand and operate as a release and conveyance from the United

States, and each and every of the other of said defendants, of all right and title to said lands," and might "be recorded as such in the records of the proper county."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1255-1257.]

COURTS ~~394~~(1)—**ERROR TO STATE COURT**
—**SCOPE OF REVIEW—LOCAL LAW.**

3. Whether or not a person has acquired title by adverse possession to lands conveyed by the United States to a state in aid of railway construction is essentially a local question involving an appreciation of the evidence as to the conduct of the parties, and is not open to review in the Federal Supreme Court on writ of error to a state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1049.]

[No. 445.]

Argued January 26, 1917. Decided March 6, 1917.

IN ERROR to the Supreme Court of the State of Michigan to review a decree which affirmed a decree of the Circuit Court for the County of Iron, in that state, in favor of defendants in a suit to quiet title. Affirmed.

See same case below, 189 Mich. 78, 155 N. W. 407.

The facts are stated in the opinion.

Mr. A. H. Ryall for plaintiff in error.

Mr. Dan H. Ball for defendants in error.

*Mr. Justice McKenna delivered the opinion of the court:

Suit to declare certain deeds to lands in Michigan to be void, and that plaintiff in error (as he was plaintiff in the court below, we shall so refer to him) be declared to be the owner of the lands and of the minerals therein, that defendants have no title thereto, for an accounting of certain royalties collected by certain of the defendants from the Buffalo Iron Mining Company, and that the latter be restrained from paying any further royalties. The lands are described as follows: W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, section 23, T. 43 N., R. 35 W., county of Iron, Michigan.

An answer, which was also claimed to be a cross bill, was filed, and upon the issues thus formed and after hearing the court by a decree dismissed the bill, adjudged title to the land to be in the defendants Vosper, Abbott, and Tonkin in certain proportions and all the ores and minerals therein, that title to the lands in the proportions mentioned be quieted against plaintiff and all persons claiming under him, that he execute a deed to Vosper, Abbott, and Tonkin of the interests decreed, and, in default there-

of, the decree to operate as such release and conveyance.

The decree was affirmed by the supreme court of the state.

*The facts of the case were found by the supreme court substantially as follows:

The land was conveyed to the state of Michigan to aid in the construction of two railroads, one in Marquette and the other in Ontonagon. The land applicable to the Marquette road was released by the state to the United States, and later, in 1866 [14 Stat. at L. 81, chap. 161], under an act of Congress granting lands to the state for canal purposes, this land inured to the benefit of the Lake Superior Ship, Canal, Railway, & Iron Company by a grant from the state.

The land to be used for the benefit of the Ontonagon road was not released, and it was subsequently decided that the title to an undivided one half of the "common lands"—that is, lands at the intersection of the proposed railroads—still remained in the state for the purposes of that road, except as affected by an Act of Congress of 1889 [25 Stat. at L. 1008, chap. 414], by which Congress declared a forfeiture of grants in the state of Michigan for all unconstructed railroads, and confirmed title in all persons who had made cash entries within the limits of the grants and all persons claiming state selections, such as the Canal Company. By an exception in the act the title was not confirmed to those lands in which there were not bona fide preemption or homestead claims asserted by actual occupation on May 1, 1888.

Michael Donohue, plaintiff's grantor, together with various other persons, had entered upon these "common lands" as pre-emptors and homesteaders, and asserted rights thereto under the Act of 1889, referred to above.

Prior to the Act of 1889, the Canal Company brought ejectment suits against those settlers. In 1894, in the ejectment suits, it was decided that the title of the Canal Company to the lands selected by the state was confirmed by the Act of 1889, subject to the exceptions provided in the act, and that it should be determined in an equity suit in the United States court what lands came within the excepting clause. It was also decided that the title of the state to the lands granted for the Ontonagon road, including an undivided one half of the "common lands," was forfeited to the United States.

Defendant Vosper had rendered service in this litigation to Donohue and the other claimants, and took from Donohue a warranty deed on December 29, 1894, to an undivided one-quarter interest in the land.

At the instigation of persons claiming under the Act of 1889, the United States filed a bill against the Canal Company. In that suit the Canal Company filed a cross bill against the claimants under the homestead and pre-emption laws, including Donohue. Vosper was also made a party. The issue in the litigation, therefore, was whether Donohue and the other claimants were bona fide homesteaders or pre-emptors on May 1, 1888.

Pending the suit, the Canal Company conveyed to the Keweenaw Association, Limited.

A decree was entered, Donohue and the other claimants and Vosper consenting, quieting the title to the lands in the Keweenaw Association, Limited, as successor of the Canal Company. The decree was entered in 1896, and adjudged that the Canal Company, at the commencement of the suit, was fully and completely vested with the title to the lands, and since the commencement of the suit it became fully and completely vested in said Keweenaw Association, Limited, as successor of the Canal Company, and that neither the United States of America nor any of the defendants consenting to the decree had "any right, title, or interest therein." And it was adjudged that title to the lands be quieted against the United States and the consenting defendants, and further, that the decree should operate as a release and conveyance from the United States and each and every of the other of said defendants of all right and title to said lands, and might be recorded as such in the records of the proper county.

*November 19, 1896, the Keweenaw Association, Limited, conveyed the lands by quitclaim deed to Donohue.

It is the contention of Vosper that he and Donohue agreed to this arrangement, by which a sum of money was to be paid for the timber cut and the lands were to be conveyed by the Keweenaw Association to Donohue.

December 3, 1896, Michael Donohue delivered to plaintiff a quitclaim deed to the premises, and on April 3, 1908, Vosper quitclaimed an undivided one-eighth interest to defendant Abbott, and on December 18th, following, plaintiff joined with Vosper and Abbott in the execution and delivery of an option for a mining lease of the premises.

February 3, 1909, Abbott quitclaimed an undivided $\frac{3}{4}$ interest in the minerals to Tonkin, and on March 7, 1910, plaintiff joined Vosper, Abbott, and Tonkin in the execution and delivery of a mining lease in pursuance of the option given before.

The mining lease, which was for a term

of thirty years, was issued to the Niagara Iron Mining Company as lessee, and was by that company assigned to the Buffalo Mining Company. The Niagara Company was and the Buffalo Company has been and is now in possession of the premises for mining purposes.

The trial and supreme courts found that Donohue executed the deed to Vosper. About this there is no controversy. Here the contentions of the parties turn upon the effect of the decree which was rendered by consent in the suit of the United States against the Canal Company, and this makes, it is contended, a Federal question.

Defendants, however, assert that the decree does not present a Federal question, and that, besides, it was not claimed or urged as such by plaintiff in the state courts, but appears for the first time in the petition for writ of error, and defendants refer to the bill of complaint to sustain their assertion.

*But the supreme court in its opinion declared that a contention of plaintiff invoked "the effect of the decree of the Federal court." And, discussing the decree, the court decided that its effect was "to oust Vosper from the land, of which he had the actual or constructive possession of an undivided quarter interest,—it appearing that Michael Donohue continued in possession of the undivided one half of the claim from the time of his original entry until his quitclaim deed to the complainant [plaintiff] despite the alleged trespasses of the Canal Company and its successor, which possession would inure to Vosper under the warranty deed." And the court further said that, by the paramount title thus established in a third party by the decree, Vosper was evicted from his title and possession and a "clear case for the application of the doctrine of estoppel by warranty" is made in his favor.

The decree, therefore, was made an element in the decision against plaintiff, and it was claimed by him to be an element in his favor. The motion to dismiss is therefore denied.

The contention was in the state courts and is here that the decree operated as a conveyance from Michael Donohue and Vosper to the Keweenaw Association, and that, by virtue of its effect as a conveyance, it released the interest that Vosper had in the lands through the warranty deed from Donohue to him, and that no interest remained in Vosper upon which an estoppel could rest. In other words, that by the decree Vosper's interest passed to the Keweenaw Association and from the latter to Michael Donohue; and a number of cases are cited to

show that Vosper could make a conveyance of his interest, and that his grantee, in this case the Keweenaw Association, and plaintiff, through the latter, would take his interest.

The contention puts out of view a great deal that is material in the situation. The suit in which the decree was entered was one to determine whether the Canal Company or its grantee, the Keweenaw Association, had derived title from the United States, or whether Donohue had. Vosper was made a party because of the deed from Donohue to him, and the decree quieted title in the Keweenaw Association. If it had gone no further there would probably be no dispute about its effect, but it declared that it should "stand and operate as a release and conveyance from the United States and each and every of the other of said defendants, of all right and title to said lands," and might "be recorded as such in the records of the proper county." Standing alone these latter words might have the effect for which plaintiff contended, but they must be construed by what precedes them and by the nature of the suit. This demonstrates that the decree was but the clearing away of obstructions to the rights of the Keweenaw Association, and was not intended to convey to it any interests the defendants had, but left unaffected whatever obligations existed between themselves. This is found by the supreme court of the state, and that Michael Donohue was paid a sum of money by the Keweenaw Association for the timber cut upon the land, and the land was to be conveyed by the Keweenaw Association to Michael Donohue, leaving, as we have said, the rights between him and Vosper unaffected, and this is demonstrated by their subsequent relations.

On April 3, 1908, Vosper quitclaimed an undivided $\frac{1}{2}$ interest in the land to Abbott, and in the following December plaintiff and Vosper and Abbott executed and delivered an option for a mining lease of the premises, and subsequently a lease in fulfilment of the option, to the Niagara Iron Mining Company for the term of thirty years. The option and the lease recited that Vosper was the owner of an undivided $\frac{1}{2}$ interest in the land.

It is further contended that plaintiff had acquired title to the land by adverse possession, but the state courts decided against the contention. This was essentially a local question, involving an appreciation of the evidence as to the conduct of the parties, and we cannot review it.

Decree affirmed.

(243 U. S. 66)
HUGO ADELBERTO THOMSEN, Gustave A. Fedderson, Hendrich Johannes Riedel, and Edward H. Muller, Composing the Firm of Thomsen & Company, Plffs. in Err.,

v.

SIR CHARLES W. CAYSER, Charles W. Caysen, Jr., August B. T. Caysen, et al., Composing the Firm of Caysen, Irvine, & Company, et al.

APPEAL AND ERROR $\S$ 1218 — ERROR TO CIRCUIT COURT OF APPEALS—DISMISSAL—GROUNDS.

1. A writ of error from the Federal Supreme Court to review a judgment of reversal with instructions to dismiss the complaint which a circuit court of appeals had entered on rehearing after it had recalled its mandate, previously issued, ordering a new trial, and had set aside the judgment of the court below, need not be dismissed, either because the trial court had theretofore entered judgment on the original mandate, and had adjourned for the term without any application made to recall such judgment, or any writ of error to review such judgment sought, or because the defendants in error in the circuit court of appeals, on whose petition the rehearing was granted, had waived therein any right to a new trial, and consented that the case be disposed of one way or the other.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 4719.]

APPEAL AND ERROR $\S$ 843(3)—ERROR TO CIRCUIT COURT OF APPEALS—REVIEW OF FACTS—CONCURRENT FINDINGS.

2. The facts are not still in controversy on a writ of error from the Federal Supreme Court to a circuit court of appeals to review a judgment which reversed, with instructions to enter an order dismissing the complaint, a judgment in favor of plaintiffs in an action to recover treble damages for the injuries sustained as the result of a combination alleged to restrain foreign trade, contrary to the Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, $\S$ 8820), where the case was decided in the circuit court of appeals upon the proposition of law that the combination charged was not an unreasonable restraint of trade, and that such character was necessary to make it illegal under that statute, both trial and appellate courts concurring as to the fact of combination and restraint and the means employed, and their conclusion not being clearly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 3331.]

MONOPOLIES $\S$ 16(3)—UNDER ANTI-TRUST ACT—ILLEGAL COMBINATION—SHIPPING TRUST.

3. Ocean carriers between New York and South African ports violated the prohibition of the Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, $\S$ 8820), against combinations in restraint of foreign trade or commerce, by uniting, with the intention and result of restraining competition, in establishing a uniform freight rate which included a so-called "primage charge," to be refunded subse-

quently to shippers upon condition that they should ship exclusively by the lines of the combining carriers, and should not, directly or indirectly, be interested in any shipment by other vessels, and upon the further condition (afterwards revoked) that the consignees must also exhibit the same loyalty to the combining lines.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12.]

MONOPOLIES ⇨16(3)—**UNDER ANTI-TRUST ACT—SHIPPING TRUST — ORGANIZATION IN FOREIGN COUNTRY.**

4. A combination of ocean carriers to restrain competition is within the Anti-trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), although it was formed in a foreign country, where it affected the foreign commerce of the United States, and was put into operation in the United States by the carriers' local managers, who were more than simply agents, being participants in the combination.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12.]

MONOPOLIES ⇨28—**UNLAWFUL COMBINATIONS—THREEFOLD DAMAGES.**

5. Shippers who have been compelled to pay an unreasonable freight rate because of a combination of ocean carriers to restrain competition, contrary to the Anti-trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), have suffered damage to the amount of the excess over what was a reasonable rate, within the meaning of § 7 of that act, giving a cause of action to any person injured in his person or property by reason of anything forbidden by the act, and the right to recover threefold damages sustained by him.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18.]

MONOPOLIES ⇨28—**THREEFOLD DAMAGES —QUESTION FOR JURY—COMBINATION IN RESTRAINT OF TRADE.**

6. The fact of combination need not be submitted to the jury in an action for threefold damages, brought under the Anti-trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), § 7, where there is no conflict in the evidence, and nothing, therefore, for the jury to pass upon.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18.]

MONOPOLIES ⇨28—**DAMAGES — INSTRUCTIONS.**

7. It cannot be said that the jury were permitted to consider supposititious profits as elements of damage in an action for threefold damages, brought under the Anti-trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), § 7, by shippers against ocean carriers who had combined to restrain competition, where there were different sums stated, resulting from the loss of particular customers, and the fact of their certainty was submitted to the judgment of the jury, who were told that they ought not to allow any speculative damages, and were not required to guess as to what damages plaintiffs claimed to have sustained, and that the burden of proof was upon plaintiffs, and that from the evidence

the jury should be able to calculate the damages,—especially where plaintiffs alleged an overcharge, and the verdict of the jury was for the amount of such overcharge and interest.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18.]

APPEAL AND ERROR ⇨1067 — **HARMLESS ERROR—FAILURE TO CHARGE ON BURDEN OF PROOF.**

8. Error, if any, in failing to charge the jury in an action for threefold damages, brought under the Anti-trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), § 7, by shippers against ocean carriers, that the burden was on the plaintiffs to show that the rates on their shipments were excessive and unreasonable,—does not demand a reversal where the record shows a most painstaking trial of the case on the part of counsel and the court, a full exposition of all the elements of judgment, and careful instructions by the court for their estimate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4223.]

PLEADING ⇨236(1)—**AMENDMENT — DISCRETION.**

9. The allowance of an amendment to the complaint rests in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601.]

[No. 2.]

Argued April 28 and 29, 1914. Restored to docket for argument before full bench June 21, 1915. Reargued January 19 and 22, 1917. Decided March 6, 1917.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed, with instructions to dismiss the complaint, a judgment of the District Court for the Southern District of New York in favor of plaintiffs in an action for threefold damages, brought under the Sherman Anti-trust Act. Reversed. Judgment of District Court affirmed.

See same case below, on first writ of error, 92 C. C. A. 315, 166 Fed. 251; on second writ of error, 111 C. C. A. 368, 674, 190 Fed. 536, 1022.

Statement by Mr. Justice McKenna:

* Action, brought in the circuit court of the United States for the southern district of New York, by plaintiffs in error against defendants in error and others under the Sherman Act to recover damages for injuries sustained as the result of a combination in restraint of foreign trade.

The defendants, it is charged, being common carriers between New York and South African ports, did, under certain company names, some time prior to December, 1898,

enter into a combination and conspiracy in restraint of trade and commerce between New York and ports in South Africa, to be rendered effective by making certain discriminations in rates of freight to be charged which were calculated to coerce and prevent plaintiffs and other shippers and merchants similarly situated from employing such agencies and facilities of transportation as might be afforded them by other common carriers.

For such purpose they united under the name of "The South African Steam Lines" and distributed a circular¹ (exhibit A) promising to pay shippers by their lines 10 per cent upon the net amount of freight at tariff rates received on shipments from the United States to Africa, the commission to be computed every six months up to the 31st of January and the 31st of July in each year, and to be payable nine months after such respective dates, but only to shippers who shipped exclusively by their lines to certain African ports, and provided that the shippers directly or indirectly have not made or have not been interested in any shipments by other vessels.

The commission is not payable on the goods of any consignee who directly or indirectly imports goods by vessels other than those despatched by the combining lines.

These terms, it is charged, are against public policy and in restraint of trade.

About the middle of the year 1901 the defendant Deutsche Dampschiffahrts Gesellschaft, Hansa, and the firm of Funch, Edye, & Company, as its agent, offered to* transport merchandise to South African ports at reasonable rates and lower than those imposed by the other defendants. Thereupon the other defendants, for the purpose of

avoiding the competition of those carriers, accepted them into the scheme and combination, and there was agreement between them to continue the monopoly, and another circular was issued like the first, including only the additional announcement that the Deutsche Dampschiffahrts Gesellschaft, Hansa, had been added as one of the parties to the first-named agreement. The circular is attached to the complaint as exhibit B.

Subsequently the defendants adopted a verbal agreement that altered the circulars to the effect that the so-called "loyal" consignees could collect the so-called rebates regardless of whether the shippers were also loyal; but on the condition that where the shippers and consignees were both loyal, the rebates would be paid to the shippers, while if the consignee alone were loyal, the rebate would be paid by the defendants in London direct to the so-called loyal consignee.

Defendants have not despatched steamers to African ports at stated and regular dates, but have placed steamers on berth to receive general cargo only at such times and for such ports in South Africa as they deemed best for their private gain and profit.

By reason of the monopoly so created by defendants, shippers—among whom are plaintiffs—have been compelled to submit to hardships and inconvenience, and to pay unreasonable and higher rates to such extent as to leave at the present time in the possession of defendants collectively, as plaintiffs are informed, about one and one-half million dollars representing the extortion of their rates, and that of such amount £1,112, 7s. 11d. has been extorted from plaintiffs.

Two steamship companies, the Prince Line

¹ "The South African Steam Lines.

"Notice to Shippers in the United States.

"Commission in Respect of Shipments by Steam and Sailing Vessels.

"London, 31st December, 1898.

"1. Shippers to all ports of the Cape Colony and of Natal and to Delagoa bay are hereby informed that until further notice, and subject to the conditions and terms set out herein each of the undernamed lines will pay shippers by their line a commission of 10 per cent, calculated upon the net amount of freight at tariff rates received by such line from such shippers on their shipments from the United States to South Africa.

"2. The said commission to be computed every six months up to the 31st January and 31st July in each year, and to be payable nine months after such respective dates to those shippers only who, until the date at which the commission shall become payable, shall have shipped exclusively by vessels despatched by the undernamed lines respectively from the United States to ports

of the Cape Colony, Natal, and Delagoa bay, provided that such shippers, either as principals or as agents, have not directly or indirectly made or been interested in any shipments to any of the aforesaid ports by vessels other than those despatched by the undernamed, and also provided that the statement of claims for such commission shall be made in the annexed form, within twelve months of the date of shipment, to the line which shall have carried the goods in respect of which the commission is claimed.

"3. The above commission is not payable on the goods of any consignee who directly or indirectly imports goods by vessels other than those despatched by the undernamed lines.

"(Subscribed) American & African Steamship Line. Union-Clan Line.

"All previous notice to shippers or consignees with reference to returns on freight are canceled.

"Note.—The above commission will be payable to the shippers whose names appear on the bills of lading or to their order."

and the Houston Line, have, since the spring of 1902, offered to carry from the United States to South African ports merchandise for a reasonable and remunerative rate lower than that exacted by defendants.

Defendants, to prevent such steamers from competing, have, in addition to the terms imposed on the South African trade by the circulars above mentioned, imposed further conditions which, while they ostensibly reduced the lower rate of freight and announced that defendants would pay the greater difference arising therefrom, by them called a special commission, they still exacted the payment of the higher rates, by them called tariff rates, at the time of shipment, and imposed the following further condition: (1) Precedent to the payment of such difference they require all shippers to be loyal to them. (2) Each shipper to disclose the name of his consignee. (3) The difference in rates to be computed only on those steamers which would come into direct competition with the steamers of either the Prince Line or the Houston Line, called by defendants "fighting steamers." (4) The special commission or rebate to be granted only on limited amounts of freight room, to be allotted at the will and discretion of defendants, additional freight room to be paid for at the higher rate under the conditions expressed in the circulars.

These additional conditions are intended to further restrain trade, and in fact have prevented shippers who had already shipped goods under the original conditions imposed by the circulars from further exporting as much merchandise to South African ports at reasonable rates offered other shippers.

To further secure the monopoly of the carrying trade to such ports and oust competition defendants have threatened to withhold and have withheld by way of forfeit the repayment of the so-called rebates from all those among whom are plaintiffs, so-called by them "loyal shippers" and "loyal consignees," as aforesaid, "who would not continue to remain loyal under the additional conditions superimposed as aforesaid."

For illustration plaintiffs adduce two instances when they were obliged to pay higher rates on a portion of the shipments, which rates were higher than those offered by the opposition lines, and defendants threatened, if plaintiffs made the shipments over the latter lines upon the more favorable terms, to withhold from repaying plaintiffs all sums previously so compulsorily paid by plaintiffs.

Plaintiffs are informed and believe that since the opposition lines have offered to carry freight to South African ports defendants have, by reason of their conspiracy, re-

fused to allot uniform and proportionate freight room on their steamers, and have arbitrarily discriminated between several shippers and even against the so-called "loyal" shippers and consignees, with the unlawful intent that the moneys so held by them would be sufficient security to prevent such shippers or consignees from making shipments of or importing their goods by the competing vessels.

By reason of the conspiracy plaintiff and others similarly situated have been compelled either not to ship at all, and to lose a great deal of their trade, or to ship on defendants' steamers a small portion of merchandise at the lower rates, and the remainder, of the same class and even of the identical lot of merchandise, at the higher rates, which is practically prohibitive of any trade whatever by reason of the fact that the substantial difference between the two rates would be a discrimination against the various consignees and customers of plaintiffs and the various shippers and customers of other shippers by the same steamer.

The conspiracy violates the laws of the United States and especially the Act of July 2, 1890 [26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820], entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

* Plaintiffs allege damages in the sum of £1,112, 7s. 11d., equal to \$5,560, for which they pray as the excess over a reasonable rate, and the further sum of \$10,000 damages, and the trebling of these sums.

The defendants, by their company names, filed separate answers in which they deny some of the allegations of the complaint and admit others. They deny conspiracy and combination for the purpose or with the effect set out in the complaint. They admit the making and issuing of the circulars designated A and B in the complaint, but deny that they have the effect or were intended to have the effect ascribed to them.

They admit the refusal to pay plaintiffs certain claims as rebates, but deny the distinction between loyal shippers and loyal consignees and all of the inferences and assertions in regard thereto.

As a separate defense they allege that all freight carried by them for plaintiffs was carried on bills of lading, each of which contained on its face the statement of the amount of freight to be paid, and in respect to which in every instance plaintiffs either paid the freight or agreed to pay the amount of freight stated in the bill of lading, and in each instance gave a due bill which was subsequently paid; that the payments were made freely and voluntarily and without protest; and that, so far as any of the payments were made pursuant or with

reference to the printed circulars, plaintiffs co-operated knowingly in such transactions, and cannot now be entitled to any relief on account of payments of freight made thereunder.

It was prayed that the complaint be dismissed.

Upon the issues thus formed there were two trials. At the conclusion of the testimony on the first trial the court considered that no cause of action was established under the Sherman Law and upon motion of defendants dismissed the complaint. 149 Fed. 933.

*The judgment was reversed by the circuit court of appeals (October, 1908). 92 C. C. A. 315, 166 Fed. 251.

Upon the return of the case to the circuit court it was tried to a jury, resulting in a verdict for plaintiffs against the defendants composing the firms of Caysar, Irvine, & Company; Barber & Company; and Norton & Son, the action as to the other defendants having abated or been dismissed by the court.

The judgment recites that the action was brought under the act of Congress of July 2, 1890, and that a verdict had been rendered against the defendants above named for the sum of \$5,600, with interest in the sum of \$1,973.06,—in all, \$7,573.06; that thereupon the court directed the clerk to treble the amount of the verdict, pursuant to the terms of the act of Congress, making the amount \$22,719.18, and that, the parties consenting, the court fixed \$2,500 as an attorney's fee. The judgment was reversed by the circuit court of appeals, one member dissenting (July, 1911). 111 C. C. A. 368, 190 Fed. 536.

The circuit court at the first trial (Judge Hough sitting) was of opinion that the testimony did not establish that the combination charged against defendants was in unreasonable restraint of trade. The circuit court of appeals expressed a different opinion. The court said that the substance of the complaint was that defendants were engaged as carriers in South African trade and had entered into a combination in restraint of all foreign trade and commerce, in violation of the act of Congress, by means of a scheme under which they united as "The South African Lines," fixed rates, and shut off outside competition by requiring shippers to pay a percentage in addition to a reasonable freight rate, which they should receive back in case—and only in case—they refrained from shipping by other lines. And the court said the evidence showed the existence of a "conference" for the purpose of fixing and maintaining rates, and a return "commission" to "loyal" shippers. The manifest purpose of the combination and its

effect were, it was further said, to restrain competition, and that it was therefore in contravention of the Federal Anti-trust Act.

The court considered that whether the restraint was reasonable or unreasonable was immaterial under the decisions of this court, or whether the combination was entered into before or after plaintiffs commenced business, the statute applying to continuing combinations, or whether the combination was formed in a foreign country, as it affected the foreign commerce of this country and was put into operation here. And as the plaintiffs had alleged damage, the court decided that they were entitled to an opportunity to prove it, and remanded the case to the circuit court.

Upon the second appeal the court declared a change of view, saying: "When this case was in this court before we said, upon the authority of the decisions of the Supreme Court as we then interpreted them, that whether the restraint of trade imposed by the combination in question was reasonable or unreasonable was immaterial," and that it was "also apparent from the record that the circuit court upon the second trial, in holding as a matter of law that the combination shown was in violation of the statute, acted upon the same view of the law." And further: "In the light of the recent decisions of the Supreme Court in *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734, and *United States v. American Tobacco Co.* 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632, the construction so placed upon the statute by this court and the circuit court must be regarded as erroneous and a new trial must be granted unless the contentions of the parties are correct that, upon the facts shown, this court can now determine the legality of the combination."

The court then said that it was impossible to hold that the record disclosed a combination in unreasonable restraint of trade, but that it would be unduly prejudicial to plaintiffs to reverse the judgment with instructions to dismiss; that as the plaintiffs had presented their case in view of the decision of the court that the reasonableness of the restraint was immaterial, it would be unjust to them to dismiss the complaint because their proof did not conform to another standard, and that upon another trial the plaintiffs might be able to "produce additional testimony tending to make out a case within the Supreme Court decisions referred to." Accordingly, the court remanded the case for a new trial.

Subsequently a rehearing was granted on petition of plaintiff's who waived any right to a new trial and consented that the case

should be disposed of one way or the other. As a result of the rehearing the mandate was recalled and the judgment reversed, with instructions to enter an order dismissing the complaint.

This writ of error was then allowed.

Mr. Lorenzo Ullo for plaintiffs in error on original argument. Mr. A. Leo Everett for plaintiffs in error on reargument.

Messrs. J. Parker Kirlin, Thomas Thacher, and Charles R. Hickox for defendants in error.

* Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

A motion to dismiss the writ of error is made, two grounds being urged: (1) The circuit court of appeals was without jurisdiction to allow the writ on March 15, 1912, for the reason that its judgment had become executed and the judgment entered thereon in the circuit court November 24, 1911, had become final and irrevocable before the petition for the writ was filed and the order allowed. (2) The judgment of the circuit court was entered in the form finally adopted at the request of plaintiffs and by their consent, and the errors assigned by plaintiffs were waived by such request and consent.

The argument to support the motion is somewhat roundabout. It gets back to the circuit court and charges that because that court had entered judgment on the original mandate and had adjourned for the term without any application having been made to recall that judgment, and because no writ of error to review it was sought, the judgment became a final disposition of the case.

We are not concerned with what the circuit court might have done, but only with what the circuit court of appeals did and the jurisdiction it possessed. It received and granted a petition for rehearing, ordered a recall of the mandate previously issued, set aside the judgment of the circuit court, and remanded the case with directions to dismiss the complaint. The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay.

Subsequently a petition for the writ of error was filed and allowed and all further proceedings upon the part of the defendants for the enforcement of the judgment were suspended and stayed until the final determination by this court upon the writ of error, in return to which the record was properly furnished. *Atherton v. Fowler*, 91 U. S. 143, 23 L. ed. 265.

The motion to dismiss is denied.

The case in the courts below had a various fate, victory alternating between the parties, but finally resting with defendants.

The plaintiffs, dissatisfied, have brought the case here. We are confronted at the outset, in view of the proceedings in the courts below, with contentions as to what questions of law or fact are before us.

Notwithstanding two trials and two appeals and reviews in the circuit court of appeals, defendants insist the facts are yet in controversy. We cannot assent.

It will be observed from the excerpts from the opinions of the circuit court of appeals that the case was decided upon the proposition of law that the combination charged against defendants was not in unreasonable restraint of trade, and that such character was necessary to make it illegal under the Federal Anti-trust Act. As to the fact of combination and restraint and the means employed both trial and appellate courts concurred, and their conclusion is not shown to be erroneous.

There is a contention that "there is not in the record any direct proof whatever of the terms of any conference or agreement participated in by any of the defendants. All that appears is that certain steamship owners consisting of firms, the identity of whose members is not established, operated steamers in the trade to South African ports without competing with one another." But more than that appears, and it cannot be assumed that the circulars that were issued and the concerted course of dealing under them were the accidents of particular occasions having no premeditation or subsequent unity in execution. The contention did not prevail with the courts below and we are brought to the consideration of the grounds upon which the circuit court of appeals changed its ruling; that is, that it was constrained to do so by *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734, and *United States v. American Tobacco Co.* 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632.

It is not contended that the facts of those cases or their decision constrained such conclusion, but only that they announced a rule which, when applied to the case at bar, demonstrated the inoffensive character of the combination of defendants. In other words, it is contended that it was decided in those cases that "the rule of reason" must be applied in every case "for the purpose of determining whether the subject before the court was within the statute," to quote the words of the opinion, and, as explained in subsequent cases, it is the effect of the rule that only such contracts and combinations are within the act as, by reason of their in-

tent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade. *Nash v. United States*, 229 U. S. 373, 376, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; *Eastern States Retail Lumber Dealers Asso. v. United States*, 234 U. S. 600, 609, 58 L. ed. 1490, 1498, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951.

But the cited cases did not overrule prior cases. Indeed, they declare that prior cases, aside from certain expressions in two of them,² or asserted implications from them, were example of the rule and show its thorough adequacy to prevent evasions of the policy of the law "by resort to any disguise or subterfuge of form," or the escape of its prohibitions "by any in direction." And we have since declared that it cannot "be evaded by good motives," the law being "its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results." *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49, 57 L. ed. 107, 117, 33 Sup. Ct. Rep. 9; *International Harvester Co. v. Missouri*, 234 U. S. 199, 58 L. ed. 1276, 52 L.R.A. (N.S.) 525, 34 Sup. Ct. Rep. 859.

The rule condemns the combination of defendants, indeed, must have a stricter application to it than to the combinations passed on in the cited cases. The defendants were common carriers and it was their duty to compete, not combine; and their duty takes from them palliation, subjects them in a special sense to the policy of the law.

Their plan of evasion was simple and as effective as simple. They established a uniform freight rate, including in it what they called a primage charge. This charge was refunded subsequently, but only to shippers who shipped exclusively by the lines of the combining companies, and who had not, directly or indirectly, made or been interested in any shipment by other vessels. And there was the further condition that the rebate was not payable on the goods of any consignee who directly or indirectly imported goods by vessels other than those of the "conference,"—to use the word employed by the witnesses to describe the combining companies. This loyalty on the part of the consignees was subsequently excused, but loyalty upon the part of shippers was con-

tinued to be exacted, and its reward was the refunding of the primage charge. That the combination was effective both the lower courts agreed. Upon its extent they differed, the court of appeals considering that while it was in restraint of trade, the restraint was reasonable and therefore not obnoxious to the law.

The court of appeals has not given us its reason for its conclusion. Counsel for defendants say that the Standard Oil and Tobacco Cases furnished the explanation, and that they support what the history of the act establishes, that it was the "clear intent upon the part of Congress not to condemn contracts and combinations merely because they are in restraint of competition, or merely because they operate to raise the cost of commodities to consumers."

The argument that is employed to sustain the contention is one that has been addressed to this court in all of the cases and we may omit an extended consideration of it. It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial, and not a detrimental, agency of commerce.

We have already seen that a combination is not excused because it was induced by good motives or produced good results, and yet such is the justification of defendants. They assert first that they are voluntary agencies of commerce, free to go where they will, not compelled to run from New York to Africa, and that, "unlike railroads, neither law nor any other necessity fixes them upon particular courses;" and therefore, it is asked, "who can say that otherwise than under the plan adopted, any of the ships of the defendants would have supplied facilities for transportation of commodities between New York and South Africa during the time referred to in the complaint?" The resultant good of the plan, it is said, was "regularity of service, with steadiness of rates;" and that "the whole purpose of the plan under which the defendants acted was to achieve this result."

We may answer the conjectures of the argument by the counter one that if defendants had not entered the trade, others might have done so and been willing to serve shippers without construing them,—been willing to compete against others for the patronage of the trade. And it appears from the testimony that certain lines so competed until they were taken into the defendants' combination.

Nor can it be said that under defendants as competitors, or that under competing lines, service would not be regular or rates

² *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

certain, or, if uncertain, that they would be detrimentally so.

That the combination was intended to prevent the competition of the lines which formed it is testified, and it cannot be justified by the conjectures offered by counsel; nor can we say that the success of the trade required a constraint upon shippers or the employment of "fighting ships" to kill off competing vessels which, tempted by the profits of the trade, used the free and unfixed courses of the seas, to paraphrase the language of counsel, to break in upon defendants' monopoly. And monopoly it was; shippers constrained by their necessities, competitors kept off by the "fighting ships." And it finds no justification in the fact that defendants' "contributions to trade and commerce" might "have been withheld." This can be said of any of the enterprises of capital, and has been urged before to exempt them from regulation even when engaged in business which is of public concern. The contention has long since been worn out ^{of} and it is established that the conduct of property embarked in the public service is subject to the policies of the law.

It is contended that the combination, if there was one, was formed in a foreign country and that, therefore, it was not within the act of Congress; and that, besides, the principals in the combination, and not their agents, were amenable to the law. To this we do not assent. As was said by the circuit court of appeals, the combination affected the foreign commerce of this country and was put into operation here. *United States v. Pacific & A. R. & Nav. Co.* 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. Rep. 443. It, therefore, is within the law, and its managers here were more than simply agents—they were participants in the combination.

It is, however, contended that even if it be assumed the facts show an illegal combination, they do not show injury to the plaintiffs by reason thereof. The contention is untenable. Section 7 of the act gives a cause of action to any person injured in his person or property by reason of anything forbidden by the act, and the right to recover threefold the damages by him sustained. The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury. *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 436, 51 L. ed. 553, 557, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075. The unreasonableness of the rate and to what extent unreasonable

was submitted to the jury, and the verdict represented their conclusion.

The next contention is that the fact of combination should have been submitted to the jury, and not decided as a matter of law by the court. We are unable to assent. There was no conflict in the evidence, nothing, therefore, for the jury to pass upon; and the court properly assumed the decision of what was done and its illegal effect.

It is next contended that the jury was permitted to consider as elements of damage supposititious profits. The record does not sustain the contention. The profits were not left to speculation. There were different sums stated, resulting from the loss of particular customers, and the fact of their certainty was submitted to the judgment of the jury. They were told that they "ought not to allow any speculative damages," that they were not "required to guess" as to what damages "plaintiff claimed to have sustained." And further, that the burden of proof was upon plaintiffs and that, from the evidence, the jury should be able to make a calculation of what the damages were. Besides, plaintiffs alleged an overcharge, and the verdict of the jury was for its amount and interest.

Two other contentions are made: (1) The court should have charged the jury that the burden was on the plaintiffs to show that the rates on their shipments were excessive and unreasonable. (2) The court erred in permitting plaintiffs to amend their complaint so as to set up a new cause of action.

(1) If there was error in this, its effect is not appreciable. The record shows a most painstaking trial of the case on the part of counsel and the court, a full exposition of all of the elements of judgment, and careful instructions of the court for their estimate. It would be going very far to reverse a case upon the effect of the bare abstraction asserted by the contention, even granting it could be sustained.

(2) Permitting the amendment of the complaint was not an abuse of the discretion which a court necessarily possesses.

The above are the main contentions of defendants. They make, besides, a contention comprehensive of all of the rulings against them; but to give a detailed review of such rulings would require a reproduction of the record, and we therefore only say that they have been given attention and no prejudicial error is discovered in them.

Judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

(243 U. S. 1)

SUSIE A. TYRRELL, as Administratrix of the Estate of Conrad E. Tyrrell, Deceased, Petitioner,

v.

DISTRICT OF COLUMBIA.

COURTS  388—CERTIORARI TO DISTRICT OF COLUMBIA COURT OF APPEALS—IMPROVIDENTLY GRANTED—DISMISSAL.

Certiorari to the court of appeals of the District of Columbia will be dismissed where the record discloses that the question upon which the certiorari was prayed was not before the court below, and is not now open for consideration, as no exception concerning the ruling of the trial court on that subject was taken so as to preserve a review concerning it.

[Ed. Note.—For other cases, see Courts, Cent Dig. §§ 1038-1040.]

[No. 54.]

Argued November 1, 1916. Decided March 6, 1917.

ON WRIT of Certiorari to the Court of Appeals of the District of Columbia to review a judgment which reversed and remanded for a new trial a judgment of the Supreme Court of the District in favor of plaintiff in an action of death against the District, as a municipal corporation. Dismissed for want of jurisdiction.

See same case below, 41 App. D. C. 463.

The facts are stated in the opinion.

Messrs. Levi H. David and Alexander Wolf for petitioner.

Messrs. Conrad H. Syme and Percival H. Marshall for respondent.

* * Mr. Chief Justice White delivered the opinion of the court:

We state only so much of the case as is essential to an understanding of the disposition which we are constrained to make of it.

The action was commenced in May, 1912, by the petitioner as administratrix of the estate of her husband, to recover from the District of Columbia, as a municipal corporation, damages suffered as the result of his wrongful death in September, 1911. Briefly, it was alleged that the District had contracted to make an addition to a school building to it belonging, known as the McKinley Manual Training School, and to put in order and adjust the boilers in the basement of the old building, and while the deceased was engaged under a subcontractor in doing the latter work, he was killed by an explosion of illuminating gas which had escaped from the gas pipes which were in the basement. It was alleged that the gas had been permitted to escape and remain in the basement through the neglect and wrongful conduct of the municipality or its agents. The averments as to the negligence

of the municipality both in permitting the escape of the gas and as to allowing it to remain after notice of the dangerous condition, and as to the absence of neglect on the part of the plaintiff's intestate, were ample. There was a subsequent amendment to the petition, alleging facts which, it was averred, established that the conduct of the District as to the escape and failure to remove the gas was equivalent to the creation by it of a public nuisance. The defense was a general denial and a special plea setting up a release on the part of the plaintiff, which latter, on demurrer, was stricken out. There was a verdict and judgment in favor of the plaintiff, and an appeal was taken by the defendant municipality. The court of appeals reversed the judgment and remanded, with directions to grant a new trial, one member of the court dissenting. The appellee alleging that the case in her favor could not be bettered at a new trial, asked that a final judgment be entered, upon the theory that the case would be then susceptible of review in this court on error. On the refusal of this prayer, a petition for certiorari was here presented.

The basis asserted for the application for certiorari was that the court below, disregarding a decisive line of decisions by this court holding that a municipality, the District of Columbia, was responsible for positive torts committed by its servants or agents in the course of their employment, under the application of the rule respondeat superior, had mistakenly decided that such decisions were not controlling because that principle had no application when the servants or agents of a municipality represented it in the discharge of duties which were governmental or public in character, as contradistinguished from mere municipal duties, —a ruling from which it was deduced that, in the former situation, a wrong suffered by an individual, however grievous, was not susceptible of redress, because the wrongdoer, the municipality, acting through its agents, was beyond the reach of courts of justice. Besides, it was declared that although the court proceeded upon the assumption that the doctrine which it announced was not in conflict with the previous decisions of this court, that assumption was obviously a mistaken one, since the case principally relied upon by the court to sustain the doctrine which was applied had in express terms declared that the principle announced was in conflict with a previous decision of this court, which decision was wrong and would therefore not be applied. The existence of the ground thus stated in the petition for the writ was not challenged in the opposition filed by the respondent, al-

though the correctness of the legal propositions relied upon and the significance of the previous decisions of this court were disputed.

As on the face of the opinion of the court below the reasoning apparently justified the inference that the situation was as stated in the petition for certiorari, the prayer for the writ was granted. When, however, we come to a close examination of the record on the submission of the case on its merits, we discover that the question upon which the certiorari was prayed under the circumstances previously stated does not arise on the record and is not open for consideration, and therefore (of course, we assume through inadvertence of counsel) the petition for certiorari was rested upon a wholly unsubstantial and nonexisting ground,—a conclusion which will be at once demonstrated by the statement which follows:

At the trial the court in express terms charged the jury that "for a mere act of isolated negligence the municipality of the District of Columbia would not be responsible, no matter what the result of the isolated act of negligence was. The District in this action, if responsible at all, can only be responsible upon the theory that the death. . . . resulted from the maintenance of a nuisance, in the first place, and secondly, that the District of Columbia maintained a nuisance." And this was followed in the charge by a definition of what in the law would constitute a nuisance. To this charge as to nonliability of the city for any act* of negligence whatever under the circumstances, unless there was a public nuisance, no exception whatever was taken by the plaintiff, the only exception on the subject being that reserved by the defendant to the charge that there would be a liability even in case of a public nuisance. The case, therefore, on the appeal below (except as to subjects having no relation to the doctrine of municipal liability), involved only the question of liability in case of a public nuisance, and raised no question concerning the correctness of the ruling that the municipality was not liable for an act of individual negligence because the work which was being done when the accident occurred involved the discharge of a governmental as distinguished from a municipal duty. It is true that in the reasoning of its opinion the court below stated what it deemed to be the correct theory concerning the division of the functions of a municipality, in one of which it had power to inflict a positive wrong without redress, and made reference to state cases deemed to establish this doctrine and a decision of this court which it said was argued at bar to establish to the contrary.

But this was only reasoning deemed by the court to throw light upon its conclusion on the subject which was before it; that is, whether there was liability on the part of a municipality for a public nuisance as an exception to the general rule of its nonliability for a wrong done when in the exercise of a governmental function, and as a prelude to the ground upon which the judgment rendered was rested; that is, that there was no evidence tending to support the conclusion that the facts constituted a public nuisance.

In this view it is plain that if we differed from the conclusion of the court below on the subject of the tendencies of the proof as to the nuisance, we would not be at liberty as an original question to consider and dispose of the alleged contention concerning the governmental function and the resulting nonliability for a wrong done by a municipality, since that question, under the state of the record, was not before the lower court and would not be open for our consideration, as no exception concerning the ruling of the trial court on that subject was taken so as to preserve a review concerning it. As it follows that the certiorari was improvidently granted as the result of a misconception of the parties as to the state of the record and the questions open, it follows that the case comes directly within the rule announced in *Furness, W. & Co. v. Yang-Tsze Ins. Asso.* 242 U. S. 430, 61 L. ed. 409, 37 Sup. Ct. Rep. 141, and our duty is to dismiss the certiorari, thus leaving the judgment of the court below unaffected by the previous order granting the writ.

Dismissed.

(243 U. S. 6)
WELLSVILLE OIL COMPANY, Plff. in
Err.,
v.

MARTHA MILLER, née Everett, and Alpha
Oil Company.

COURTS ⇐284—FEDERAL QUESTION—ISSUES INHERENTLY FEDERAL.

1. The issues involved in a suit to protect alleged rights under an oil and gas lease, and to set aside a subsequent conflicting lease, so concern matters inherently Federal in their nature because of the Federal nature of the court which authorized the first lease (the United States court of the Indian Territory), because of the subject-matter with which the case dealt (Indian lands), and because of the asserted want of power in the Secretary of the Interior to disapprove the lease, and the further assertion that the court had no authority in any event to subject the lease to the approval of such Secretary, that a writ of error will lie from the Federal Su-

preme Court to review the judgment of the highest court of a state, adverse to the lessee in such lease.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-826, 831.]

INDIANS ⚡16(3)—OIL AND GAS LEASE—APPROVAL BY SECRETARY OF INTERIOR.

2. The contention that the condition precedent of approval by the Secretary of the Interior of a lease of an Indian allotment for oil and gas purposes, which was imposed by the court authorizing such lease, was retracted when that court approved the executed lease before it had been presented to the Secretary, when it was reported to the court by the guardian of the Indian allottee, in conformity with previous directions to that effect, is plainly without merit, where the report of the lease and its approval by the court were merely prerequisite and preliminary steps to the submission of the lease to the Secretary for his action, in order that the condition precedent which the court had established might be brought into play, and where every condition of the lease makes it manifest that it was drawn with reference to the power of the Secretary to approve or disapprove it, and that its execution was subject to all the conditions, limitations, and restrictions resulting from that situation, and where the petition in the suit to uphold the validity of the lease alleges in express terms that the Secretary asserted the power to approve, and that the court, in giving the authority, acquiesced in such assertion of authority as a prerequisite.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45.]

JUDGMENT ⚡829(1)—FULL FAITH AND CREDIT—DECREE OF FEDERAL COURT.

3. Failure to give effect to a lease of an Indian allotment for oil and gas purposes is not a denial of full faith and credit to the order of the United States court of the Indian Territory, authorizing such lease, where the approval of the Secretary of the Interior, made a condition precedent by that court to the exercise of such authority, was never obtained.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1510, 1511, 1515.]

[No. 541.]

Argued December 6, 1916. Decided March 6, 1917.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which dismissed an appeal from a judgment of the District Court of Rogers County, in that state, dismissing the petition in a suit to protect rights under an oil and gas lease, and to set aside a subsequent conflicting lease. Affirmed.

See same case below, on first appeal, 44 Okla. 493, 145 Pac. 344; on second appeal, — Okla. —, 150 Pac. 186.

The facts are stated in the opinion.

Messrs. Charles H. Merillat, James A. Veasey, Lloyd A. Rowland, and Jere P. O'Meara for plaintiff in error.

Mr. Robert J. Boone for defendants in error.

* Mr. Chief Justice White delivered the opinion of the court:

The Wellsville Oil Company sued to protect its alleged rights as lessee under an oil and gas lease and to set aside a conflicting lease held by the Alpha Oil Company. Upon demurrer the petition was dismissed for want of cause of action, and the judgment to that effect was affirmed by the court below.

* To state the undisputed facts which led to the bringing of the suit, and upon which its determination depends, will make clear the issues. Martha Miller, born Everett, owned land which had been allotted to her as a Cherokee of the full blood, and which, through her guardian, under authority of court, approved by the Secretary of the Interior, had been leased in 1905 for the term of her minority for oil and gas purposes, the lease having by assignment passed to the Wellsville Oil Company, also with the approval of the Secretary of the Interior. In 1907 the guardian filed in the United States court, northern judicial district of the Indian Territory, a request for authority to make a new lease to the Wellsville Oil Company for fifteen years. It was stated that the minor was then within one year of majority, that the existing lease would expire at that time, and that the Oil Company, in view of the short time which the lease had yet to run, was engaged in pumping oil night and day and would probably extract all of the oil before the expiration of the lease, to the great detriment and injury of the minor and her property, as the price of oil was very low and the royalties would amount to very little. It was averred that the Oil Company had agreed that it would abandon the "excessive and damaging pumping" in which it was engaged if it could get a new lease for fifteen years, and proposed to pay a bonus and an additional royalty. The court, after a reference, entered an order authorizing the lease, expressly, however, causing the authority to make it to depend upon the approval of the Secretary of the Interior, and providing that only when the lease was so approved should it take the place of the old and existing lease, which had yet a year to run. The order directed the guardian to report the lease by him made, and to furnish a new bond to secure the bonus and the additional sums to be paid. Acting under this authority, on the form of lease prepared and exacted by the Interior Department,* the parties executed the fifteen-year lease. This lease in the

fullest way gave the Secretary of the Interior control over the parties in performing the obligations of the lease, delegated to the Secretary authority to cancel the lease without resort to legal proceedings if he deemed the situation required it, and expressly exacted that, after approval by the Secretary, the lease should be void unless an additional bond, subject to his approval, was given. The lease thus drawn was reported to the court, and was by it approved on July 24, 1907. It was forwarded by the Indian agent in October of that year to the Commissioner of Indian Affairs for submission to the Secretary of the Interior, and was by the Secretary in the same month expressly disapproved.

A little more than three years later, the petition to which we have at the outset referred was filed, and some months thereafter, in September, 1911, there was an amended petition. This petition was divided into two counts. The first, after reciting the facts which we have stated as to the making of the new lease and the disapproval of the same by the Secretary, charged that the plaintiff had remained in possession of the property under the new lease; that it worked and developed the same, producing oil therefrom, but that it was unable to dispose of the oil, as the only means for its outlet was through the pipe line of the Prairie Oil Company, and that company, under the influence of the Secretary of the Interior, had refused to pay for the oil on the ground of the nonexistence of the lease. It was further charged that some time after Martha Miller, the lessor, had become of age, she had leased the property to the Alpha Oil Company for gas and oil purposes, that that company had fraudulently interfered with the exercise of the rights of plaintiff under its lease and had ousted the plaintiff of possession and had wrongfully held possession until 1910, in which year it had abandoned the property. It was alleged that, following this abandonment, the plaintiff had retaken possession and continued to produce oil and transmit it through the pipes of the Prairie Oil Company without pay, as in the previous period. It was charged that the fifteen-year lease was valid, that the Secretary of the Interior was wholly without authority of law to disapprove the same, that while the court, in sanctioning the lease, had acquiesced in his claim of authority to do so, that acquiescence was nothing worth, and the lease, as made, was valid notwithstanding the disapproval of the Secretary. There was an inconsistent claim in the petition that the court, by approving the lease as presented by the guardian prior to its transmission to the Secretary of the Interior for his action,

had virtually sanctioned the lease, upon the theory that the approval of the Secretary was not necessary. The second count asserted, under the theory of the validity of the lease, the right to the proceeds of the oil in the hands of the Prairie Oil Company, and even upon the hypothesis that the lease was invalid, the right to be reimbursed a very large amount of expenses and costs of improvements which it was alleged had been made in working and developing the property.

The prayer was for a judgment upholding the validity of the fifteen-year lease, and annulling the lease to the Alpha Oil Company, and awarding the proceeds of oil in the hands of the Prairie Oil Company to the plaintiff. It was further prayed, under the hypothesis that the fifteen-year lease should not be upheld, that there be a judgment for the costs and expenses, as averred in the second count.

The petition was demurred to on the ground that it stated no cause of action. The demurrer was sustained, and as the plaintiff elected to stand upon its pleading, a judgment was entered dismissing the petition on the merits. By order of court and consent of parties it came to pass that the proceeds of the oil which had been hitherto received by the Prairie Oil Company were subjected to the order of the court for ultimate distribution, and an agreement was had concerning the right of the Prairie Oil Company to retain the proceeds of the oil produced by the operations under the lease until it became possible to distribute the same by a final disposition of the cause. The case was then taken to the court below. It was there decided: (a) That the plaintiff was not in a position to invoke the equitable powers of the court for the purpose of enforcing the fifteen-year lease because it appeared that the lease had been procured by the wrongdoing of the petitioner in excessively exercising its right to pump as a means of forcing the making to it of a new lease for a long period; and (b) that in any event, as the new lease had, by the order of the court, been in express terms subjected, as a condition precedent, to the approval of the Secretary of the Interior, the failure of that officer to so approve, indeed, his express disapproval, had prevented the power to make the lease from taking being, and therefore there was no foundation whatever upon which to base the claim that the lease had been lawfully executed, and it was held that there was hence no necessity for passing upon the question of legal power in the Secretary to approve or disapprove. In other words, it was decided that if the Secretary had power, the failure to approve was an end of the controversy; if he had not

the power, the same result followed, since the court which granted the right had, in express terms, permitted it to be exercised only upon the precedent condition that its exertion was approved by the Secretary. In addition the court held that the contention that because the form of lease as drawn was reported to the court, which had given the authority to make it, subject to the approval of the Secretary of the Interior, and received its approval before action by the Secretary, therefore the condition of precedent action of the Secretary was waived or withdrawn, was without foundation. The court did not pass upon the question raised upon the second count concerning the right to recover costs and expenses if the lease were held not to exist, upon the ground that, as the petitioner was in possession, that question might be reserved for ulterior consideration. 44 Okla. 493, 145 Pac. 344.

Following this judgment the trial court distributed the money which had accumulated in its custody by virtue of the agreement previously made as well as a further sum derived from the delivery of oil from the leased property which was in the hands of the Prairie Oil Company. This distribution was made upon the basis of the non-existence of the fifteen-year lease, of the right of Martha Miller to possession subject to the lease by her made to the Alpha Oil Company, on a ratio which was agreed upon between the two interested parties, and there was a judgment against the Wellsville Oil Company for costs. The appeal of that company, taken from this order, was dismissed by the court below on the ground that the order substantially embraced only a distribution of funds which had been virtually directed to be distributed by the previous judgment. In thus disposing of the case it was held that the assignment of error made by the Wellsville Oil Company concerning the failure to allow it costs and expenses, as urged in the second count of its petition, was not foreclosed because, being in possession, as previously held, that subject might be litigated when an attempt to oust the possession was made. In this connection the court observed that while it was true a recital was contained in the order of distribution that Martha Miller was entitled to possession as owner, as no process was directed to issue giving effect to this decree, it was a mere surplusage, which left the question open. — Okla. —, 150 Pac. 186.

All consideration of error committed in refusing, in either judgment, to allow the costs and expenses asserted in the second count of the petition, may be at once put aside, as it is declared in the argument for

the plaintiff in error that this particular phase of the case is not urged. Moreover, before coming to consider the merits of the errors relied upon, we observe that because of the Federal nature of the court which authorized the lease whose validity was involved, the subject-matter with which the case dealt (Indian land), and the asserted want of power in the Secretary of the Interior to disapprove the lease, and the further assertion that the court had no authority in any event to subject the lease to the approval of the Secretary, we think the issues involved so concern matters of inherently Federal nature as to afford jurisdiction. *Swafford v. Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; *Fritzen v. Boatmen's Bank*, 212 U. S. 364, 53 L. ed. 551, 29 Sup. Ct. Rep. 366; *Ohio ex rel. Davis v. Hildebrand*, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708. We therefore overrule the motion to dismiss.

Without following the elaborate argument of the plaintiff in error and the various propositions which that argument advances, we content ourselves with saying that every proposition relied upon will be embraced and disposed of by these considerations:

First. The contention that the court which authorized the lease retracted the condition precedent of approval by the Secretary of the Interior which it had previously imposed because it approved the executed lease before it had been presented to the Secretary, when it was reported to the court by the guardian in conformity with previous directions to that effect, is plainly without merit: (a) Because, as pointed out by the court below, the report of the lease and its approval were mere prerequisite and preliminary steps to the submission of the lease to the Secretary for his action in order that the condition precedent which the court had established might be brought into play; (b) because the contention is directly in conflict with the express terms of the lease which was submitted and approved, every condition of which made it manifest that it was drawn with reference to the power of the Secretary to approve or disapprove the same, and that its execution was subject to all the conditions, limitations, and restrictions resulting from that situation; (c) because the contention is directly in conflict with the petition which, as we have already pointed out, in express terms alleged that the Secretary asserted the power to approve, and that the court, in giving the authority, acquiesced in such assertion of authority as a prerequisite.

Second. The contention that the failure to give effect to the lease was a denial of full faith and credit to the order of the court

authorizing the guardian to make the lease involves on its face a misconception and comes to saying that because the condition precedent which was imposed by the order of authorization, that is, the approval of the Secretary, was enforced, thereby there resulted a failure to give effect to the order. In other words, the argument is, that because the court gave full effect to the judgment, it failed to carry it out. In fact, on the very face of the petition, of the assignments of error, and of all the arguments, it is apparent that they rest upon the plainly erroneous assumption which we thus point out, since they all but assert that the power to execute the lease, which was given only upon the precedent condition of approval by the Secretary, should have been upheld despite the fact that such approval was never obtained. As the petition averred that, acquiescing in the possession by the Secretary of legal authority to approve the lease, the court gave the right to make it, only conditioned upon such approval, it follows that the averment that there was no legal power in the Secretary to approve was negligible, since it but asserted that the power to make the lease never arose.

Affirmed.

(243 U. S. 15)

ALLEN BOND and William J. Buttfield,
Partners as Bond & Buttfield,

v.

J. L. HUME.

GAMING — 2 — CONFLICT OF LAWS — CONTRACTS — FUTURES — PUBLIC POLICY.

1. The public policy defined by the provisions of Tex. Rev. Crim. Stat. 1911, arts. 538, 539, making criminal all dealings in futures where certain prescribed conditions as to delivery, option, and ultimate performance are not exacted or do not exist, will not be violated by the enforcement in a Federal court, sitting in that state, of a contract made and executed in the state of New York, and valid under the laws of that state, between a citizen of New York and a citizen of Texas, for the sale of cotton for future delivery upon the New York Cotton Exchange (with the understanding that actual delivery was contemplated), pursuant to the rules, regulations, customs, and usages of said Exchange, one of which provides that the cotton may be "of any grade from Good Ordinary to Fair inclusive, . . . at the price of — cents per pound for middling, with additions or deductions for other grades according to the rates of the New York Cotton Exchange existing on the day previous to the date of the transferable notice of delivery."

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 2.]

GAMING — 49(1) — PLEADING — TRUTH OF ALLEGATIONS — STATUTORY PRESUMPTION.

2. The general provisions of Tex. Rev. Crim. Stat. 1911, arts. 545, 546, that whenever a criminal prosecution is commenced against a person who may have made a particular future contract containing provisions in violation of the statute against futures the presumption shall be prima facie that the illegal conditions forbidden by that statute existed, and, therefore, that there was guilt, until the contrary was shown, affords no ground for holding, in a civil case brought to enforce a contract for the sale of cotton for future delivery, that the averments of the petition must be taken to be untrue in order to defeat the suit.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 100.]

[No. 119.]

Argued February 2, 1917. Decided March 6, 1917.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fifth Circuit presenting the question as to whether the enforcement in Texas of a New York contract for the sale of cotton for future delivery was prevented by the Texas statute against futures. Answered in the negative.

Statement by Mr. Chief Justice White: ^{*10}

*"This action was instituted in the United States circuit court for the western district of Texas, at Austin, on the 23d day of February, 1910, by Allen Bond and William J. Buttfield, plaintiffs, against J. L. Hume, defendant, to recover the balance due upon an open account for money advanced to defendant, and paid, laid out, and expended for his account, and for services rendered and performed for defendant at his special instance and request at divers times between the 1st day of July, 1907, and the 1st day of June, 1908, at the city, county, and state of New York, in connection with the purchase and sale for defendant's account of cotton for future delivery upon the New York Cotton Exchange, pursuant to the rules, regulations, customs, and usages of said Exchange, and for the amount due upon a certain promissory note executed by defendant, payable to the order of J. W. Buttfield, and by the latter assigned to the firm of Bond and Buttfield.

"The plaintiffs' first-amended original petition contains the following allegations:

"The plaintiffs at the special instance and request of the defendant at the city, county, and state of New York, advanced to the defendant and paid, laid out, and expended for his account divers sums of money, and did and performed for said defend-

*17 ant at the city, county, and state of New York, divers services in and about the purchase and sale of the defendant account cotton upon the New York Cotton Exchange, and in pursuance of the rules, regulations, customs, and usage of the said New York Cotton Exchange, a copy of the rules and by-laws and regulations being hereto attached and marked exhibit A, and asked to be made, etc.

"That the said services were rendered and said money paid out by them to said defendant for and at his request in buying and selling for his said account as his agent cotton for future delivery according to the rules and regulations of the New York Cotton Exchange in the city of New York, a copy of said rules and regulations being hereto attached and marked exhibit, etc.

"Said orders for the purchase and sale of cotton for future delivery were received by plaintiffs and executed with the understanding and agreement between the parties that actual delivery for this account was contemplated, subject to the rules and by-laws of the said New York Cotton Exchange, as hereto attached and marked said exhibit A.

"Plaintiffs allege further that they made said purchase and sales of the cotton for and at the request of the said defendant at the prices respectively authorized by him, and at his instance and request entered into binding contracts of purchase and sale for future delivery in accordance with the said rules and by-laws of the said New York Cotton Exchange, a copy of said rules and by-laws being hereto attached and marked exhibit A, and made a part of this petition.

*18 "Plaintiffs further allege that at the several times they made said purchases and sales for the defendant he well knew that actual delivery was contemplated, and well knew that plaintiffs were to make and did make said purchases and sales under and subject to the rules and by-laws of the New York Cotton Exchange, and were held personally bound for carrying out said contract, as will more fully appear by reference to said rules and by-laws hereto attached and marked exhibit A, and plaintiffs allege that they promptly advised the defendant of the said several purchases and sales, and that said purchases and sales were made in accordance and with his instruction, subject to the rules and by-laws of the New York Cotton Exchange, and that said orders for the purchase and sale of cotton for future delivery were received and executed with the distinct understanding that actual delivery was contemplated, as provided by the by-laws and rules of said Exchange, as will more fully appear by reference to said exhibit A.'

"The by-laws of the New York Cotton Exchange pleaded by the plaintiffs contain the following provision:

"The cotton to be of any grade from Good Ordinary to Fair, inclusive, and if tinged or stained not below Low Middling Stained (New York Cotton Exchange inspection and classification) at the price of —cents per pound for middling, with additions or deductions for other grades according to the rates of the New York Cotton Exchange existing on the day previous to the date of the transferable notice of delivery.'

"To this pleading the defendant, in the lower court, interposed the following exceptions:

"I. Now comes the defendant in the above-entitled cause by his attorney, and excepts to plaintiffs' petition herein and says that the same is not sufficient in law to require him to answer, and should be dismissed.

"II. And for special cause of exception defendant shows the following:

"1. It is apparent from the face of plaintiffs' petition that the balance due upon the alleged account sued on arose out of a gaming transaction in cotton futures on the New York Cotton Exchange, that none of the cotton*alleged to have been bought and sold was delivered, but the account sued on simply represents the difference in the rise and fall of the market on said Cotton Exchange, and were alleged to have been settled by plaintiffs by paying or receiving a margin or profit on each contract, as shown in said account, and that the alleged balance claimed by plaintiff to be due from defendant consists of said alleged margin or profit.

"2. It appears from plaintiffs' petition that said alleged account sued on arose out of transactions on the New York Cotton Exchange, and pursuant to the rules, regulations, customs, and usages of said Exchange, and does not show or set forth that in the settlement or closing out of said transaction sued on by delivery or tender of any grade or grades of cotton other than the grade upon which the prices were based in the transaction sued on, that the same were settled or closed out at the actual price for spot delivery of such other grade or grades at the time and place of delivery or tender.'

"Upon this record the court below entered the following order:

"Thereupon came on to be heard the demurrers and exceptions of defendant to plaintiffs' amended petition, and the same having been heard and duly considered, it is the opinion of the court that said demurrers and exceptions should be sustained, and it is accordingly so ordered, and the plain-

tiffs declining to amend, it is further ordered that said cause be and the same is hereby dismissed at the cost of plaintiffs, to which order of the court sustaining said demurrers and exceptions, and dismissing said cause, the plaintiffs in open court excepted."

Messrs. Charles Pope Caldwell and W. D. Caldwell for Bond et al.

No brief was filed for Hume.

* 20 * Mr. Chief Justice White, after stating the contents of the certificate of the court below as above reproduced, delivered the opinion of the court:

The question as to which the court below desires to be instructed upon the case as stated in the foregoing certificate is this:

"Where a contract between a citizen of the state of New York and a citizen of the state of Texas is entered into, made, and executed in the state of New York, for the sale of cotton for future delivery upon the New York Cotton Exchange, pursuant to the rules, regulations, customs, and usages of said Exchange, and the same is a valid exigible contract in the state of New York, does the statute of the state of Texas (known as the 'Bucket Shop Law') passed by the 30th legislature of the state of Texas, in 1907, the same being incorporated in the Revised Criminal Statutes of Texas (1911) as chapter 3, pages 141, 142, or any public policy therein declared, prevent a district court of the United States, sitting in Texas, wherein a suit is brought to recover for breach of said contract, from granting such relief as otherwise but for such statute the parties would be entitled to have and receive?"

We construe the question as simply asking whether, under the pleadings as stated in the certificate, a cause of action was disclosed which there was jurisdiction to hear, taking into consideration the local law, including the provisions of the Texas statute referred to in the question.

It is obvious on the face of the pleadings, as stated in the certificate, that the contract the enforcement of which was sought was valid under the laws of the state of New York, the place where it was entered into and where it was executed, and this validity was not and could not be affected by the laws of the state of Texas, as, in the nature of things, such laws could have no extraterritorial operation. This conclusion is, however, negligible, as the question is not whether the contract was valid, but whether, being valid under the law of New York, it was susceptible, consistently with the laws of Texas, of enforcement in the courts of the United States, sitting in that

state. And this question involves the inquiry, Was there any local public policy in the state of Texas which, consistently with the duty of the courts of that state under the Constitution to give effect to a contract validly made in another state, was sufficient to warrant a refusal by the courts of that state to discharge such duty?

A statement of a few elementary doctrines is essential to a consideration of this issue. Treating the two states as sovereign and foreign to each other,—New York, under whose laws the contract was made and where it was valid, and Texas, in whose courts we are assuming it was sought to be enforced,—it is elementary that the right to enforce a foreign contract in another foreign country could alone rest upon the general principles of comity. But, elementary as is the rule of comity, it is equally rudimentary that an independent state under that principle will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or, in other words, violate the public policy of the state where the enforcement of the foreign contract is sought. It is, moreover, axiomatic that the existence of the described conditions preventing the enforcement in a given case does not exclusively depend upon legislation, but may result from a judicial consideration of the subject, although it is also true that courts of one sovereignty will not refuse to give effect to the principle of comity by declining to enforce contracts which are valid under the laws of another sovereignty unless constrained to do so by clear convictions of the existence of the conditions justifying that course. And finally, it is certain that, as it is peculiarly within the province of the law-making power to define the public policy of the state, where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under a foreign law, comity will yield to the manifestation of the legislative will and enforcement will not be permitted. It is certain that these principles which govern as between countries foreign to each other apply with greater force to the relation of the several states to each other, since the obligations of the Constitution which bind them all in a common orbit of national unity impose of necessity restrictions which otherwise would not obtain, and exact a greater degree of respect for each other than otherwise by the principles of comity would be expected. It is unnecessary to cite authority for these several doctrines since, as we have said, they are in-

disputable; but they nowhere find a more lucid exposition than that long ago made by Mr. Chief Justice Taney in *Bank of Augusta v. Earle*, 13 Pet. 519, 589, 590, 10 L. ed. 274, 308, 309.

Coming to apply these principles from general considerations, as it is undoubted that the New York contract as declared on was not only valid under the law of New York, but was not repugnant to the common or general law, as long since settled by this court (*Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950; *Clews v. Jamieson*, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845), and as we have been referred to and have been able to discover no decision of the courts of Texas or statute of that state causing its enforcement to be repugnant to the public policy of Texas, it must result that the question would have to be answered in the negative unless a different conclusion is required by the provisions of the particular state statute referred to in the question.

The statute is criminal and provides a punishment for the offenses which it defines, and the argument is that,*this being true, it necessarily forbids, as a matter of public policy, the enforcement in Texas of contracts, although lawful by the laws of another state, which, if entered into in Texas, would be criminal, since it must be that the public policy of Texas exacts that the results of a contract which, if made in Texas, would be punished as a crime, shall not be susceptible of enforcement in its civil courts because made in another state. But, without stopping to analyze the authorities relied upon to sustain the proposition in order to determine whether they support the doctrine as broadly stated, we observe that although the proposition were to be con-

ceded for the sake of the argument only, that concession is immaterial for this reason: The statute relied upon (the pertinent sections are in the margin¹) does not make criminal all sales for future delivery*of the property described, but only forbids and punishes the making of contracts of that nature where certain prescribed conditions are not exacted or do not exist. It looks, therefore, not to prohibit all such contracts, but to secure in all when made in Texas the presence of conditions deemed to be essential. Indeed, it goes further, since even although the contract on the subject may have been made with the express stipulation as to delivery exacted by the statute, nevertheless crime and punishment may result as against a particular party to the contract who, in bad faith, has assented to the express stipulation, which otherwise would be valid. These conclusions we think plainly result from the definitions which the statute makes in the first class as to delivery, in the second class as to option, and in the third as to ultimate performance, none of which conditions, we think, can be said to necessarily embrace the contract sued upon, taking the facts alleged in the petition to be established. It is true the statute contains general provisions in articles 545 and 546 (which we do not reproduce) that wherever a criminal prosecution is commenced against a person who may have made a particular future contract containing provisions in violation of the statute, the presumption shall be prima facie that the illegal conditions existed, and therefore that there was guilt until the contrary was shown. But we are of opinion that this affords no ground in a civil case brought to enforce a contract, for holding that the averments of the petition must be taken to be untrue in order to defeat a right to be heard, simply because, under a criminal

¹Texas Revised Criminal Statutes 1911, title 11, chap. 3, p. 141.

Art. 538. A bucket shop defined.—A bucket shop, within the meaning of this law, is any place wherein dealing in futures is carried on contrary to any of the provisions hereof.

Art. 539. Futures or dealing in futures defined.—By each of the expressions, "futures," "dealing in futures," and "future contracts," as these terms are used in this law is meant: 1. A sale or purchase, or contract to sell, or any offer to sell or purchase, any cotton, grain, meat, lard, or any stocks or bonds of any corporation, to be delivered in the future, when it was not the bona fide intention of the party being prosecuted under this chapter, at the time that such sale, contract, purchase, or offer to sell or purchase, was made, that the thing mentioned in such transaction should be delivered and paid for as

37 S. C.—24.

specified in such transaction. 2. Any such sale, purchase, offer or contract, where it was the intention of the party being prosecuted hereunder at the time of making such contract or offer, that the same should, or, at the option of either party, might be settled by paying or receiving a margin or profit on such contract. 3. Any purchase, sale or offer of sale or purchase, or contract for future delivery of any of the things mentioned in this article on, by or through any exchange or board of trade, the rules, by-laws, customs or regulations of which permit such contract or transaction to be settled or closed by delivery or tender of any grade or grades of the thing mentioned in such contract or transaction, other than the grade upon which the price is based in said transaction, at any price other than the actual price for spot delivery of such other grade or grades, at the time and place of delivery or tender.

statute as to particular offenses, the burden of proof is shifted.

Concluding, as we do, that, accepting the averments of the petition as true, the cause of action was susceptible*of being heard in the courts of Texas, and therefore was also susceptible of being brought in the courts of the United States in that state, we are of opinion that the question asked should be replied to in the negative. And of course we must not be understood as deciding whether the mere existence of a state statute punishing one who, in bad faith, and because of such bad faith, had made an agreement to deliver in a contract of sale which would be otherwise valid, could become the basis of a public policy preventing the enforcement in Texas of contracts for sale and delivery made in another state which were there valid, although one of the parties might have made the agreement to deliver in bad faith. In other words, we must not be understood as expressing any opinion on the subject of whether, consistently with the very nature of the relations between the several states resulting from the constitutional obligations resting upon them, the courts of Texas, under the guise of a public policy resting merely on the conditions stated, could rightfully refuse to enforce a contract validly made in another state, or at all events whether, under such circumstances, such a contract would not, in the nature of things, be enforceable in the appropriate courts of the United States.

A negative answer is therefore made to the question asked, and it is ordered that it be so certified.

(243 U. S. 26)

UNION NATIONAL BANK and Claud Gatch, Substituted for H. N. Morris, as Receiver of said Union National Bank, Plffs. in Err.,

v.

GEORGE McBOYLE and Lulu May McBoyle.

COURTS ⇐394(19)—ERROR TO STATE COURT—FEDERAL QUESTION—NATIONAL BANKS.

The contention that, consistently with the National Bank Act (U. S. Rev. Stat. §§ 5133 et seq., U. S. Comp. Stat. 1913, §§ 9658 et seq.), the rules adopted by the board of directors of a national bank could not be interpreted as empowering the cashier to sell shares of stock belonging to the bank, presents no substantial Federal question which will support the appellate jurisdiction of the Federal Supreme Court over a state court, where no question is made as to the powers of the bank, the issue being

one of interpretation, not of the statute, but of the rules.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1063.]

[No. 164.]

Argued January 24 and 25, 1917. Decided March 6, 1917.

IN ERROR to the Supreme Court of the State of California to review a judgment which, on a second appeal, affirmed a judgment of the Superior Court of Alameda County, in that state, declaring plaintiffs to be the owners of certain shares of stock which they had purchased from the cashier of a national bank. Dismissed for want of jurisdiction.

See same case below, on first appeal, 162 Cal. 277, 122 Pac. 458; on second appeal, 168 Cal. 263, 142 Pac. 837.

The facts are stated in the opinion.

Messrs. Charles A. Beardsley, R. M. Fitzgerald, and Carl H. Abbott for plaintiffs in error.

Messrs. William H. Orrick, H. A. Powell, T. C. Coogan, and Julius Kahn for defendants in error.

Mr. Chief Justice White delivered the opinion of the court:

McBoyle and his wife sued the bank to recover 599 shares of the stock of the Burnham-Standeford Company,*which it was alleged they had purchased from the bank, and which, after payment of the cash part of the price, had been placed with it as collateral to secure a note evidencing the credit price. It was alleged that, despite a tender of the purchase money due, the bank had refused to deliver the stock. The answer of the bank, while not denying the sale of the stock to McBoyle, charged that the sale had been fraudulently procured by him, and, besides, that the sale was void because it was made by the cashier, who was without authority to do so. It was, moreover, alleged that the sale had been repudiated by the board of directors, and that there had been a tender of the cash price paid and of the note given for the balance.

The supreme court of the state, in reviewing and reversing a judgment of the trial court in favor of the bank, held that there was no proof of fraud in the sale from the bank to McBoyle, and that from a consideration of the authority of the cashier, in the light of the power conferred upon that officer by the board of directors, and the nature and character of the transaction, the cashier had authority to make the sale, and it was therefore valid. The case was remanded for a new trial. 162 Cal. 277, 122

Pac. 458. Before that trial the bank amended its answer by asserting that authority in the cashier to sell shares of stock belonging to the bank could not be sustained without a violation of the National Bank Law. The supreme court, to which the case was again taken, in affirming a judgment of the trial court, awarding the stock to McBoyle, pointed out that while the National Bank Law conferred no authority on national banks to buy stock for speculation or investment, yet such law did not prevent them from taking stock as security for loans made in the due course of business, from realizing on the security in default of payment of the loan, and consequently, when needs be, from buying in the security to protect the bank, and from selling the security after it had been bought in, for the purpose of realizing on the same. Thus recognizing the right of the bank, consistently with the National Bank Act, to acquire the stock, and treating the power to sell it as being indisputably vested at least in the board of directors, the court adhered to the opinion which it had previously expressed that the power in the cashier to make the sale in question was susceptible of being deduced by fair implication from the rules adopted by the board of directors for the government of the business of the bank and from the circumstances of the case. 168 Cal. 263, 142 Pac. 837.

The case is here in reliance upon the Federal question supposed to have been raised by the amended answer and the ruling just stated; that is, the asserted violation of the National Bank Act which arose from implying from the rules adopted by the board of directors, authority in the cashier to make the sale. We say this because there is no pretense that the case, as presented below or as here made, raised any question concerning the power of a national bank in good faith, in the due course of business, under the law, to loan on capital stock as collateral and realize on the same. But when the issue is thus accurately fixed, it is apparent that while in mere form of expression it may seemingly raise a question under the National Bank Act, in substance it presents no question of that character whatever, since it simply concerns an interpretation, not of the statute, but of the rules adopted by the board for the government of the bank, involving, in whatever view be taken, no exercise of power beyond that which it is conceded the National Bank Act conferred. To illustrate, if in express terms the board of directors had clothed the cashier with power to make the sale, there can be no question that they would have had authority to do so under the statute,—a conclusion which makes it

clear that the determination of whether, by a correct interpretation of the rules adopted by the board, power did or did not exist in the cashier, involves not the statute,*but² the mere significance of the rules. That, coming to this, the contention involves no question under the National Bank Law upon which to base jurisdiction to review, is so conclusively settled as not to be open. *Le Sasser v. Kennedy*, 123 U. S. 521, 31 L. ed. 262, 8 Sup. Ct. Rep. 244; *Chemical Nat. Bank v. City Bank*, 160 U. S. 646, 40 L. ed. 568, 16 Sup. Ct. Rep. 417; *Union Nat. Bank v. Louisville, N. A. & C. R. Co.* 163 U. S. 325, 41 L. ed. 177, 16 Sup. Ct. Rep. 1039; *Leyson v. Davis*, 170 U. S. 36, 42 L. ed. 939, 18 Sup. Ct. Rep. 500; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202. It follows, therefore, that as there is nothing within our competency to review, the writ of error must be and it is dismissed for want of jurisdiction.

(243 U. S. 29)

J. D. BOWERSOCK, Plff. in Err.,
v.

ADA BURHANS SMITH, Administratrix of
the Estate of Sumner I. Smith, Deceased.

CONSTITUTIONAL LAW §301 — MASTER
AND SERVANT §11 — DUE PROCESS OF
LAW — REMEDIES AND PROCEDURE —
ABOLISHING COMMON-LAW DEFENSES —
BURDEN OF PROOF.

1. A state, when requiring, for the protection of employees engaged in hazardous occupations, that dangerous machinery be safeguarded, and when making the failure to do so an act of negligence upon which a cause of action may be based in case of injury resulting therefrom, as is done by Kan. Laws 1903, chap. 356, may, consistently with due process of law, also provide that, in actions brought under such statute, the doctrines of contributory negligence, assumption of risk, and fellow servant shall not bar a recovery, and that the burden of proof shall be upon the defendant to show a compliance with the act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 848-850, 857.]

CONSTITUTIONAL LAW §301 — MASTER
AND SERVANT §11 — DUE PROCESS OF
LAW—DUTY TO SAFEGUARD MACHINERY
—CONTRACT EXEMPTION — EMPLOYEE'S
OWN NEGLIGENCE.

2. Upholding a recovery under Kan. Laws 1903, chap. 356, in an action for the death of a factory superintendent, caused by unguarded machinery, despite the fact that he had authority and was charged with the duty to safeguard such machinery, does not cause the statute to be repugnant to the due process of law clause of U. S. Const. 14th Amend., as making the employer liable and allowing a recovery by the employee because of the latter's neglect of duty, where the statute, as interpreted by the state court,—a construction which

is not challenged,—imposes a duty as to safeguards upon the employer which is absolute, and as to which he cannot relieve himself by contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 848-850, 857.]

CONSTITUTIONAL LAW — 245 — **EQUAL PROTECTION OF THE LAWS—DISCRIMINATION—INDIVIDUALS AND CORPORATIONS—DUTY TO SAFEGUARD MACHINERY—CONTRACT EXEMPTION.**

3. Factories owned and operated by individuals are not unconstitutionally discriminated against in favor of those carried on by corporations by the provisions of Kan. Laws 1903, chap. 356, which require dangerous machinery to be safeguarded, and make a failure in that respect an act of negligence upon which a cause of action may be based in case of injury resulting therefrom, since that statute imposes the positive duty to have the machinery duly safeguarded, whether the owner be an individual or a corporation, and forbids corporations, equally with individuals, from escaping by contract the liability which the statute imposes.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702.]

[No. 172.]

Submitted February 1, 1917. Decided March 6, 1917.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Douglass County, in that state, in favor of plaintiff in an action for death, brought under the Kansas factory act. Affirmed.

See same case below, 95 Kan. 96, 147 Pac. 1118.

The facts are stated in the opinion.

Messrs. **Charles F. Hutchings and McCabe Moore** for plaintiff in error.

Messrs. **Joseph Taggart, S. D. Bishop, and J. H. Mitchell** for defendant in error.

* * * Mr. Chief Justice White delivered the opinion of the court:

Chapter 356 of the Laws of Kansas of 1903 (Gen. Stat. 1909, §§ 4676 to 4683) is entitled and provides in part as follows:

An Act Requiring Safeguards for the Protection of All Persons Employed or Laboring in Manufacturing Establishments, and Providing Civil Remedies for All Persons So Engaged, or Their Personal Representatives, in Cases Where Any Such Person May Be Killed or Injured While Employed or Laboring in Any Manufacturing Establishment Which Is Not Properly Provided with the Safeguards Required by This Act.

Sec. 4. All . . . machinery of every description used in a manufacturing establishment shall, where practicable, be properly and safely guarded, for the purpose of preventing or avoiding the death of or injury to the persons employed or laboring in any such establishment; and it is hereby made the duty of all persons owning or operating manufacturing establishments to provide and keep the same furnished with safeguards as herein specified.

Sec. 5. If any person employed or laboring in any manufacturing establishment shall be killed or injured in any case wherein the absence of any of the safeguards or precautions required by the act shall directly contribute to such death or injury, the personal representatives of the person so killed, or the person himself, in case of injury only, may maintain an action against the person owning or operating such manufacturing establishment for the recovery of all proper damages. . . .

Sec. 6. In all actions brought under and by virtue of the provisions of this act, it shall be sufficient for the plaintiff to prove in the first instance, in order to establish the liability of the defendant, that the death or injury complained of resulted in consequence of the failure of the person owning or operating the manufacturing establishment where such death or injury occurred to provide said establishment with safeguards as required by this act, or that the failure to provide such safeguards directly contributed to such death or injury.

This act being in force, Smith, the superintendent of the Lawrence Paper Manufacturing Company, while engaged in adjusting some unguarded dryer rolls, was caught between them, crushed and killed. Relying upon the law above quoted, his personal representative sued Bowersock, the owner of the factory, to recover the damages suffered. The petition alleged the dangerous character of the dryer rolls and the fact that although it was practicable to guard them, the requirements of the act in that respect had not been complied with, and charged that the failure to do so directly caused the death of Smith. It was further alleged that at the time of the accident Smith was engaged in adjusting the machinery under the direction of a superior officer, the assistant manager of the factory. The answer, while denying generally the allegations of the petition, alleged that it was not practicable to guard the dryer rolls, and averred that Smith was guilty of contributory negligence. It was also averred that, as superintendent, Smith, by his contract of employment, was under the duty of safeguarding the machinery, and was

charged generally with authority to direct the use of the same, and hence he had assumed the risk of injury from failure to guard the dryer rolls, and hence his injury and death resulted solely from his own neglect, and through no fault on the part of the owner.

At the trial the plaintiff's evidence tended to support all of the allegations of the petition. The defendant offered evidence tending to show that the guarding of the dryer rolls was not practicable, and that Smith had been guilty of contributory negligence. Further evidence was introduced tending to show that when Smith was employed as superintendent, it was stipulated by him as a condition to his accepting the position, that he should have full and complete charge and management of the factory, including grounds, building, machinery, and men, and that he should place guards on the machinery where needed for the protection of the employees. In addition the defendant, in support of the allegation that he had fully performed his duty under the statute, introduced in evidence the following notice, which he had posted in the factory in question and three others which he carried on:

"CAUTION. Every Employee is Urged to be Careful in Order to Avoid Accidents.

"If there is any machinery, dangerous place or tool that you think should be safeguarded, repaired, or improved, we will regard it a favor if you will report same at once to the office. It is desired that all employees assist in reducing accidents to lowest possible point. November, 1911."

The court instructed the jury, over the objection of the defendant, that, under the statute, contributory negligence was no defense, and that the fact that Smith was employed as superintendent of the factory, with authority to safeguard the machinery, would not bar a recovery, and charged with reference to the burden of proof, in accordance with the provision of the statute relating to that subject. There was a verdict for the plaintiff, and the judgment entered thereon was affirmed by the court below. It was held, following previous decisions, that the common-law defenses of contributory negligence, fellow servant, and assumption of the risk were not applicable to suits under the statute. The court, further construing the statute, held that it embraced all employees of every class or rank in the factories to which it applied, and that merely because the deceased was employed as superintendent did not exclude him from the benefits of the act nor relieve the owner from responsibility under it. And it was held that a different result was not required because the deceased had contracted with

the owner to safeguard the machinery under the circumstances of his employment. In so ruling the court referred to the evidence, and pointed out that although there was testimony as to the authority of the deceased, under his contract, to safeguard the machinery, at the same time the evidence showed that, in the exercise of such authority, he was under the control of three superiors, all of whom had testified that they did not consider it practicable to safeguard the dryer rolls. Attention was also directed to the notice above reproduced which the defendant posted with reference to guards on machinery, as showing a control over that subject by the owner. 95 Kan. 96, 147 Pac. 1118.

The case is here because of the asserted denial of rights guaranteed by the 14th Amendment.

*That government may, in the exercise of its police power, provide for the protection of employees engaged in hazardous occupations by requiring that dangerous machinery be safeguarded, and by making the failure to do so an act of negligence upon which a cause of action may be based in case of injury resulting therefrom, is undoubted. And it is also not disputable that, consistently with due process, it may be provided that, in actions brought under such statute, the doctrines of contributory negligence, assumption of risk, and fellow servant shall not bar a recovery, and that the burden of proof shall be upon the defendant to show a compliance with the act. Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Missouri P. R. Co. v. Castle, 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A. (N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243; Easterling Lumber Co. v. Pierce, 235 U. S. 380, 59 L. ed. 279, 35 Sup. Ct. Rep. 133.

While not directly disputing these propositions, and conceding that the Kansas statute contains them, and that it is not invalid for that reason, nevertheless it is insisted that the construction placed upon the statute by the court below causes it to be repugnant to the due process clause of the 14th Amendment. This contention is based alone upon the ruling made by the court below that, under the statute, the deceased had a right to recover although he had contracted with the owner to provide the safe-

guards the failure to furnish which caused his death,—a result which, it is urged, makes the owner liable and allows a recovery by the employee because of his neglect of duty. We think the contention is without merit. It is clear that the statute, as interpreted by the court below,—a construction which is not challenged,—imposed a duty as to safeguards upon the owner which was absolute, and as to which he could not relieve himself by contract. This being true, the contention has nothing to rest upon, since,* in the nature of things, the want of power to avoid the duty and liability which the statute imposed embraced all forms of contract, whether of employment or otherwise, by which the positive commands of the statute would be frustrated or rendered inefficacious. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 52, 56 L. ed. 327, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Again, it is contended that the statute denies to the plaintiff in error the equal protection of the laws, since it discriminates against factories owned and operated by individuals in favor of those carried on by corporations. This is the case, it is said, because a corporation, in the nature of things, can only comply with the requirements of the statute by contracting with agents or employees to safeguard the machinery, to whom, in case of injury, the corporation would not be liable, while an individual owner, under the ruling of the court, must perform that duty himself. The reasoning is obscure, but we think it suffices to say that it rests upon an entire misconception, since the statute imposes the positive duty to have the machinery duly safeguarded, whether the owner be an individual or a corporation, and the want of power by contract to escape the liability which the statute imposes also equally applies to corporations as well as individuals. It follows, therefore, that the statute affords no semblance of ground upon which to rest the argument of inequality which is urged.

Affirmed.

(243 U. S. 36)

P. J. MCCLUSKEY,¹ as Administrator of the Estate of Gunder Nordgard, Deceased, Plff. in Err.,
v.

MARYSVILLE & NORTHERN RAILWAY COMPANY and Stimson Mill Company.

COMMERCE ⇨27(2)—EMPLOYERS' LIABILITY—WHEN EMPLOYER IS ENGAGED IN "INTERSTATE COMMERCE"—LOGGING RAILROAD.

1. A logging railroad over which its

owner carries its own logs in its own cars from its own timber land within the state to a tidewater point also within the state, where such logs are dumped into the water and sold, some of them going to points outside the state, is not engaged in interstate commerce within the meaning of the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), and hence an injured employee on such railroad cannot maintain an action under that act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

STIPULATIONS ⇨18(2)—ALLOWING WRIT OF ERROR TO DECEDENT—MAKING ADMINISTRATOR PARTY.

2. Any irregularity in allowing a writ of error after the death of the plaintiff in error, or of making the administrator a party, was waived by a stipulation of the parties in the court below, agreeing to the substitution of the administrator as plaintiff in error.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 42.]

[No. 166.]

Argued January 30 and 31, 1917. Decided March 6, 1917.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of Washington, dismissing a suit brought under the Federal Employers' Liability Act. Affirmed.

See same case below, 134 C. C. A. 415, 218 Fed. 737.

The facts are stated in the opinion.

Messrs. **John T. Casey**, George F. Hannan, and Charles R. Pierce for plaintiff in error.

Messrs. **E. C. Hughes**, Maurice McMicken, Otto B. Rupp, and H. J. Ramsey for defendants in error.

* Mr. Chief Justice **White** delivered the opinion of the court:

This suit was brought under the Employers' Liability Act to recover damages resulting from injuries suffered by Nordgard while in the employ of the defendant railway company. The trial court directed a verdict for the defendants on the ground that there was no evidence tending to show that the defendants and Nordgard were engaged at the time of the accident in interstate or foreign commerce, and the case is here on writ of error to secure a reversal of the action of the court below, affirming the judgment entered by the trial court, dismissing the suit. 134 C. C. A. 415, 218 Fed. 737.

¹ Appearance of P. J. McCluskey, administrator of the estate of Gunder Nordgard,

deceased, filed and entered November 8, 1915, as the party plaintiff in error herein.

* 22 These are the facts: The defendant Stimson Mill Company was engaged in the logging and lumber business and carried its logs on its own logging railroad, the Marysville & Northern Railway, from timber land owned by it in Washington to a point near Marysville in that state, where they were dumped into the waters of Puget Sound. Part of the logs were thereafter sold to mills located on the sound and the balance were rafted and taken by tugs to the Stimson Company's mills at Ballard, Washington, where they were manufactured into timber, which was thereafter sold, about 20 per cent in local markets and the remainder in other states and countries. The logs which were sold after they had been carried to tidewater by the railroad were towed away by the purchasers to their mills or places for storage, and part of them were subsequently resold for piling or poles to purchasers both within and without the state. Nordgard was a brakeman on the logging railroad, and suffered the injuries for which he sued while engaged in unloading logs from the cars at tidewater.

The conclusion of the court below that, under these facts, the defendants were not engaged in interstate or foreign commerce when the injuries were suffered, was based upon the decisions in *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, and *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999, from which the following quotations were made:

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state." 116 U. S. 525.

* 23 "But this movement [that is, interstate commerce movement] does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. . . . Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state." 10 Wall. 565

After pointing out that these rulings had not been modified, but, on the contrary, had

been reaffirmed by the subsequent cases relied upon by the plaintiff in error (*Texas & N. O. R. Co. v. Sabine Tram Co.* 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; *Railroad Commission v. Texas & P. R. Co.* 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837; *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; *Railroad Commission v. Worthington*, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653), the court said:

"In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tidewater, where they were sold, was not a shipment. There was no contract of carriage; there was no bill of lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant Mill Company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to receive them or carry them further. The selling of the poles after the first sale by the Mill Company, or whether they were going outside of the state, depended upon chance or the exigencies of trade. The movement of the poles did not become interstate commerce until, by the act of the purchasers thereof, the poles were started on their way to their destination in another state or country. The beginning of the transit which constitutes interstate commerce 'is defined in *Coe v. Errol* to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage.'" *General Oil Co. v. Crain*, 209 U. S. 211, 229, 52 L. ed. 754, 764, 28 Sup. Ct. Rep. 475."

The conclusion of the court below that the defendants were not engaged in interstate or foreign commerce when the accident occurred is, we think, clearly demonstrated by the reasoning by which it sustained its conclusion and the authorities upon which it relied as above stated, and its judgment should be affirmed.

Before concluding we observe that, in view of the stipulation of the parties in the court below, agreeing to the substitution as plaintiff in error of the administrator of Nordgard, who died while the cause was there pending, the motion to dismiss on the ground that the writ of error was wrongfully allowed, and that the administrator is not a proper party, is based upon a mere irregularity which was waived.

Affirmed.

AUGUST BAY, Plff. in Err.,
v.

MERRILL & RING LOGGING COMPANY.

COMMERCE — 27(2)—EMPLOYERS' LIABILITY — WHEN EMPLOYER IS ENGAGED IN "INTERSTATE COMMERCE" — LOGGING RAILROAD.

A logging railroad over which its owner carries its own logs in its own cars from its own timber land within the state to a tidewater point, also within the state, where such logs are dumped into the water and sold, some of them going to points outside the state, is not engaged in interstate commerce within the meaning of the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), and hence an injured employee on such railroad cannot maintain an action under that act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

[No. 165.]

Argued January 30 and 31, 1917. Decided March 6, 1917.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of Washington, dismissing a suit brought under the Federal Employers' Liability Act. Affirmed.

See same case below, 136 C. C. A. 277, 220 Fed. 295.

The facts are stated in the opinion.

Messrs. John T. Casey, George F. Hannan, and Charles R. Pierce for plaintiff in error.

Messrs. E. C. Hughes, Maurice McMicken, Otto B. Rupp, and H. J. Ramsey for defendant in error.

* Mr. Chief Justice White delivered the opinion of the court:

This case is controlled by the decision in *McCluskey v. Marysville & N. R. Co.* just decided (243 U. S. 36, 61 L. ed. 578, 37 Sup. Ct. Rep. 374). As in that case, the suit was brought under the Federal Employers' Liability Act to recover damages for injuries suffered while Bay, the plaintiff in error, was employed by the defendant on its logging railroad. The accident which gave rise to his injuries occurred while he was engaged in loading on a flat car on defendant's timber land, logs which had been cut for carriage on the railroad to tidewater at Puget Sound. The case was tried by the same court which heard the *McCluskey*

Case, there was a directed verdict for the defendant on the ground that the company was not engaged in interstate or foreign commerce when the accident occurred, and the judgment thereupon entered dismissing the suit was affirmed by the court below on the authority of the *McCluskey* Case, 136 C. C. A. 277, 220 Fed. 295.

The facts were thus stated by the court below:

* "The Logging Company owned extensive tracks of timber in Snohomish county, Washington, and was engaged solely in cutting logs on its own lands and hauling them over its own road to the waters of Puget Sound, where it dumped them from the cars into a boom. At that point it sold the logs to purchasers who paid for them there, and there took possession of them and towed them away by tugs. The most of the logs were sold to near-by mills on the Sound, which were engaged in the manufacture of lumber, and this lumber, when manufactured, was for the most part ultimately disposed and shipped to points outside of the state of Washington. In addition to these transactions in logs, the Logging Company had at times taken out some poles, which also it sold and delivered at its boom to the National Pole Company, a purchaser which did business at Everett, and which bought and paid for the poles after they were delivered in the water, and thereafter sold them for shipment to California. The road is a standard gauge logging railroad, and is operated as a part of the logging business of the defendant in error, and is connected by switches with the Great Northern and the Interurban roads; but those connections are used only for the purpose of bringing supplies to the company's logging camps. No logs or timber of any kind were at any time transferred to these other roads. One shipment of steel rails had gone over the logging road for the Interurban at the time when the latter was constructing its road. For that service the actual expense of operating the locomotive was the only charge made, and the Interurban assumed all liability on account of accidents occurring in the transportation."

As these facts are not substantially different from those presented in the *McCluskey* Case, it follows that the reasoning and authorities by which the court below sustained its ruling in that case also demonstrate the correctness of its conclusion that in this case, at the time the injuries were suffered, the defendant was not engaged in interstate or foreign commerce. Affirmed.

(243 U. S. 46)

BERNARD B. SELLING, Otto Kirchner, Henry M. Campbell, Clarence A. Lightner, and Sidney T. Miller, a Special Committee Appointed by the Association of the Bar of the City of Detroit, Petitioners,
v.

GEORGE W. RADFORD.

ATTORNEY AND CLIENT ⇨38 — DISBARMENT—LOSS OF CHARACTER.

1. The loss by a member of the Bar of the Supreme Court of the United States of his fair private and professional character by wrongful personal and professional conduct, no matter where committed, furnishes adequate reason for taking away his right to continue to be a member of such Bar in good standing.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 51, 61.]

ATTORNEY AND CLIENT ⇨60 — DISBARMENT — LOSS OF CHARACTER — EFFECT OF DISBARMENT BY STATE COURT.

2. The want of fair private and professional character in a member of the Bar of the Supreme Court of the United States, inherently arising as the result of the act of the highest court of a state, disbarring him from practising in the courts of that state, for personal and professional misconduct amounting to moral wrong, should be recognized by the Federal Supreme Court on motion to disbar unless, from an intrinsic consideration of the record of the state court, it appears (1) that the state procedure, from want of notice or opportunity to be heard, was wanting in due process, or (2) that there was such an infirmity of proof as to give rise to a clear conviction that the conclusion as to the want of fair private and professional character should not be accepted as final, or (3) that some other grave reason exists, impelling the conviction that to allow the natural consequences of the judgment to have their effect would conflict with the duty not to disbar unless constrained to do so by principles of right and justice.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 83.]

ATTORNEY AND CLIENT ⇨54 — DISBARMENT—PROCEDURE—HEARING.

3. An opportunity should be afforded to a member of the Bar of the Supreme Court of the United States, where his disbarment is sought on the ground of a previous disbarment by a state court, to file the record of the state court, and by printed brief, considering the record intrinsically, to point out any ground within the limitations prescribed by the Federal Supreme Court which should prevent that court from giving effect to the finding of the state court establishing the want of fair private and professional character.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 73.]

[No. 21, Original.]

Submitted November 20, 1916. Decided
March 6, 1917.

ON PETITION to disbar a member of the Bar of the Supreme Court of the United States upon the ground of his previous disbarment by a state court for personal and professional misconduct. Leave granted to respondent to file the record of the state court, accompanied by printed brief.

The facts are stated in the opinion.

Solicitor General Davis for petitioner.

Messrs. Thomas A. E. Weadock and Harrison Geer for respondent.

* Mr. Chief Justice White delivered the opinion of the court:

George W. Radford was admitted to practice in the supreme court of the state of Michigan on the 15th day of June, 1876. About ten years thereafter, on March 18, 1886, upon the representation that he had been for the three years preceding, a member of the Bar of the highest court of the state of Michigan, and upon the further assurance, both conformably with rule 2 of this court, that his private and professional character appeared to be fair, he was permitted to become a member of the Bar of this court.

Represented by the Solicitor General of the United States, the petitioners, as a committee of the Association of the Bar of the City of Detroit, specially appointed for that purpose, seek to procure an order striking Radford from the roll of the members of the Bar of this court on the ground of his personal unworthiness to continue as a member of such Bar. And, in coming to consider their request, we unselfishly understand their sense of pain at being called on to discharge the duty which they perform. The original petition filed for that purpose alleged that in a suit brought in a designated court of original jurisdiction in Michigan for the purpose of disbarring Radford for professional misconduct amounting to moral wrong, he had, after notice and full hearing, been found to have committed the wrongful acts complained of, and had been disbarred, and that such judgment had been approved by the supreme court of Michigan in a proceeding by certiorari taken to consider the same. Annexed to the petition was a copy of the opinion and order of disbarment entered by the court of original jurisdiction, as well as a copy of the opinion and order of the supreme court of the state in the certiorari proceeding, the same being reported in 168 Mich. 474, 134 N. W. 472.

It was alleged in the petition that, notwithstanding the fact that Radford had, by the final action of the supreme court of the state of Michigan, been stricken from the rolls of the courts in that state for the reasons previously stated, he had continued

in the city of Detroit to hold himself out as a practising lawyer entitled to respect and confidence as such because of the fact that he continued to be a member of the Bar of this court, unaffected by the order of disbarment by the courts of the state. After reciting the unseemly condition produced by these circumstances and the disrespect for the state courts which was naturally implied, the prayer was for a rule to show cause and for the awarding, on the return to such rule, of the order of disbarment which was sought.

An answer was made to the rule to show cause and a brief filed in support of the same, as to which we think it suffices to say for our present purposes that both the answer and the brief take a much wider range than is permissible, and rely upon much that is here irrelevant, not to say in some respects improper to be considered, as the prayer for the enforcement of the judgment of the court of last resort of Michigan is not to be converted into a trial of the courts of that state or of the members of the Detroit Bar Association on behalf of which the petition was filed.

Beyond all question, when admission to the Bar of this court is secured, that right may not be taken away except by the action of this court. While this is true, it is also true that the character and scope of the investigation to be made on a prayer for disbarment, before sanction is given to it, must depend upon the character of the acts of misconduct and wrong relied upon, of the place of their commission, and the nature of the proof relied upon to establish their existence.

While, moreover, it is true that the two conditions—membership of the Bar of the court of last resort of a state and fair private and professional character—are prerequisites to admission here, there is a wide difference in the nature and effect of the two requirements. This follows, because the first, although a prerequisite to admission here, is ephemeral in its operation, since its effect is exhausted upon admission to this Bar which it has served to secure,—a result which becomes manifest by the consideration that although the membership of the Bar of the court of last resort of a state, after admission here, might be lost by change of domicile from one state to another, if so provided by the state law or rule of court, or by any other cause not involving unworthiness, such loss would be wholly negligible upon the right to continue to be a member of the Bar of this court. The second exaction, on the contrary, is not ephemeral, and its influence is not exhausted when the admission based upon it is secured, since the continued possession of a fair pri-

vate and professional character is essential to the right to be a member of this Bar. It follows, therefore, that the personality of the member and these inherent and prerequisite qualifications for membership of this Bar are indivisible; that is, inseparable. They must, if they exist, follow the personality of one who is a member of the Bar, and hence their loss by wrongful personal and professional conduct, wherever committed, operates everywhere, and must, in the nature of things, furnish adequate reason in every jurisdiction for taking away the right to continue to be a member of the Bar in good standing.

In the light of these conclusions, the question is, What,* consistently with the duty which rests upon us, is exacted in dealing with the situation now presented?

In coming to solve that question three things are patent: (a) that we have no authority to re-examine or reverse, as a reviewing court, the action of the supreme court of Michigan in disbarring a member of the Bar of the courts of that state for personal and professional misconduct; (b) that the order of disbarment is not binding upon us as the thing adjudged in a technical sense; and (c) that albeit this is the case, yet, as we have previously shown, the necessary effect of the action of the supreme court of Michigan, as long as it stands unreversed, unless for some reason it is found that it ought not to be accepted or given effect to, has been to absolutely destroy the condition of fair private and professional character, without the possession of which there could be no possible right to continue to be a member of this Bar.

Meeting this situation, we are of opinion that, on the case presented, our duty is not to review the action of the state court of last resort,—a power which we do not possess,—but wholly to abdicate our own functions by treating its judgment as the thing adjudged, excluding all inquiry on our part, and yet not, in considering the right of one to continue to be a member of the Bar of this court, to shut our eyes to the status, as it were, of unworthiness to be such a member which the judgment must be treated as having established, unless for some reason we deem that consequence should not now be accepted. In other words, in passing upon the question of the right to continue to be a member of the Bar of this court, we think we should recognize the absence of fair private and professional character inherently arising as the result of the action of the supreme court of Michigan so far as we are at liberty to do so consistently with the duty resting upon us to determine for ourselves the right to continue to be a member of this Bar. That is to say, we are

of opinion*that we should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure, from want of notice or opportunity to be heard, was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do.

In concluding that our duty is to give effect to the finding of the state court establishing the want of fair private and professional character, subject to the limitations stated, we confine ourselves to the case before us, and therefore do not in the slightest degree call in question the ruling in *Ex parte Tillinghast*, 4 Pet. 108, 7 L. ed. 798, that a mere punishment for contempt by an inferior Federal court was not a sufficient ground for preventing admission to the Bar of this court, there being nothing to indicate that the action of the inferior court was based upon the doing of acts which inherently and necessarily deprived the applicant of the fair private and professional character essential to admission.

Thus defining what is open to our consideration, we think we ought not to foreclose the subject on the answer made to the rule to show cause in the proceeding which is now before us, but that an opportunity should be afforded the respondent, confining himself to the propositions stated, if he is so advised, to file the record or records of the state court within thirty days from this date with*permission by printed brief, considering the record intrinsically, to point out any ground within the limitations stated which should prevent us from giving effect to the conclusions established by the action of the supreme court of Michigan which is now before us, as we have seen, as part of the petition we are now considering.

It is so ordered.

STATE OF WYOMING, Complainant,
v.

STATE OF COLORADO, Greeley-Poudre Irrigation District, and Laramie-Poudre Reservoirs & Irrigation Company.

[No. 7, Original.]

Argued December 6, 7, and 8, 1916. Decided March 6, 1917.

Messrs. John W. Lacey and N. E. Corthell for complainant.

Mr. Fred Farrar for the state of Colorado.

Mr. Delph E. Carpenter for the Greeley-Poudre Irrigation District.

Mr. Julius C. Gunther for the Laramie-Poudre Reservoirs & Irrigation Company.

* It is ordered that this case be restored to the docket for reargument.

1. Counsel are requested to specially direct their attention to the rule which they deem should properly be applied to a solution of the controversy for decision: That is, whether the rights asserted are to be tested and determined solely by the application of the general principles of prior appropriation, without regard to state boundaries, or whether, on the contrary, the general principles of prior appropriation are subject to be restricted or their operation limited in this case by state lines, and if so, by what principles, under that assumption, the case is to be controlled.

2. They are moreover requested not merely by generalizations to state the facts relied upon, but specifically, by careful reference to the pages of the record, and to group them under the various propositions relied upon, including the extent of the use of water in both states when the work complained of was begun and when this suit was commenced, and the extent of appropriation made or authorized in either or both states since its commencement.

3. In view of the legislation of Congress concerning reclamation and the extensive public works which have been constructed under that legislation and the possible consequences which may result from the rule to be applied in the solution of this controversy, the clerk is instructed to notify the Attorney General of the United States of this order for reargument.

UNITED STATES, Plff. in Err.,

v.

W. R. CRESS. (No. 84.)

UNITED STATES, Plff. in Err.,

v.

ACHILLES KELLY, Green B. Kelly, Jr.,
Lillian Kelly Crawford, et al. (No. 718.)NAVIGABLE WATERS ⇨36(4)—RIGHTS OF
RIPARIAN OWNERS—SERVITUDE TO PUB-
LIC RIGHT OF NAVIGATION — NATURAL
CONDITION.

1. The servitude of privately owned lands forming the banks and bed of a stream to the interests of navigation is a natural servitude confined to such streams as, in their ordinary and natural condition, are navigable in fact, and confined to the natural condition of such streams.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 188-193.]

EMINENT DOMAIN ⇨98—TAKING IN AID
OF NAVIGATION—NECESSITY FOR COMPEN-
SATION.

2. So much of the properties of the owners in Kentucky of the beds and shores of certain creeks tributary to the Cumberland and Kentucky rivers as was theretofore unaffected by the flow of the rivers or their tributaries could not be overflowed without compensation by the backwater resulting from the construction and maintenance by the Federal government in aid of navigation of certain locks and dams upon those rivers in that state, whereby the level of those rivers along certain stretches was raised, rendering them, to the extent of the raising, artificial canals instead of natural waterways.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 252-255.]

EMINENT DOMAIN ⇨98—WHAT CONSTITUTES
A TAKING — IMPROVING NAVIGATION—
OVERFLOW.

3. Land situate in Kentucky upon a creek tributary to the Cumberland river cannot be subjected, without compensation to the owner, to frequent overflows which depreciate it to the extent of one half its value, occasioned by the construction and maintenance by the Federal government in aid of navigation of a lock and dam upon that river in Kentucky, whereby the level of such river along certain stretches is raised so as to render it, to the extent of the raising, an artificial canal instead of a natural waterway.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 252-255.]

EMINENT DOMAIN ⇨98—TAKING—EASE-
MENT—IMPROVING NAVIGATION.

4. A private pass way and ford appurtenant to land situated in Kentucky upon a creek tributary to the Cumberland river cannot be destroyed, to the damage of the land, without compensation to the owner, by the backwater resulting from the construction and maintenance by the Federal government, in aid of navigation, of a lock and dam upon that river in Kentucky, whereby the level of such river along

certain stretches is raised so as to render it, to the extent of the raising, an artificial canal instead of a natural waterway.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 252-255.]

EMINENT DOMAIN ⇨98—TAKING — DE-
STRUCTION OF POWER OF MILLDAM—RAIS-
ING LEVEL—IMPROVING NAVIGATION.

5. The power of a milldam, essential to the value of a mill situated in Kentucky upon a creek tributary to the Kentucky river, cannot be destroyed without compensation to the owner by the raising of the creek level, due to the construction and maintenance by the Federal government in aid of navigation of a lock and dam upon that river in Kentucky, whereby the level of such river, along certain stretches, is raised so as to render it, to the extent of the raising, an artificial canal instead of a natural waterway.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 252-255.]

UNITED STATES ⇨147—COSTS.

6. Costs may be allowed against the United States in a suit brought under the Judicial Code, § 24 (20), (Act March 3, 1911, c. 231, 36 Stat. 1093 [Comp. St. 1913, § 991]), notwithstanding the repeal by § 297 of that Code, of all of the Tucker Act of March 3, 1887, 24 Stat. at L. 505, chap. 359, Comp. Stat. 1913, § 991 (20), with the exception of certain sections relating to matters of procedure, since not only is the provision of § 2 of the Tucker Act, conferring upon the district courts concurrent jurisdiction with the court of claims over certain claims against the United States, carried into § 24 (20) of the Code, but the provision of § 15 of the Tucker Act, for the allowance of costs against the government, is carried in as § 152 of the Code, and while § 24 (20) is a part of chapter 2 of the Code, entitled, "District courts—Jurisdiction," and § 152 is a part of chapter 7, entitled, "The Court of Claims" it is declared by §§ 294 and 295 of the Code that the laws revised therein are to be construed as continuations of existing laws, and that no inference of legislative construction is to be drawn from the arrangement and classification.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 148.]

[Nos. 84 and 718.]

Argued December 13, 1916. Decided March
12, 1917.

TWO WRITS of Error to the District Court of the United States for the Eastern District of Kentucky to review judgments awarding compensation against the United States for the taking of lands and water rights by means of backwater resulting from the construction and maintenance by the government of certain locks and dams upon the Cumberland and Kentucky rivers, in aid of navigation. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General Thompson and Messrs. P. M. Cox and Seth Shepard, Jr., for plaintiff in error in No. 84.

Assistant Attorney General Thompson for plaintiff in error in No. 718.

No brief was filed for defendant in error in No. 84.

Mr. J. F. Winn for defendant in error in No. 718.

Mr. Justice Pitney delivered the opinion of the court:

These cases were argued together, involved similar questions, and may be disposed of in a single opinion. They were actions brought in the district court by the respective defendants in error against the United States under the 20th paragraph of § 24, Judicial Code (Act of March 3, 1911, chap. 231, 36 Stat. at L. 1087, 1093, Comp. Stat. 1913, §§ 968, 991(20)), to recover compensation for the taking of lands and water rights by means of backwater resulting from the construction and maintenance by the government of certain locks and dams upon the Cumberland and Kentucky rivers, respectively, in the state of Kentucky, in aid of the navigation upon those rivers.

In No. 84 the findings of the district court are, in substance, that at the time of the erection of lock and dam No. 21 in the Cumberland river, the plaintiff was the owner of 189 acres of land on Whiteoak creek, a tributary of the Cumberland, not far distant from the river; that by reason of the erection of the lock and dam 6½ acres of this land are subject to frequent overflows of water from the river, so as to depreciate it one half of its value, and a ford across Whiteoak creek and a part of a pass way are destroyed; that the 6½ acres were worth \$990, and the damage thereto was \$495; that the damage to the land by the destruction of the ford was \$500; and that plaintiff was entitled to recover the sum of \$995. It may be supposed that Whiteoak creek was not a navigable stream, but there is no finding on the subject.

In No. 718 the findings are to the effect that at the time of the erection by the government of lock and dam No. 12 in the Kentucky river the plaintiffs, together with another person who was joined as a defendant, were the owners and in possession of a tract of land situate on Miller's creek, a branch of the Kentucky, containing 5½ acres, upon which there were a mill and a mill seat; that by reason of the erection of the lock and dam the mill no longer can be driven by water power; that the water above the lock and dam, when it is at pool stage, is about 1 foot below the crest of the mill-dam, and this prevents the drop in the cur-

rent that is necessary to run the mill; that no part of the land or mill is overflowed or covered by pool stage of water, nor is the mill physically damaged thereby; that Miller's creek is not a navigable stream; that the damages sustained by the owners of the mill, representing depreciation of the value of the mill property by cutting off the water power, amount to \$1,500.

Judgments were entered in favor of the respective landowners for the sums mentioned in the findings, together with interest and the costs of the suits, and the United States appealed to this court.

(1) A fundamental contention made in behalf of the government, and one that applies to both cases, is that the control by Congress, and the Secretary of War acting for it, over the navigation of the Cumberland and Kentucky rivers, must also include control of their tributaries, and that, in order to improve navigation at the places mentioned in the findings, it was necessary to erect dams and back up the water, and the right to do this must include also the right to raise the water in the tributary streams.

In passing upon this contention we may assume, without, however, deciding, that the rights of defendants in error are no greater than if they had been riparian owners upon the rivers, instead of upon the tributary creeks.

The states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks (*Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. ed. 224, 228; *Packer v. Bird*, 137 U. S. 661, 671, 34 L. ed. 819, 821, 11 Sup. Ct. Rep. 210; *Hardin v. Jordan*, 140 U. S. 371, 382, 35 L. ed. 428, 433, 11 Sup. Ct. Rep. 803, 838; *Shively v. Bowlby*, 152 U. S. 1, 40, 58, 38 L. ed. 331, 346, 352, 14 Sup. Ct. Rep. 548; *St. Anthony Falls Water Power Co. v. Water Comrs.* 168 U. S. 349, 358, 42 L. ed. 497, 501, 18 Sup. Ct. Rep. 157), subject however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations (*Shively v. Bowlby*, 152 U. S. 1, 40, 38 L. ed. 331, 346, 14 Sup. Ct. Rep. 548; *Gibson v. United States*, 166 U. S. 269, 272, 41 L. ed. 996, 1000, 17 Sup. Ct. Rep. 578; *Scott v. Lattig*, 227 U. S. 229, 243, 57 L. ed. 490, 496, 44 L.R.A.(N.S.) 107, 33 Sup. Ct. Rep. 242); the exercise of this authority being subject, in its turn, to the inhibition of the 5th Amendment against the taking of private property for public use without just

compensation (*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; *United States v. Lynah*, 188 U. S. 445, 465, 471, 47 L. ed. 539, 546, 549, 23 Sup. Ct. Rep. 349).

The state of Kentucky, like most of the states of the Union, determines the navigability of her streams, so far as the public right is concerned, not by the common-law test of the ebb and flow of the tide,—manifestly inapplicable in a state so wholly remote from the sea,—but by the test of navigability in fact (*Thurman v. Morrison*, 14 B. Mon. 367; *Morrison v. Thurman*, 17 B. Mon. 249, 66 Am. Dec. 153; *Goodin v. Kentucky Lumber Co.* 90 Ky. 625, 14 S. W. 775; *Murray v. Preston*, 106 Ky. 561, 564, 90 Am. St. Rep. 232, 50 S. W. 1095; *Banks v. Frazier*, 111 Ky. 909, 912, 64 S. W. 983; *Ireland v. Bowman*, 130 Ky. 153, 161, 113 S. W. 56, 17 Ann. Cas. 786), while sustaining private ownership of the beds of her streams, both navigable and non-navigable, according to the common-law rule (*Berry v. Snyder*, 3 Bush, 266, 273, 277, 96 Am. Dec. 219; *Miller v. Hepburn*, 8 Bush, 326, 331; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372, 374, 1 S. W. 765; *Wilson v. Watson*, 141 Ky. 324, 327, 35 L.R.A.(N.S.) 227, 132 S. W. 563; *Robinson v. Wells*, 142 Ky. 800, 804, 135 S. W. 317), with incidental rights to flow of the stream in its natural state (*Anderson v. Cincinnati Southern R. Co.* 86 Ky. 44, 48, 9 Am. St. Rep. 263, 5 S. W. 49).

The general rule that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public right of navigation, and the governmental control and regulation necessary to give effect to that right, is so fully established, and is so amply illustrated by recent decisions of this court, that a mere reference to the cases will suffice. *Scranton v. Wheeler*,*179 U. S. 141, 163, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 634, 56 L. ed. 570, 582, 32 Sup. Ct. Rep. 340; *United States v. Chandler-Dunbar Water Power Co.* 229 U. S. 53, 62, 57 L. ed. 1063, 1075, 33 Sup. Ct. Rep. 667; *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U. S. 82, 85, 88, 57 L. ed. 1083-1085, 33 Sup. Ct. Rep. 679, Ann. Cas. 1915A, 232; *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U. S. 251, 268, 59 L. ed. 939, 947, 35 Sup. Ct. Rep. 551; *Willink v. United States*, 240 U. S. 572, 580, 60 L. ed. 808, 810, 36 Sup. Ct. Rep. 422.

But this rule, like every other, has its limits, and in the present cases, which require us to ascertain the dividing line between public and private right, it is important to inquire what are "navigable streams" within the meaning of the rule.

In Kentucky, and in other states that

have rejected the common-law test of tidal flow and adopted the test of navigability in fact, while recognizing private ownership of the beds of navigable streams, numerous cases have arisen where it has been necessary to draw the line between public and private right in waters alleged to be navigable; and by an unbroken current of authorities it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation, with appropriate compensation for the private right. Cases exemplifying these propositions are cited in a marginal note.¹ We² have found no case to the contrary. An³ apparent but not a real exception is the New York case of *Canal Appraisers v. People* (1836) 17 Wend. 571, where the decision was rested (pp. 609, 612, 624) upon the ground that the bed of the Mohawk river was the property of the state; the authority of the case having been limited accord-

¹ *Wadsworth v. Smith*, 11 Me. 278, 281, 26 Am. Dec. 525; *Brown v. Chadbourne*, 31 Me. 9, 21, 50 Am. Dec. 641; *Treat v. Lord*, 42 Me. 552, 561, 562, 66 Am. Dec. 298; *Pearson v. Rolfe*, 76 Me. 380, 385; *Moore v. Sanborne*, 2 Mich. 519, 523, 524, 59 Am. Dec. 209; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 343, 345, 18 Am. Rep. 184; *Witheral v. Muskegon Booming Co.* 68 Mich. 48, 58, 59, 13 Am. St. Rep. 325, 35 N. W. 758; *East Branch Sturgeon River Improv. Co. v. White & F. Lumber Co.* 69 Mich. 207, 212, 213, 37 N. W. 192; *Koopman v. Blodgett*, 70 Mich. 610, 616, 14 Am. St. Rep. 527, 38 N. W. 649; *Goodin v. Kentucky Lumber Co.* 90 Ky. 625, 627, 14 S. W. 775; *Murray v. Preston*, 106 Ky. 561, 565, 90 Am. St. Rep. 232, 50 S. W. 1095; *Banks v. Frazier*, 111 Ky. 909, 912, 64 S. W. 983; *Morgan v. King*, 35 N. Y. 454, 459, 91 Am. Dec. 58; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 185, 38 Am. Rep. 407; *Ten Eyck v. Warwick*, 75 Hun, 562, 566, 27 N. Y. Supp. 536; *Weise v. Smith*, 3 Or. 445, 449, 8 Am. Rep. 621; *Goodwill v. Police Jury*, 38 La. Ann. 752, 755; *Smith v. Fonda*, 64 Miss. 551, 554, 1 So. 757; *East Hoquiam Boom & Logging Co. v. Neeson*, 20 Wash. 142, 146, 54 Pac. 1001; *Stuart v. Clark*, 2 Swan, 9, 16, 58 Am. Dec. 49; *Irwin v. Brown*, 3 Shannon, Cas. 309; *Webster v. Harris*, 111 Tenn. 668, 677, 59 L.R.A. 324, 69 S. W. 782; *Little Rock, M. R. & T. R. Co. v. Brooks*, 39 Ark. 403, 409, 43 Am. Rep. 277.

ingly by later decisions of the court of last resort of that state. *Canal Fund Comrs. v. Kempshall*, 26 Wend. 404, 416; *Child v. Starr*, 4 Hill, 369, 372; *Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44, 63; *Smith v. Rochester*, 92 N. Y. 463, 482, 44 Am. Dec. 393; *Fulton Light, Heat, & P. Co. v. State*, 200 N. Y. 400, 413, 37 L.R.A. (N.S.) 307, 94 N. E. 190.

Many state courts, including the court of appeals of Kentucky, have held, also, that the legislature cannot, by simple declaration that a stream shall be a public highway, if in fact it be not navigable in its natural state, appropriate to public use the private rights therein without compensation. *Morgan v. King*, 18 Barb. 277, 284, 35 N. Y. 454, 459, 461, 91 Am. Dec. 58; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 185, 38 Am. Rep. 407; *Murray v. Preston*, 106 Ky. 561, 563, 90 Am. St. Rep. 232, 50 S. W. 1095; *Stuart v. Clark*, 2 Swan, 9, 17, 58 Am. Dec. 49; *Walker v. Board of Public Works*, 16 Ohio, 540, 544; *Olive v. State*, 86 Ala. 88, 92, 4 L.R.A. 33, 5 So. 653; *People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co.* 107 Cal. 221, 224, 48 Am. St. Rep. 125, 40 Pac. 531. And see *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 345, 18 Am. Rep. 184; *Koopman v. Blodgett*, 70 Mich. 610, 616, 14 Am. St. Rep. 527, 38 N. W. 649.

This court has followed the same line of distinction. *That the test of navigability in fact should be applied to streams in their natural condition was in effect held in *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999,—a case which turned upon the question whether Grand river, in the state of Michigan, was one of the “navigable waters of the United States” within the meaning of acts of Congress that regulated vessels carrying merchandise and passengers upon such waters. Mr. Justice Field, speaking for the court, after showing that the tidal test was not applicable in this country, said (p. 563): “A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” The point was set forth more clearly in *The Montello*, 20 Wall. 430, 22 L. ed. 391, where the question was whether Fox river, in the state of Wisconsin, was a navigable water of the United States within the meaning of the acts of Congress. There were rapids and falls in the river,

but the obstructions caused by them had been removed by artificial means so as to furnish uninterrupted water communication for steam vessels of considerable capacity. It was argued (p. 440) that although the river might now be considered a highway for commerce conducted in the ordinary modes, it was not so in its natural state, and therefore was not a navigable water of the United States within the purview of *The Daniel Ball* decision. The court, accepting navigability in the natural state of the river as the proper test, proceeded to show that, even before the improvements resulting in an unbroken navigation were undertaken, a large and successful interstate commerce had been carried on through this river by means of Durham boats,* which were vessels from 70 to 100 feet in length, with 12 feet beam, and drawing, when loaded, from 2 to 2½ feet of water. The court, by Mr. Justice Davis, declared (p. 441) that it would be a narrow rule to hold that, in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. “The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.” And again (p. 443): “There are but few of our freshwater rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox river, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand bars.” Numerous decisions of state courts were cited as supporting this view, including some of those to which we have referred.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557, involved the right to compensation for land overflowed with backwater from a dam erected and maintained in the Fox river, under authority of the state of Wisconsin, for the improvement of navigation. (A permissible exercise of state power, in the absence of action by Congress, although it was an interstate navigable water. *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 251, 7

L. ed. 412, 414; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96.) The raising of the river above its natural stage, by means of an artificial structure, was the gravamen of the complaint. It was argued (p. 174) that the state might, in the interest of the public, "erect such works as may be deemed expedient for the purpose of improving the navigation and increasing usefulness of a navigable river, without rendering itself liable to individuals owning land bordering on such river, for injuries to their lands resulting from their overflow by reason of such improvements." This court overruled the contention, and held there was a taking without compensation, contrary to the applicable provision of the Constitution of Wisconsin.

In *United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349*, the same principle was applied in the case of an operation by the government of the United States. For the improvement of the navigation of the Savannah river certain dams and other obstructions were placed and maintained in its bed, with the result of raising the water above its natural height and backing it up against plaintiff's embankment upon the river and interfering with the drainage of their plantation. This was held (pp. 465, 471) to be a taking of private property, requiring compensation under the 5th Amendment, notwithstanding the work was done by the government in improving the navigation of a navigable river. The raising of the water above its natural level was held to be an invasion of the private property thereby flowed.

In several other cases the limitation of the public right to the natural state of the stream has been recognized. *Packer v. Bird, 137 U. S. 661, 667, 34 L. ed. 819, 820, 11 Sup. Ct. Rep. 210; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 698, 43 L. ed. 1136, 1139, 19 Sup. Ct. Rep. 770; Leovy v. United States, 177 U. S. 621, 631, 44 L. ed. 914, 918, 20 Sup. Ct. Rep. 797.*

It follows from what we have said that the servitude of privately-owned lands forming the banks and bed of a stream to the interests of navigation is a natural servitude, confined to such streams as, in their ordinary and natural condition, are navigable in fact, and confined to the natural condition of the stream. And, assuming that riparian owners upon non-navigable tributaries of navigable streams are subject to such inconveniences as may arise from the exercise of the common right of navigation, this in like manner must be limited to the natural right. The findings make it clear that the dams in question, constructed by the government in the Cumberland and Kentucky rivers, respectively, are for raising the

level of those streams along certain stretches by means of backwater, so as to render them, to the extent of the raising, artificial canals instead of natural waterways. In the language of engineering, the government has "canalized" the rivers. We intimate no doubt of the power of the United States to carry out this kind of improvement. Nor do we doubt that, upon the completion of the improvements, these rivers: the Cumberland, because it is an avenue of communication between two states; the Kentucky and also the Cumberland, because, in connection with the Ohio and Mississippi rivers, they furnish highways of commerce among many states (*Gilman v. Philadelphia, 3 Wall. 713, 725, 18 L. ed. 96, 99; The Daniel Ball, 10 Wall. 557, 563, 19 L. ed. 999, 1001; South Carolina v. Georgia, 93 U. S. 4, 10, 23 L. ed. 782, 783*),—remained navigable waters of the United States for all purposes of Federal jurisdiction and regulation, notwithstanding the artificial character of the improvements (*Ex parte Boyer, 109 U. S. 629, 632, 27 L. ed. 1056, 1057, 3 Sup. Ct. Rep. 434; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 28, 48 L. ed. 73, 78, 24 Sup. Ct. Rep. 8*).

But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the 5th Amendment. *Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; United States v. Lynah, 188 U. S. 445, 465, 471, 47 L. ed. 539, 546, 549, 23 Sup. Ct. Rep. 349.* And we deem it clear that so much of the properties of the respective defendants in error as was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be overflowed, without compensation, in the raising of the level of the rivers by means of artificial dams.

These cases have no proper relation to cases such as *Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578*, where no water was thrown back on claimant's land, and the damage was confined to an interference with the access thence to the navigable portion of the river; *Scranton v. Wheeler, 179 U. S. 141, 153, 45 L. ed. 126, 133, 21 Sup. Ct. Rep. 48*, which likewise had to do with the interruption of access from riparian land to a navigable channel; *Bedford v. United States, 192 U. S. 217, 225, 48 L. ed. 414, 417, 24 Sup. Ct. Rep. 238*, where the damage to claimant's land resulted from operation con-

ducted by the government 6 miles farther up the river; *Jackson v. United States*, 230 U. S. 1, 23, 57 L. ed. 1363, 1374, 33 Sup. Ct. Rep. 1011, where owners of lands on the east bank of the Mississippi claimed compensation as for a taking of their property by reason of the effect of levees built on the west bank opposite their lands as a part of a system of levees designed to prevent crevasses, retain the water in the river, and thus improve the navigation. In each of these, there was no direct invasion of the lands of the claimants, the damages were altogether consequential, and the right to compensation was denied on that ground.

(2) It is contended, in No. 84, that the damage to Cress's land by the overflow of 6½ acres, because it depreciated its value only to the extent of one half, does not measure up to a taking, but is only a "partial injury," for which the government is not liable. The findings, however, render it plain that this is not a case of temporary flooding or of consequential injury, but a permanent condition, resulting from the erection of the lock and dam, by which the land is "subject to frequent overflows of water from the river." That overflowing lands by permanent backwater is a direct invasion, amounting to a taking, is settled by *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall 166, 177, 20 L. ed. 557, 560; *United States v. Lynah*, 188 U. S. 445, 468-470, 47 L. ed. 539, 547-549, 23 Sup. Ct. Rep. 349. It is true that in the *Pumpelly* Case there was an almost complete destruction, and in the *Lynah* Case a complete destruction, of the value of the lands, while in the present case the value is impaired to the extent of only one half. But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking. As the court said, speaking by Mr. Justice Brewer, in *United States v. Lynah*, 188 U. S. 445, 470, 47 L. ed. 539, 548, 23 Sup. Ct. Rep. 349: "Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the 5th Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee; and when the amount awarded as compensation is paid, the title, the fee, with whatever rights may attach thereto,—in this case those at least which

belong to a riparian proprietor,—pass to the government and it becomes henceforth the full owner." There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent* domain. Where formal proceedings are initiated by the party condemning, it is usual and proper to specify the precise interest taken, where less than the fee. But where, as in this case, the property owner resorts to the courts, as he may, to recover compensation for what actually has been taken, upon the principle that the government, by the very act of taking, impliedly has promised to make compensation because the dictates of justice and the terms of the 5th Amendment so require (*United States v. Great Falls Mfg. Co.* 112 U. S. 645, 656, 28 L. ed. 846, 850, 5 Sup. Ct. Rep. 306; *United States v. Lynah*, 188 U. S. 445, 465, 47 L. ed. 539, 546, 23 Sup. Ct. Rep. 349), and it appears that less than the whole has been taken and is to be paid for, such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking; and where, as in this case, with respect to the 6½ acres, land is not constantly but only at intervals overflowed, the fee may be permitted to remain in the owner, subject to an easement in the *United States* to overflow it with water as often as necessarily may result from the operation of the lock and dam for purposes of navigation.

(3) In No. 84 some question is made about the allowance for the damage to the land by the destruction of the ford across Whiteoak creek and the pass way, but we deem the objection unsubstantial. It is said there is nothing to show how Cress acquired ownership of the ford, and that it does not appear that he had a right to pass over the adjoining land of one Brown. It seems to us, however, that the findings, while meager, sufficiently import that Cress had a right to a private way and ford as appurtenant to his land, and that the damage to the land by the destruction of the ford was \$500. This brings the case squarely within *United States v. Welch*, 217 U. S. 333, 339, 54 L. ed. 787, 789, 28 L.R.A. (N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680, and *United States v. Grizzard*, 219

U. S. 180, 184, 185, 55 L. ed. 165-167, 31 L.R.A. (N.S.) 1135, 31 Sup. Ct. Rep. 162.

(4) In No. 718 there is a contention that, because the backwater is confined to Miller's creek, it does not amount to a taking of land. But the findings render it plain that it had the necessary effect of raising the creek below the dam to such an extent as to destroy the power of the milldam that was essential to the value of the mill; or, as the findings put it: "The water above the lock and dam, when it is at pool stage, is about 1 foot below the crest of the milldam, which prevents the drop in the current which is necessary to run the mill." Under the law of Kentucky, ownership of the bed of the creek, subject only to the natural flow of the water, is recognized as fully as ownership of the mill itself. The right to have the water flow away from the milldam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land. *Gardner v. Newburgh*, 2 Johns. Ch. 162, 166, 7 Am. Dec. 526; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Johnson v. Jordan*, 2 Met. 234, 239, 37 Am. Dec. 85; *Wadsworth v. Tillotson*, 15 Conn. 366, 373, 39 Am. Dec. 391; *Parker v. Griswold*, 17 Conn. 288, 299, 42 Am. Dec. 739; *Harding v. Stamford Water Co.* 41 Conn. 87, 92; *Holsman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 335, 343; *Beach v. Sterling Iron & Zinc Co.* 54 N. J. Eq. 65, 73, 33 Atl. 286; *Scriven v. Smith*, 100 N. Y. 471, 480, 53 Am. Rep. 224, 3 N. E. 675; *Crook v. Hewitt*, 4 Wash. 749, 754, 31 Pac. 23; *Rigney v. Tacoma Light & Water Co.* 9 Wash. 576, 583, 26 L.R.A. 425, 38 Pac. 147; *Benton v. Johncox*, 17 Wash. 277, 281, 39 L.R.A. 107, 61 Am. St. Rep. 912, 49 Pac. 495; *Lux v. Haggin*, 69 Cal. 255, 390, 10 Pac. 674; *Hargrave v. Cook*, 108 Cal. 72, 77, 30 L.R.A. 390, 41 Pac. 18; *Pine v. New York*, 103 Fed. 337, 339, 50 C. C. A. 145, 112 Fed. 98, 103; *Wood v. Waud*, 3 Exch. 748, 775, 154 Eng. Reprint, 1047, 18 L. J. Exch. N. S. 305, 13 Jur. 472, 10 Eng. Rul. Cas. 226; *Dickinson v. Grand Junction Canal Co.* 7 Exch. 282, 299, 155 Eng. Reprint, 953, 21 L. J. Exch. N. S. 241, 16 Jur. 200; *Stokoe v. Singers*, 8 El. & Bl. 31, 36, 120 Eng. Reprint, 12, 26 L. J. Q. B. N. S. 257, 3 Jur. N. S. 1256, 5 Week. Rep. 756 (Erle, J.).

(5) In both cases it is urged that there was error in allowing costs against the government. Section 24(20) of the Judi-

cial Code, 36 Stat. at L. 1093, chap. 231, Comp. Stat. 1913, § 991(20), under which the suits were brought, originated in the provisions of the so-called Tucker Act* of March 3, 1887, chap. 359, 24 Stat. at L. 505, Comp. Stat. 1913, § 991(20), and the argument of the government is that while, under § 15 of that act, costs were recoverable against the United States, in the district court as in the court of claims, yet that § 297, Judicial Code, repealed all of the Tucker Act with the exception of §§ 4, 5, 6, 7, and 10, which relate to matters of procedure, and that there is no longer any authority of law for allowing costs against the United States in suits brought in the district court. The fact is that § 297, Judicial Code, besides the clause repealing the Tucker Act, with the exceptions mentioned, contains in its final paragraph a repeal of "all other acts and parts of acts, in so far as they are embraced within and superseded by this act." Now, not only is the provision of § 2 of the Tucker Act, conferring upon the district courts concurrent jurisdiction with the court of claims over certain claims against the United States, carried into § 24(20) of the Code, but the provision of § 15 of the Tucker Act for the allowance of costs against the government is carried in as § 152. It is true that § 24(20) is a part of chapter 2 of the Code, entitled "District Courts—Jurisdiction," while § 152 is a part of chapter 7, entitled, "The Court of Claims." But by §§ 294 and 295 it is declared and enacted as follows: "Sec. 294. The provisions of this act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest. Sec. 295. The arrangement and classification of the several sections of this act have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapter under which any particular section is placed."

*From this it is plain that § 152 of the Code applies to suits in the District Courts, as well as to those in the Court of Claims. Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of these cases.

(243 U. S. 389)

UTAH POWER & LIGHT COMPANY,
Appt.,
v.

UNITED STATES. (No. 202.)

UNITED STATES, Appt.,
v.

UTAH POWER & LIGHT COMPANY. (No.
203.)

BEAVER RIVER POWER COMPANY,
Appt.,
v.

UNITED STATES. (No. 204.)

UNITED STATES, Appt.,
v.

BEAVER RIVER POWER COMPANY.
(No. 205.)

LUCIEN L. NUNN et al., Appts.,
v.

UNITED STATES. (No. 206.)

UNITED STATES, Appt.,
v.

LUCIEN L. NUNN et al. (No. 207.)

PUBLIC LANDS ⇨7—STATES — RELATION
TO FEDERAL GOVERNMENT—EXCLUSIVE-
NESS OF FEDERAL CONTROL OF PUBLIC
LANDS.

1. The inclusion within a state of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what is commonly known as the police power.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 7, 34.]

PUBLIC LANDS ⇨7—STATES — RELATION
TO FEDERAL GOVERNMENT—EXCLUSIVE-
NESS OF FEDERAL CONTROL OF PUBLIC
LANDS — USE FOR COMMERCIAL ENTER-
PRISES.

2. State laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy over the right to use public lands of the United States within the state as sites for commercial enterprises, except so far as such laws may have been adopted or made applicable by Congress.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 7, 34.]

PUBLIC LANDS ⇨7—USE FOR RIGHT OF
WAY FOR ELECTRIC POWER—REPEAL OF
GRANT.

3. So far as they may have been applicable to rights of way for electric power, U. S. Rev. Stat. §§ 2339 and 2340 (Comp. Stat. 1913, §§ 4647, 4648), granting a right of way over the public lands for ditches, canals, and reservoirs used in diverting, storing, and carrying water for "mining, agricultural, manufacturing, and other purposes," were superseded by the enactment of the Act of May 14, 1896 (29 Stat. at L. 120, chap. 179, Comp. Stat. 1913, § 4944), empowering the Secretary of the

Interior, "under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and for st reservations of the United States, by any citizen or association of citizens of the United States, for the purpose of generating, manufacturing, or distributing electric power." The omission from this statute of any mention of ditches, canals, and reservoirs is of no significance, since it is similarly silent respecting power houses, transmission lines, and subsidiary structures.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 7, 34.]

PUBLIC LANDS ⇨7—USE FOR GENERATING AND DISTRIBUTING ELECTRIC ENERGY—CONGRESSIONAL ASSENT.

4. No right to use the public lands as sites for works employed in generating and distributing electric power can be founded upon the provisions of the Act of March 3, 1891 (26 Stat. at L. 1095, chap. 561, Comp. Stat. 1913, §§ 4934-4937), §§ 18-21, relating to rights of way for ditches, canals, and reservoirs for the purpose of irrigation, and calling for the filing of maps of location which are to be effective and noted upon the public records when approved by the Secretary of the Interior, or upon the provisions of the Act of May 11, 1898 (30 Stat. at L. 404, chap. 292, Comp. Stat. 1913, §§ 4943, 4938), permitting rights of way "approved" under the earlier statute to be used for certain additional purposes, including the development of power "as subsidiary to the main purpose of irrigation," where no maps of location have been filed or approved, the rights of way are not claimed merely for ditches, canals, or reservoirs, and irrigation is neither the sole nor the main purpose for which any part of the asserted rights of way is used.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 7, 34.]

PUBLIC LANDS ⇨7—USE FOR GENERATING AND DISTRIBUTING ELECTRIC ENERGY—CONGRESSIONAL ASSENT.

5. Those who have not conformed to the requirements of the Act of February 15, 1901 (31 Stat. at L. 790, chap. 372, Comp. Stat. 1913, § 4946) and have received no permission or license under it, can claim no right under such statute to use the public lands as sites for works employed in generating or distributing electric power.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 7, 34.]

WOODS AND FORESTS ⇨8—USE OF PUBLIC LANDS FOR GENERATING AND DISTRIBUTING ELECTRIC ENERGY—CONGRESSIONAL ASSENT.

6. The right to use the public lands in forest reservations as sites for works employed in generating and distributing electric power, some of which is sold in adjacent or distant towns, or to those who are engaged in mining or milling or in reducing ores, was not given by the Act of February 1, 1905 (33 Stat. at L. 628, chap. 288, Comp. Stat. 1913, § 823), which provides for rights of way in forest reserves for

ditches, canals, reservoirs, and the like (making no provision for power houses, transmission lines, or subsidiary structures) "for municipal or mining purposes, and for the purposes of the milling and reduction of ores."

ESTOPPEL ⇨62(2)—OF UNITED STATES — ACTS OF OFFICERS AND AGENTS.

7. No understanding and agreement with the officers or agents of the United States can estop the government from questioning the right to use the public land in forest reservations as sites for works employed in generating and distributing electric power. [Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 152.]

ESTOPPEL ⇨62(2)—OF UNITED STATES—LACHES OR NEGLECT OF DUTY BY OFFICERS.

8. The United States is not estopped to question the right to use public lands in forest reservations as sites for works employed in generating and distributing electric power because the agents in the forestry service, and other government officers and employees, with knowledge of what the power companies were doing, not only did not object thereto, but impliedly acquiesced therein until after the works were completed and put into operation.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 152.]

WOODS AND FORESTS ⇨8—ADMINISTRATIVE REGULATIONS—WHO MAY QUESTION VALIDITY.

9. Those using the public lands in forest reservations as sites for works employed in distributing electric power without seeking a license or permit under the Act of February 15, 1901 (31 Stat. at L. 790, chap. 372, Comp. Stat. 1913, § 4946), or conforming or offering to conform to all lawful administrative regulations promulgated under that statute, are not in a position to complain that some of such regulations go beyond what is appropriate for the protection of the interests of the United States, and are unconstitutional, unauthorized, and unreasonable.

WOODS AND FORESTS ⇨8—USE OF PUBLIC LANDS FOR GENERATING AND DISTRIBUTING ELECTRIC ENERGY—CONGRESSIONAL ASSENT.

10. Congressional enactments providing or recognizing that rights to the use of water in streams running through the public lands and forest reservations may be acquired in accordance with local laws have no application to a controversy over the right to use the public lands and forest reservations as sites for works employed in generating and distributing electric power.

WOODS AND FORESTS ⇨8 — UNLAWFUL USE—COMPENSATION TO GOVERNMENT.

11. Appropriate compensation to the United States for the past use and occupancy of public lands in forest reservations as sites for works employed in generating and distributing electric power without the consent of the United States, and contrary to its laws, should be included in a decree

enjoining such use, and should be measured by the reasonable value of the occupancy and use, considering its extent and duration, and not by the scale of charges fixed by administrative regulations promulgated by the Act of February 15, 1901 (31 Stat. at L. 790, chap. 372, Comp. Stat. 1913, § 4946), for use and occupancy under a license or permit granted under that statute.

[Nos. 202-207.]

Argued October 11 and 12, 1916. Decided March 19, 1917.

CROSS APPEALS from the District Court of the United States for the District of Utah to review decrees enjoining, but without compensation for prior occupancy and use, the continued occupancy and use of public lands in the forest reservations as sites for works employed in generating and distributing electric power. Reversed so far as such decrees deny the government's right to compensation, and in other respects affirmed.

The facts are stated in the opinion.

Messrs. **Graham Sumner** and **William V. Hodges** for the Utah Power & Light Company.

Messrs. **Clyde C. Dawson**, **Frank H. Short**, **H. R. Waldo**, **Frank J. Gustin**, **Charles A. Gillette**, and **Dean F. Brayton** for the Beaver River Power Company.

Mr. **Albert R. Barnes**, Attorney General of Utah, Mr. **Fred Farrar**, Attorney General of Colorado, Mr. **J. H. Peterson**, Attorney General of Idaho, Mr. **George B. Thacher**, Attorney General of Nevada, Mr. **Willis E. Reed**, Attorney General of Nebraska, and Messrs. **Frank H. Short**, **Clyde C. Dawson** and **S. A. Bailey** heard on behalf of the state of Utah and other states.

Messrs. **John R. Dixon** and **William B. Bosley** as amici curiæ.

Assistant Attorney General **Knaebel** for the United States.

* Mr. Justice **Van Devanter** delivered the opinion of the court:

We are concerned here with three suits by the United States to enjoin the continued occupancy and use, without its permission, of certain of its lands in forest reservations in Utah as sites for works employed in generating and distributing electric power, and to secure compensation for such occupancy and use in the past. The reservations were created by executive orders and proclamations with the express sanction of Congress. Almost all the lands therein belong to the United States, and before the reservations were created were public lands subject to disposal and acquisition under

403 the general land laws. The works in question consist of diversion dams, reservoirs, pipe lines, power houses, transmission lines, and some subsidiary structures. In the aggregate these are used in collecting water from mountain streams, in conducting it for considerable distances to power houses where the force arising from its descent through the pipe lines is transmitted into electric energy, and in transmitting that energy to places beyond the reservations, where it is sold to whoever has occasion to use it for power, lighting, or heating. In each case some part of the works is on private lands, but much the greater part is on lands of the United States. Part was constructed before and part after the reservation was created, but all after 1896 and nearly all after 1901. The entire works are conducted in each instance as a commercial enterprise, and not as an incident to or in aid of any other business in which the defendant is engaged.

In occupying and using the government lands as sites for these works the defendants have proceeded upon the assumption that they were entitled so to do without seeking or securing any grant or license from the Secretary of the Interior or the Secretary of Agriculture under the legislation of Congress, and, in truth, they have neither applied for nor received such a grant or license from either. But, notwithstanding this, they assert that they have acquired and are invested with rights to occupy and use permanently, for the purposes indicated, the government lands upon which the works are located.

The principal object of the suits, as is said in one of the briefs, is to test the validity of these asserted rights, and, if they be found invalid, to require the defendants to conform to the legislation of Congress, or, at their option, to remove from the government lands. The district court ruled against the defendants upon the main question, following a decision of the circuit court of appeals in another case (126 C. C. A. 376, 209 Fed. 554), but refused the government's prayer for pecuniary relief. Cross appeals were then taken directly to this court.

*404 The first position taken by the defendants is that their claims must be tested by the laws of the state in which the lands are situate rather than by the legislation of Congress, and in support of this position they say that lands of the United States within a state, when not used or needed for a fort or other governmental purpose of the United States, are subject to the jurisdiction, powers, and laws of the state in the same way and to the same extent as are similar lands of others. To this we cannot assent. Not only does the Constitution

(art. 4, § 3, cl. 2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court, have gone upon the theory that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may require rights in them. Thus, while the state may punish public offenses, such as murder or larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves, or invest others with any right whatever in them. *United States v. McBratney*, 104 U. S. 621, 624, 26 L. ed. 869, 870; *Van Brocklin v. Tennessee* (*Van Brocklin v. Anderson*) 117 U. S. 151, 168, 29 L. ed. 845, 851, 6 Sup. Ct. Rep. 670; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 504, 33 L. ed. 687, 690, 10 Sup. Ct. Rep. 341. From the earliest times Congress by its legislation, applicable alike in the states and territories, has regulated in many particulars the use by others of the lands of the United States, has prohibited and made punishable various acts calculated to be injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of rights of way over them for highways, railroads, canals, ditches, telegraph lines, and the like. The states and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its supremacy over state enactments sustained. *Wilcox v. Jackson*, 13 Pet. 498, 516, 10 L. ed. 264, 273; *Jourdan v. Barrett*, 4 How. 169, 185, 11 L. ed. 924, 931; *Gibson v. Chouteau*, 13 Wall. 92, 99, 20 L. ed. 534, 536; *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864; *Light v. United States*, 220 U. S. 523, 536, 537, 55 L. ed. 570, 574, 31 Sup. Ct. Rep. 485. And so we are of opinion that the inclusion within a state of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is

known as the police power. "A different rule," as was said in *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864, "would place the public domain of the United States completely at the mercy of state legislation."

It results that state laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as is here presented, save as they may have been adopted or made applicable by Congress.

The next position taken by the defendants is that their claims are amply sustained by §§ 2339 and 2340 of the Revised Statutes, originally enacted in 1866 [14 Stat. at L. 253, chap. 262, § 9] and 1870 [16 Stat. at L. 218, chap. 235, § 17, Comp. Stat. 1913, §§ 4647, 4648]. By them the right of way over the public lands was granted for ditches, canals, and reservoirs used in diverting, storing, and carrying water for "mining, agricultural, manufacturing, and other purposes." The extent of the right of way in point of width or area was not stated, and the grant was noticeably free from conditions. No application to an administrative officer was contemplated, no consent or approval by such an officer was required, and no direction was given for noting the right of way upon any record. Obviously this legislation was primitive. At that time works for generating and distributing electric power were unknown, and so were not in the mind of Congress. Afterwards, when they came into use, it was found that this * legislation was at best poorly adapted* to their needs. It was limited to ditches, canals, and reservoirs, and did not cover power houses, transmission lines, or the necessary subsidiary structures. In that situation Congress passed the Act of May 14, 1896, chap. 179, 29 Stat. at L. 120, Comp. Stat. 1913, § 4944, which related exclusively to rights of way for electric power purposes, and read as follows:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power."

We regard it as plain that this act superseded §§ 2339 and 2340 in so far as they were applicable to such rights of way. It dealt specifically with that subject, covered it fully, embodied some new provisions, and evidently was designed to be complete in itself. That it contained no express men-

tion of ditches, canals, and reservoirs is of no significance, for it was similarly silent respecting power houses, transmission lines, and subsidiary structures. What was done was to provide for all in a general way without naming any of them.

As the works in question were constructed after §§ 2339 and 2340 were thus superseded, the defendants' claims receive no support from those sections. No attempt was made to conform to the Act of 1896, and nothing is claimed under it.

Some reliance is placed upon §§ 18-21 of the Act of March 3, 1891, chap. 561, 26 Stat. at L. 1095, Comp. Stat. 1913, §§ 4934-4937, and the Act of May 11, 1898, chap. 292, 30 Stat. at L. 404, Comp. Stat. 1913, § 4943. The first relates to rights of way for ditches, canals, and reservoirs for the purpose of irrigation, and, differing from §§ 2339 and 2340, calls for the filing of maps of location which are to be effective* and ^{§ 410} noted upon the public records when approved by the Secretary of the Interior. The second permits rights of way "approved" under the first to be used for certain additional purposes, including the development of power, "as subsidiary to the main purpose of irrigation." But here no maps of location have been filed or approved, the rights of way are not claimed merely for ditches, canals, or reservoirs, and irrigation is neither the sole nor the main purpose for which any part of the asserted rights of way is used. So it is apparent that the reliance upon these acts is ill-founded.

In the oral and written arguments counsel have given much attention to the Act of February 15, 1901, chap. 372, 31 Stat. at L. 790, Comp. Stat. 1913, § 4946. On the part of the government it is insisted that the comprehensive terms of the act and its legislative history¹ conclusively show that it was adopted as a complete revision of the confused and fragmentary right-of-way provisions found in several earlier enactments, including those already noticed, but this need not be considered or decided now beyond observing that the act obviously superseded and took the place of the law of May 14, 1896, *supra*. The act empowers the Secretary of the Interior, "under general regulations to be fixed by him," to permit the use of rights of way through the public lands, forest reservations,² etc., for any one

¹ Report Secretary of the Interior, 1899, pp. 6-7; House Report, 1850, 56th Cong., 1st Sess.; Cong. Rec. 56th Cong., 1st Sess., 6762; *id.*, 56th Cong. 2d Sess., 2075.

² The forest reserves were measurably placed under the control of the Secretary of Agriculture by the Act of February 1, 1905, chap. 288, 33 Stat. at L. 628, Comp. Stat. 1913, § 823.

or more of several purposes, including the generation and distribution of electric power, carefully defines the extent of such rights of way, and embodies provisions not found in any of the earlier enactments. But the defendants can claim nothing under the act. They have not conformed* to its requirements and have not received any permission or license under it.

Another statute upon which the defendants rely is the Act of February 1, 1905, chap. 288, 33 Stat. at L. 628, Comp. Stat. 1913, § 823. But we think it does not help them. While providing for rights of way in forest reserves for ditches, canals, reservoirs and the like "for municipal or mining purposes, and for the purposes of the milling and reduction of ores," it makes no provision for power houses, transmission lines, or subsidiary structures such as the defendants have. And, in our opinion, the purposes named do not include those for which the works in question are used. It is not enough that some of the electric energy is sold in adjacent or distant towns, or to those who are engaged in mining or in milling or reducing ores. In an opinion rendered June 4, 1914, the Attorney General said of this act: "The rights granted are described with particularity. The right of way for transmitting and distributing electrical power is not included expressly, nor is it so intimately related to any of the rights enumerated that a grant of the one must needs be implied as essential to the enjoyment of the other." 30 Ops. Atty. Gen. 263. We regard this as the correct view.

In their answers some of the defendants assert that when the forest reservations were created an understanding and agreement was had between the defendants, or their predecessors, and some unmentioned officers or agents of the United States, to the effect that the reservations would not be an obstacle to the construction or operation of the works in question; that all rights essential thereto would be allowed and granted under the act of 1905; that, consistently with this understanding and agreement, and relying thereon, the defendants, or their predecessors, completed the works and proceeded with the generation and distribution of electric energy, and that, in consequence, the United States is estopped to question the right of the defendants to maintain and operate the works. Of this* it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *Lee v. Munroe*, 7 Cranch, 366, 3 L. ed. 373; *Filor v. United States*, 9 Wall. 45, 49, 19 L. ed. 549, 551;

Hart v. United States, 95 U. S. 316, 24 L. ed. 479; *Pine River Logging Co. v. United States*, 186 U. S. 279, 291, 46 L. ed. 1164, 1170, 22 Sup. Ct. Rep. 920.

As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the government, with knowledge of what the defendants were doing, not only did not object thereto, but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest. *United States v. Kirkpatrick*, 9 Wheat. 720, 735, 6 L. ed. 199, 203; *Steele v. United States*, 113 U. S. 128, 134, 28 L. ed. 952, 954, 5 Sup. Ct. Rep. 396; *United States v. Beebe*, 127 U. S. 338, 344, 32 L. ed. 121, 124, 8 Sup. Ct. Rep. 1083; *United States v. Insley*, 130 U. S. 263, 265, 266, 32 L. ed. 968, 969, 9 Sup. Ct. Rep. 485; *United States v. Dalles Military Road Co.* 140 U. S. 599, 632, 35 L. ed. 560, 571, 11 Sup. Ct. Rep. 988; *United States v. Michigan*, 190 U. S. 379, 405, 47 L. ed. 1103, 1112, 23 Sup. Ct. Rep. 742; *State ex rel. Lott v. Brewer*, 64 Ala. 287, 298; *People v. Brown*, 67 Ill. 435, 438; *Den ex dem. Candler v. Lunsford*, 20 N. C. 542 (4 Dev. & B. L. 407); *Humphrey v. Reg.* 2 Can. Exch. 386, 390; *Reg. v. Black*, 6 Can. Exch. 236, 253. And, if it be assumed that the rule is subject to exceptions, we find nothing in the cases in hand which fairly can be said to take them out of it, as heretofore understood and applied in this court. A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it. *Causey v. United States*, 240 U. S. 399, 402, 60 L. ed. 711, 713, 36 Sup. Ct. Rep. 365.

By their answers the defendants assert that some of the*administrative regulations* promulgated under the act of February 15, 1901, go beyond what is appropriate for the protection of the interest of the United States and are unconstitutional, unauthorized, and unreasonable. The regulations occupy many printed pages and the answers do not adequately show which regulations are assailed, or the grounds upon which the invalidity of particular ones is asserted. That Congress intends there shall be some administrative regulations on the subject is plainly shown in the act, and that its discretion in the matter is not narrowly confined is shown by our decisions in *United States v. Grimaud*, 220 U. S. 506, 55 L. ed.

563, 31 Sup. Ct. Rep. 480, and *Light v. United States*, 220 U. S. 523, 55 L. ed. 570, 31 Sup. Ct. Rep. 485. If any of the regulations go beyond what Congress can authorize, or beyond what it has authorized, those regulations are void and may be disregarded; but not so of such as are thought merely to be illiberal, inequitable, or not conducive to the best results. In the nature of things it hardly can be that all are invalid, and this was conceded in argument. The defendants have not complied with any, or really offered to do so, but have proceeded upon the theory that the act and all the regulations are without application to their situation. In this they have been mistaken, and so are occupying and using reserved lands of the United States without its permission and contrary to its laws. Not until they seek a license or permit under the act and conform, or appropriately offer to conform, to all lawful regulations thereunder, will they be in a position to complain that some of the regulations are invalid. As we interpret the decrees below, they enjoin the defendants from occupying and using the lands of the United States until, and only until, they acquire rights to do so by complying with some applicable statute and the lawful regulations. Of course, we do not imply that any of the regulations are invalid, but leave that question entirely open.

*411 Much is said in the briefs about several congressional enactments providing or recognizing that rights to the use of water in streams running through the public lands and forest reservations may be acquired in accordance with local laws, but these enactments do not require particular mention, for this is not a controversy over water rights, but over rights of way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned. See *Snyder v. Colorado Gold Dredging Co.* 104 C. C. A. 136, 181 Fed. 62, 69.

As the defendants have been occupying and using reserved lands of the United States without its permission and contrary to its laws, we think it is entitled to have appropriate compensation therefor included in the decree. The compensation should be measured by the reasonable value of the occupancy and use, considering its extent and duration, and not by the scale of charges named in the regulations, as prayed in the bill. However much this scale of charges may bind one whose occupancy and use are under a license or permit granted under the statute, it cannot be taken as controlling what may be recovered from an occupant and user who has not accepted or assented to the regulations in any way.

It follows that the decrees are right and must be affirmed, save as they deny the government's right to compensation for the occupancy and use in the past, and in that respect they must be reversed.

It is so ordered.

(243 U. S. 422)

CHICAGO & ALTON RAILROAD COMPANY et al., Plffs. in Err.,

v.

WILLIAM J. McWHIRT.

CONSTITUTIONAL LAW §133, 245, 301—RAILROADS §6—IMPAIRING CONTRACT OBLIGATIONS—DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS—LIABILITY OF LESSOR RAILWAY COMPANY.

1. Applying to a domestic railway company which has exercised its authority, under a charter amendment (Mo. Laws 1870, p. 93), to lease its road to a non-resident railway company, "upon such terms as may be mutually agreed upon," the general provisions of Mo. Laws 1870, p. 91, § 2, rendering any such leasing company liable jointly with the lessee for any actionable tort of the latter, committed in the operation of the road, does not impair the obligation of the charter contract of the lessor company, nor deprive it of its property without due process of law, nor deny to it the equal protection of the laws, where the subject is not dealt with in the charter, and the statute was in force when the lease was made.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 376, 402, 702, 848-850, 857; *Railroads*, Cent. Dig. § 7.]

REMOVAL OF CAUSES §49(3)—SEPARABLE CONTROVERSY—FRAUDULENT JOINDER.

2. A nonresident operating railway company joined as party defendant with its lessor, a resident railway company, in an action for a tort committed in the operation of the road, may not remove the cause to a Federal court as presenting a separable controversy between it and the resident plaintiff, where, under the local law, the case stated in plaintiff's pleading was one of joint liability on the part of the defendants, and there was no showing that the defendants were fraudulently joined for the purpose of preventing the removal.

[Ed. Note.—For other cases, see *Removal of Causes*, Cent. Dig. § 97.]

[No. 714.]

Argued January 29 and 30, 1917. Decided March 26, 1917.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court for Ralls County, in that state, in favor of plaintiff in a personal-injury action in which both lessor and lessee railway companies were joined as parties defendant. Affirmed.

See same case below, — Mo. —, 187 S. W. 830.

The facts are stated in the opinion.

Messrs. **Elliott H. Jones**, **William C. Scarritt**, and **Charles M. Miller** for plaintiffs in error.

Messrs. **Patrick Henry Cullen**, **Thomas T. Fauntleroy**, and **Charles M. Hay** for defendant in error.

⁴²³ * Mr. Justice **Van Devanter** delivered the opinion of the court:

This was an action to recover for personal injuries caused, as was alleged, by negligently backing an engine and cars across a public street in Vandalia, Missouri, without taking any precautions for the safety of persons using the street at the time. The action was against two railroad companies, one incorporated in Missouri and the other in Illinois. The former had constructed and still owned the railroad, and the latter was operating it under a lease. A trial resulted in a judgment for the plaintiff, and this was affirmed. — Mo. —, 187 S. W. 830.

⁴²⁴ The Missouri company was created by a special act in 1859, Laws 1859, p. 400, which was amended, with the company's consent, by special acts in 1868 and 1870, Laws 1868, p. 97; Laws 1870, p. 93. A general and older statute provided that all subsequent corporate charters should be "subject to alteration, suspension, and repeal, in the discretion of the legislature," Rev. Stat. 1855, p. 371, § 7; but these special acts declared that this provision should have no application to them or to the Missouri company. After the Act of 1859, and before it was amended, the state adopted a new Constitution containing a provision that corporations, other than for municipal purposes, could be formed only under general laws and that these might be altered, amended, or repealed; but, under the local decisions, it is doubtful at least that this provision was applicable to subsequent amendments of charters previously granted (*State ex rel. Circuit Atty. v. Cape Girardeau & S. L. R. Co.* 48 Mo. 468; *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 569, 17 S. W. 581; *Callaway County v. Foster*, 93 U. S. 567, 570, 23 L. ed. 911, 912), and so it may be put out of view. The amendment of 1870, which took effect on March 20th of that year, authorized the Missouri company to lease its road* for a period of years to any other railroad company "upon such terms as may be mutually agreed upon." March 24 of the same year a general statute was enacted which, as locally interpreted, renders any railroad company of that state leasing its road to a company of another

state liable jointly with the lessee for any actionable tort of the latter, committed in the operation of the road. Laws 1870, p. 91, § 2; *Brown v. Louisiana & M. River R. Co.* 256 Mo. 522, 534, 165 S. W. 1060. Following this enactment the Missouri company leased its road to the Illinois company, and it was under this lease that the latter was operating the road when the plaintiff was injured. In the lease the lessee agreed to pay off and satisfy all lawful claims for damages arising out of its negligence or dereliction of duty while operating the road.

The general statute of March 24, 1870, now embodied in Rev. Stat. 1909, § 3078, was applied in this case over the Missouri company's objection that it could not be so applied without bringing it in conflict with the contract clause of the Constitution of the United States and with the due process and equal protection clauses in the 14th Amendment. The overruling of this objection and the denial of a petition for removal to the Federal court are the matters to be reviewed here.

In invoking the contract clause the Missouri company goes upon the theory that the special acts constituting its corporate charter broadly authorized it to lease its road to any other railroad company upon any terms which might be agreeable to both, and that, in the absence of a reservation of power to alter, amend, or repeal the charter, a later statute qualifying the authority to lease, or attaching any condition to its exercise,—as by making the company liable for the torts of the lessee committed in conducting the road,—necessarily impairs the obligation of the charter contract. While not doubting that any lawful contract contained in the charter is⁴²⁵ within the*protection of the clause invoked (*Stone v. Mississippi*, 101 U. S. 814, 816, 817, 25 L. ed. 1079), we find nothing in the charter respecting the liability of the Missouri company for torts committed by another company to which it commits the operation of its road under a lease. That subject is not dealt with in the charter in any way. The provision that the leasing may be upon such terms as are mutually agreeable to the parties is not in point, for it obviously relates to matters which appropriately can be left to the lessor and lessee, such as their rights and duties as between themselves, and not to matters of public concern, such as the rights of third persons to recover for injuries sustained through the negligent operation of the road under the lease. As to the latter, we think it is plain that no contract was intended or made by the state, and that the matter remained open to legislative action when

the provision in the Act of March 24, 1870, was adopted. *Texas & N. O. R. Co. v. Miller*, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 59 L. ed. 1204, 1210, 35 Sup. Ct. Rep. 678.

That provision was in force when the lease was made. It is not inherently arbitrary, is found in the laws of other states, and applies to all railroad companies of Missouri which lease their roads to companies of other states. In these circumstances it neither deprives the Missouri company of its property without due process of law, nor denies to it the equal protection of the laws.

The plaintiff was a citizen of Missouri, and, as before stated, one of the defendants was an Illinois corporation. The latter sought to remove the case against it into the Federal court upon the ground that the same involved a distinct and separable controversy between citizens of different states. But the petition for removal was denied, and rightly so. Under the local law the case stated in the plaintiff's pleading was one of joint liability on the part of the defendants, and, for the purpose of passing upon the petition for removal, this was decisive of the nature of the controversy, there being no showing that the defendants were fraudulently joined for the purpose of preventing a removal. *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 213 et seq., 50 L. ed. 441, 445, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; *Chesapeake & O. R. Co. v. Cockrell*, 232 U. S. 146, 152, 58 L. ed. 544, 547, 34 Sup. Ct. Rep. 278.

Judgment affirmed.

(243 U. S. 415)

STATE OF CALIFORNIA, Plff. in Err.,
v.

DESERET WATER, OIL, & IRRIGATION
COMPANY.

COURTS — 394(7) — ERROR TO STATE COURT —
DECISION OF FEDERAL QUESTION —
RIGHTS ASSERTED UNDER FEDERAL LAWS —
CONTROLLING EFFECT OF DECISION.

1. A judgment of a state court holding that certain school lands within a forest reservation were subject to condemnation by a water company is reviewable in the Federal Supreme Court, where the opinion of the state court shows that U. S. Rev. Stat. §§ 2275, 2276, giving the right to select other lands in lieu of school sections, were considered, and that immunity from condemnation under them upon the ground that the lands in equity belong to the United States was asserted by the state and denied, and where the controlling effect of

the Federal statutes was conceded by the state court, and necessarily follows from the nature of the rights with which they deal.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1053.]

PUBLIC LANDS — 53 — SCHOOL SECTIONS —
WAIVER BY STATE — LIEU LANDS.

2. A state was authorized to waive its right to a school section which was included in a forest reservation proclaimed after survey, i. e., after title had vested in the state, by the provisions of U. S. Rev. Stat. § 2275, as amended by the act of February 28, 1891 (26 Stat. at L. 797, chap. 384, Comp. Stat. 1913, § 4860), which, after giving the right to select lands in lieu of such school sections as were settled upon with a view of pre-emption or homestead, and the same right where such school sections are mineral or are included in an Indian, military, or other reservation, or are otherwise disposed of by the United States, adds a proviso that where any state is entitled to said school sections, or where said sections are reserved to any territory, notwithstanding the same may be mineral land or embraced within an Indian or other reservation, the selection of such lands in lieu thereof by said state or territory shall be a waiver of its right to said sections.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 143-145.]

[No. 269.]

Argued January 29, 1917. Decided March
26, 1917.

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court for the County of Mono, in that state, in favor of a water company in proceedings by it to condemn certain school sections within a forest reservation. Reversed and remanded for further proceedings.

See same case below, 167 Cal. 147, 138 Pac. 981.

The facts are stated in the opinion.

Mr. John T. Nourse and Mr. U. S. Webb, Attorney General of California, for plaintiff in error.

Messrs. Charles F. Consaul and A. H. Ricketts for defendant in error.

Messrs. Charles D. Mahaffie, C. Edward Wright, and Oscar W. Lange as amici curiæ.

* Mr. Justice Day delivered the opinion of the court:

The Deseret Water, Oil, & Irrigation Company brought a proceeding in condemnation in the superior court of Mono county, California, against the state of California, to appropriate by right of eminent domain certain lands in that state, for the

purpose of preserving and maintaining water rights, equipping and operating canals, etc., to be used in supplying water and power to mines, farming neighborhoods, cities, and towns and villages, and to corporations and individuals, draining, reclaiming, and irrigating lands, equipping, operating, and maintaining ditches, reservoirs, etc., and for the operation and maintenance of pumps and pumping plants, electrical lighting and power plants, and electric and power lines.

The right to make such appropriation was sustained in the superior court, but upon appeal this judgment was reversed by the district court of appeal for the third appellate district. Thereupon, upon motion to the supreme court of California, the cause was transferred to that court for hearing and decision, and, upon consideration, the judgment of the superior court was affirmed. 167 Cal. 147, 138 Pac. 981. The supreme court held that the lands belonged to the state, and that by certain statutes of the state it had been provided that, notwithstanding the ownership of the state, the lands might be appropriated to a public use such as the Water Company was lawfully proposing to make of them, and that as to such matters the state had consented to be sued in the same manner as any private proprietor might be. A writ of error brings the case to this court.

The land in question is a sixteenth section, passing to the state by virtue of the Federal grant for school purposes (Act of 1853, 10 Stat. at L. 244, chap. 143; Act of 1866, 14 Stat. at L. 218, chap. 219, Comp. Stat. 1913, § 4878). Afterward, a national reservation, known as the Mono Forest Reserve, was established by proclamation of the President. *This reservation included this section 16 within its boundaries.

It was shown at the trial that the lands in question were withdrawn from sale by the state by an act of the legislature, and it was contended they could only be used as bases for lieu selections. The surveyor-general of the state offered the lands as bases for such selections, except 40 acres, for which the state had sold an indemnity certificate entitling the purchaser to surrender that land, and apply for unappropriated public land in lieu thereof. All the remainder had been offered for lieu selections, which are pending in the General Land Office.

The supreme court of California held that the title to the lands was completely vested in the state, and subject to condemnation at the instance of the Water Company.

A motion to dismiss for want of jurisdiction has been submitted. As we shall have occasion to see in the further discussion of

the case, its disposition depended upon the construction of statutes of the United States, and the opinion of the state court shows that these statutes were considered and Federal rights asserted under them denied. Nor can we agree that there was a local ground of decision broad enough to sustain the judgment of the state court independently of the construction and effect given to the Federal statute. The controlling effect of the Federal statutes is conceded in the opinion of the state court, and must necessarily follow in view of the nature of the rights dealt with. In this situation this court has jurisdiction. *Miedreich v. Lauenstein*, 232 U. S. 236, 242, 58 L. ed. 584, 589, 34 Sup. Ct. Rep. 309; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 257, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; *Rogers v. Hennepin County*, 240 U. S. 184, 188, 60 L. ed. 594, 597, 36 Sup. Ct. Rep. 265.

The Federal statutes involved are §§ 2275 and 2276 of the Revised Statutes of the United States, as amended in 1891 (26 Stat. at L. 796, 797, chap. 384, Comp. Stat. 1913, §§ 4860, 4861). They are found in the margin.¹

* As we have already stated, the state has elected to surrender this section 16 to the United States, asking compensation in other lands for the same under the provisions contained in the sections of the Federal statutes just referred to. It is the contention of the state that, because of such action, the lands in question in equity belong to the United States, and that consequently they could not be condemned for the uses of the Water Company.

The controversy reduces itself to the precise question whether, when a forest reservation, subsequently proclaimed, includes within its limits a school section surveyed before the establishment of the reservation,

1 "Sec. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the state or territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said state or territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory where sections sixteen or thirty-six are mineral land, or are included within any Indian,

the state may, under § 2275, Revised Statutes of the United States, as amended in 1891, waive its right to such section and select other lands in lieu thereof.

The first part of the section, giving the right to select lands in lieu of such as were settled upon with a view to pre-emption or homestead, is clearly limited to settlements made before survey of lands in the field, and under the following provision, giving the right of selection to the state where the lands are mineral or are included in an Indian, military, or other reservation, or are otherwise disposed of by the United States, it well may be that, in the absence of the proviso, the right of selection would be confined to instances where the lands were unsurveyed* when found to be mineral or included in a reservation, and this because if the lands were unreserved and not known to be mineral when surveyed, the title would then vest in the state (*Sherman v. Buick*, 93 U. S. 209, 23 L. ed. 849; *Heydenfeldt v. Daney Gold & S. Min. Co.* 93 U. S. 634, 23 L. ed. 995, 13 Mor. Min. Rep. 204; *United States v. Morrison*, 240 U. S. 192, 204, 207, 60 L. ed. 599, 605, 606, 36 Sup. Ct. Rep. 326), and because lieu selections are usually, although not always, permitted where the right to the place lands is cut off before the time for the title to

become vested. But the proviso, which was not originally in the statute, is an important part of it, and, according to a familiar rule, must be given some effect. It reads:

"Where any state is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said state or territory shall be a waiver of its right to said sections." This language, while not as clear as it might be, operates, as we interpret it, to give to the state a right to waive its right to such lands where, as in this case, the same are included in a forest reservation after survey, that is, after the title vests in the state. Unless this proviso refers to lands the title to which has passed to the state, it adds nothing to the statute and performs no office whatever. This construction preserves the integrity of forest reservations, and permits the state to acquire other lands not surrounded by large tracts in such reservations which are withdrawn from settlement.

It is true that the interpretation of the statute has not been uniform in the Department of the Interior, and it has been otherwise construed in at least one of the Federal

military, or other reservation, or are otherwise disposed of by the United States: Provided, where any state is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said state or territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.' And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the state or territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: Provided, however, That nothing herein contained shall prevent any state or territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein em-

braced to the public domain, and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

"Sec. 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the state or territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one half, and not more than three quarters of a township, three quarters of a section; for a fractional township, containing a greater quantity of land than one quarter, and not more than one half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one quarter of a township one-quarter section of land: Provided, That the states or territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships."

courts. *Hibberd v. Slack*, (U. S. C. C. S. D. Cal.) 84 Fed. 571. But the interpretation for which the state insists has been long given to it by the Interior Department. It was more than suggested in *Gregg v. Colorado*, 15 Land Dec. 151, 154, and *Rice v. California*, 24 Land Dec. 14, 15, was adopted upon full consideration in *Re California*, 28 Land Dec. 57, and has been uniformly followed ever since. *Re New Mexico*, 29 Land Dec. 364; *Re School Land Opinion*, 30 Land Dec. 438; *Dunn v. California*, 30 Land Dec. 608; *Re New Mexico*, 34 Land Dec. 599; *Re California*, 34 Land Dec. 613.

In the brief presented by leave of court on behalf of the United States it is set forth that the rule laid down in *Re California*, 28 Land Dec. supra, is still adhered to by the Land Department; that selections aggregating many thousands of acres have been made in reliance upon it, and that no doubt large expenditures of money have been made in good faith upon the selected lands. It is therefore urged that such construction has become a rule of property. In this situation we should be slow to disturb a ruling of the department of the government to which is committed the administration of public lands. *McMichael v. Murphy*, 197 U. S. 304, 49 L. ed. 766, 25 Sup. Ct. Rep. 460.

Furthermore, the reasoning upon which the departmental interpretation is founded commends itself to our judgment as best calculated to carry out the purposes intended to be accomplished by the statute in question.

It follows that the Supreme Court of California erred in its decision of the Federal question involved. With the state questions we have no concern, their ultimate solution being a matter for that court. The judgment is reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

(243 U. S. 412)

LEHIGH VALLEY RAILROAD COMPANY, Appt.,
v.

UNITED STATES OF AMERICA and Interstate Commerce Commission.

COMMERCE §96—ORDERS OF COMMISSION—INJUNCTION—NEGATIVE ACTION.

A court of equity is without jurisdiction to enjoin the enforcement of an order of the Interstate Commerce Commission refusing, on the ground of real or possible competition, to grant an extension of time for compliance with the provisions of the Panama Canal Act of August 24, 1912 (37 Stat. at L. 566, chap. 390, Comp. Stat. 1913,

§ 8567), § 11, which prohibited after July 1, 1914, any ownership by a railroad in any common carrier by water when the railroad might compete for traffic with the water carrier, and empowered the Commission to determine questions of fact as to such competition, and to extend the time if the extension would not exclude or reduce competition on the water route, since the order of the Commission was negative in substance as well as form, and the risk to which the railway company was left subject did not come from the order, but from the statute.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 146.]

[No. 733.]

Argued March 15, 1917. Decided March 26, 1917.

APPEAL from the District Court of the United States for the Eastern District of Pennsylvania to review a decree dismissing the bill in a suit to enjoin the enforcement of an order of the Interstate Commerce Commission refusing to grant an extension of time for compliance with the provisions of the Panama Canal Act, prohibiting any ownership by a railroad in any common carrier by water when the railroad might compete for traffic with the water carrier. Affirmed.

See same case below, 234 Fed. 682.

The facts are stated in the opinion.

Messrs. **Richard W. Barrett**, John G. Johnson, and Edgar H. Boles for appellant.

Mr. **Blackburn Esterline** and Solicitor General Davis for the United States.

Mr. **Joseph W. Folk** for the Interstate Commerce Commission.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to prevent the enforcement of an order of the Interstate Commerce Commission. On December 2, 1913, the Commission issued a circular calling attention* to the fact that the Act of August 24, 1912 (chap. 390, § 11, 37 Stat. at L. 560, 566, Comp. Stat. 1913, §§ 10,037, 8,567), known as the Panama Canal Act, prohibited, after July 1, 1914, any ownership by a railroad in any common carrier by water when the railroad might compete for traffic with the water carrier; and that the Commission was authorized to determine questions of fact as to such competition, and to extend the time beyond July 1, 1914, if the extension would not exclude or reduce competition on the water route. Notice was given that applications for extension of time should be filed by March 1, 1914. Thereupon, in January, 1914, the appellant filed a petition praying for a hearing as

to whether the services of a steamboat line owned by it would be in violation of the above section and for an extension of time. It is the order issued upon this petition against which relief is sought.

The facts other than the question whether they warrant the conclusion that the railroad and the steamboat line do or may compete are not disputed. The railroad extends from Jersey City to Buffalo, and there connects with the line of the Lehigh Valley Transportation Company, which runs vessels between Buffalo and Chicago and Milwaukee. The railroad company owns all the stock of the Transportation Company, but, with the exception of the interchange port of Buffalo, serves no point in common with the boats of the latter. It is, however, a party to certain fast-freight-line arrangements and all-rail routes and joint rates to the ports served by its vessels. The effect of these connections and of the railroad's membership of the Lake Lines Association was held by the Commission to put the railroad in a position inimical to the best interests of the boat line, to deprive the latter of its initial rate-making power, and to determine by outside authority whether freight shall move by all rail or by lake and rail routes, and if by the latter, by which lake line. It was held that, by virtue of these arrangements, the railroad did or might compete with its boat line, and upon that decision the petition of the appellant was dismissed. 33 Inters. Com. Rep. 699, 706, 716; 37 Inters. Com. Rep. 77.

Three judges sitting in the district court denied the injunction asked and dismissed the bill. 234 Fed. 682. Although they

proceeded to discuss the merits of the case, they intimated at the outset a strong doubt whether, in any event, an injunction could be granted. If this doubt was well founded, there is nothing more to be said, since the ground of jurisdiction is gone. We assume that the question whether the facts found by the Commission present a case of real or possible competition within the meaning of the statute is a question of law that could not be conclusively answered by the Commission; but still there is nothing for a court of equity to enjoin if all that the Commission has done is to decline to extend the time during which the railroad can keep its boat line without risk.

The order of the Commission was negative in substance as well as in form. *Procter & G. Co. v. United States*, 225 U. S. 282, 292, 293, 56 L. ed. 1091, 1095, 32 Sup. Ct. Rep. 761. The risk to which the railroad was left subject did not come from the order, but from the above-mentioned section of the Panama Canal Act (amending § 5 of the Act to Regulate Commerce [24 Stat. at L. 380, chap. 104, Comp. Stat. 1913, § 8567]), making each day of violation a separate offense, and the provision of the latter act, § 10, which imposes a possibly large fine. This risk is the same that it was before the order, or that it would have been if appellant had not applied to the Commission, except so far as the findings establish facts that we believe there is no desire to dispute. Without going further it appears to us plain that the decree of the District Court, dismissing the bill, was right.

Decree affirmed.

FOLLOWING ARE MEMORANDA
OF
CASES DISPOSED OF AT OCTOBER TERM, 1916,

WITHOUT OPINIONS AND NOT ELSEWHERE OR OTHERWISE DISPOSED OF IN THIS EDITION.

EX PARTE: IN THE MATTER OF SAMUEL WINTNER, Petitioner. [No. —, Original.] Motion for leave to file Petition for Writ of Mandamus.

Mr. Harold Remington for petitioner.

No appearance for respondent.

March 6, 1917. Denied.

A. S. COHN, Petitioner, v. R. A. MALONE, Trustee, etc. [No. 852.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. George S. Jones for petitioner.

Messrs. Alexander Akerman, Charles Akerman, and John D. Pope for respondent.

March 6, 1917. Denied.

SAMUEL C. COHEN, as Trustee, etc., Petitioner, v. ELIAS W. SAMUELS. [No. 855.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Lawrence B. Cohen for petitioner.

Messrs. Irving L. Ernst and Samuel Sturtz for respondent.

March 6, 1917. Denied.

MRS. M. S. JENNINGS et al., Petitioners, v. L. P. SMITH. [No. 856.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Edgar T. Brackett and John J. Strickland for petitioners.

Messrs. S. H. Sibley, Alex. C. King, H. M. Holden, Hamilton McWhorter, and E. F. Noel for respondent.

March 6, 1917. Denied.

DETROIT ROCK SALT COMPANY, Petitioner, v. SWIFT & COMPANY. [No. 865.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. John B. Corliss and Paul B. Moody for petitioner.

Mr. William L. Carpenter for respondent.

March 6, 1917. Denied.

WASHINGTON LOAN & TRUST COMPANY, Trustee, Petitioner, v. ARTHUR E. RANDLE. [No. 877.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. Daniel W. O'Donoghue, Arthur A. Alexander, William C. Woodward, and Charles H. Merillat for petitioner.

No appearance for respondent.

March 6, 1917. Denied.

SAMUEL S. CHAMBERLIN, etc., Petitioner, v. JOHN B. MULLINGS. [No. 881.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. William J. Larkin, Jr., and Paul A. Blair for petitioner.

Mr. Lawrence L. Lewis for respondent.

March 6, 1917. Denied.

HUGH G. MACWILLIAM, Petitioner, v. PRESIDENT SUSPENDER COMPANY. [No. 896.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. W. P. Preble for petitioner.

Mr. Odin Roberts for respondent.

March 6, 1917. Denied.

JACOB S. HAYDEN, Petitioner, v. ELLEN G. DAVIS et al. [No. 899.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. H. F. Stambaugh and John M. Freeman for petitioner.

Messrs. Charles McCamic, James Morgan Clarke, Melvin G. Sperry, and George M. Hoffheimer for respondents.

March 6, 1917. Denied.

GENERAL ELECTRIC COMPANY, Petitioner, v. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY. [No. 914.]

Petition for a Writ of Certiorari to the Supreme Court of the State of New York.

Mr. Richmond Moot for petitioner.

Mr. William L. Visscher for respondent.

March 6, 1917. Denied.

R. S. HOWARD COMPANY, Petitioner, v. BALDWIN COMPANY. [No. 916.]

Petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Samuel S. Watson for petitioner.

Messrs. Lawrence Maxwell, Edmund Wetmore, Oscar W. Jeffery, and John E. Cross for respondent.

March 6, 1917. Denied.

MEXICO-WYOMING PETROLEUM COMPANY et al., Petitioners, v. W. L. VALENTINE et al. [No. 917.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Henry E. Lutz for petitioners.

Mr. William S. Metz for respondents.

March 6, 1917. Denied.

ELIOT A. DE PASS et al., Appellants, v. UNITED STATES. [No. 23.]

Appeal from the Court of Claims.

Messrs. Henry M. Ward and Henry W. Van Dyke for appellants.

Mr. Assistant Attorney General Warren for appellee.

March 6, 1917. Per Curiam: Judgment affirmed upon the authority of: Dooley v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762; Armstrong v. United States, 182 U. S. 243, 45 L. ed. 1086, 21 Sup. Ct. Rep. 827; Fourteen Diamond Rings v. United States, 183 U. S. 176, 46 L. ed. 138, 22 Sup. Ct. Rep. 59; De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743.

SOUTHERN SURETY COMPANY, Plaintiff in Error, v. BOARD OF COUNTY COMMISSIONERS OF OKLAHOMA COUNTY, etc. [No. 236.]

In Error to the Supreme Court of the State of Oklahoma.

Mr. Arthur G. Moseley for plaintiff in error.

Mr. Charles J. Kappler for defendant in error.

March 6, 1917. Per Curiam: Dismissed for want of jurisdiction, upon the authority of: (1) Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 118, 53 L. ed. 430, 434, 29 Sup. Ct. Rep. 220, 227; Kansas City Southern R. Co. v. Henrie, 214 U. S. 491, 53 L. ed. 1057, 29 Sup. Ct. Rep. 697; Appleby v. Buffalo, 221 U. S. 524, 55 L. ed. 838, 31 Sup. Ct. Rep. 699; Manhattan L. Ins. Co. v. Cohen, 234 U. S. 123, 134, 58 L. ed. 1245, 1254, 34 Sup. Ct. Rep. 874; (2) Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Deming v. Carlisle Packing Co. 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; Stewart v. Kansas City, 239 U. S. 14, 60 L. ed. 120, 36 Sup. Ct. Rep. 15.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error, v. JOHN B. SHAW. [No. 454.]

In Error to the Court of Appeals of the State of Kentucky.

Messrs. E. L. Worthington, W. D. Cochran, and Lewright Browning for plaintiff in error.

Mr. Allan D. Cole for defendant in error.

March 6, 1917. Per Curiam: Judgment affirmed with costs upon the authority of Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; Louisville & N. R. Co. v. Parker, 242 U. S. 14, 61 L. ed. 119, 37 Sup. Ct. Rep. 4; Baltimore & O. R. Co. v. Whitacre, 242 U. S. 169, 61 L. ed. 228, 37 Sup. Ct. Rep. 33.

TIMOTHY HEALY, Petitioner, v. SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco. [No. 272.]

On Writ of Certiorari to United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Marshall B. Woodworth for petitioner.

Mr. Solicitor General Davis for respondent.

March 6, 1917. Decree reversed with costs upon confession of error, and cause remanded for further proceedings, on motion of counsel for the respondent.

HENRY F. MARSHALL, Petitioner, v. SAMUEL W. BACKUS, Commissioner of Immigration at the Port of San Francisco. [No. 603.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Henry Ach for petitioner.

Mr. Solicitor General Davis for respondent.

March 6, 1917. Decree reversed with costs upon confession of error, and cause remanded for further proceedings, on motion of counsel for the respondent.

MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. J. F. DUGGAN. [No. 233.]

In Error to the Supreme Court of the State of Kansas.

Messrs. B. P. Waggener, W. P. Waggener, and A. E. Crane for plaintiff in error.

Mr. E. C. Brandenburg for defendant in error.

March 6, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error.

DUNCAN L. THOMPSON, Auditor of Public Accounts of the State of Mississippi, et al., Appellants, v. MOBILE & OHIO RAILROAD COMPANY. [No. 257.]

Appeal from the District Court of the United States for the Southern District of Mississippi.

Messrs. William H. Watkins and James N. Flowers for appellants.

Messrs. S. R. Prince and Carl Fox for appellee.

March 6, 1917. Dismissed with costs, on motion of counsel for the appellants.

DUNCAN L. THOMPSON, Auditor of Public Accounts of the State of Mississippi, et al., Appellants, v. SOUTHERN RAILWAY COMPANY IN MISSISSIPPI. [No. 258.]

Appeal from the District Court of the United States for the Southern District of Mississippi.

Messrs. William H. Watkins and James N. Flowers for appellants.

Messrs. S. R. Prince and Carl Fox for appellee.

March 6, 1917. Dismissed with costs, on motion of counsel for the appellants.

37 S. C.—26.

NATIONAL LOAN & EXCHANGE BANK OF GREENWOOD et al., Plaintiffs in Error, v. ADOLPHUS W. JONES et al., Constituting the South Carolina Tax Commission, et al. [No. 349.]

In Error to the Supreme Court of the State of South Carolina.

Mr. F. B. Grier for plaintiffs in error.

No appearance for defendants in error.

March 6, 1917. Dismissed with costs, on motion of counsel for the plaintiffs in error.

PEOPLE'S NATIONAL BANK OF GREENVILLE, South Carolina, Plaintiff in Error, v. A. W. JONES et al., Commissioners, etc. [No. 350.]

In Error to the Supreme Court of the State of South Carolina.

Mr. F. B. Grier for plaintiff in error.

No appearance for defendants in error.

March 6, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error, v. GREENBRIER DISTILLING COMPANY. [No. 602.]

In Error to the Court of Appeals of the State of Kentucky.

Mr. Charles H. Moorman for plaintiff in error.

No counsel appeared for defendant in error.

March 6, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error.

NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY, Plaintiff in Error, v. TOY HENRY. [No. 466.]

In Error to the Court of Appeals of the State of Kentucky.

Messrs. D. H. Hughes and Charles K. Wheeler for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

March 12, 1917. Per Curiam: Judgment affirmed with costs and 5 per cent damages, upon the authority of Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; Baltimore & O. R. Co. v. Whitacre, 242 U. S. 169, 61 L. ed. 228, 37 Sup. Ct. Rep. 33.

NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY, Plaintiff in Error, v. GEORGE BANKS. [No. 467.]

In Error to the Court of Appeals of the State of Kentucky.

Messrs. D. H. Hughes and Charles K. Wheeler for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

March 12, 1917. Per Curiam: Judgment affirmed with costs and 5 per cent damages, upon the authority of *Chicago Junction R. Co. v. King*, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; *Seaboard Air Line R. Co. v. Padgett*, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; *Baltimore & O. R. Co. v. Whitacre*, 242 U. S. 169, 61 L. ed. 228, 37 Sup. Ct. Rep. 33.

RAMON PASTOR DIAZ, Plaintiff in Error, v. PEOPLE OF PORTO RICO [No. 381]; and LUIS ABELLA and Pedro G. Goico, Plaintiffs in Error, v. PEOPLE OF PORTO RICO [No. 382].

In Error to the Supreme Court of Porto Rico.

Mr. R. H. Todd for plaintiffs in error.

Mr. Samuel T. Ansell for defendant in error.

March 12, 1917. Per Curiam: Dismissed for want of jurisdiction, upon the authority of: (1) *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; *Thomas v. Iowa*, 209 U. S. 258, 52 L. ed. 782, 28 Sup. Ct. Rep. 487; *Mallers v. Commercial Loan & T. Co.* 216 U. S. 613, 54 L. ed. 638, 30 Sup. Ct. Rep. 438; *Appleby v. Buffalo*, 221 U. S. 524, 529, 55 L. ed. 838, 840, 31 Sup. Ct. Rep. 699; (2) *Deming v. Carlisle Packing Co.* 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; *Overton v. Oklahoma*, 235 U. S. 31, 59 L. ed. 112, 35 Sup. Ct. Rep. 14; *Stewart v. Kansas City*, 239 U. S. 14, 60 L. ed. 120, 36 Sup. Ct. Rep. 15.

EX PARTE: IN THE MATTER OF PARRIS PRINCE, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus.

Mr. George E. Sullivan for petitioner.

No appearance for respondent.

March 12, 1917. Denied.

THEODORE S. ROSEN et al., Petitioners, v. UNITED STATES. [No. 868.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Meier Steinbrink for petitioners.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

March 12, 1917. Granted.

WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY, Petitioner, v. INTERNATIONAL CURTIS MARINE TURBINE COMPANY et al. [No. 919.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Clifton V. Edwards and Abraham M. Beitler for petitioner.

Messrs. Charles Neave and William G. McKnight for respondents.

March 12, 1917. Granted.

NORTH GERMAN LLOYD, Claimant of the Steamship Kronprinzessin Cecilie, Petitioner, v. GUARANTY TRUST COMPANY OF NEW YORK et al. [No. 922.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Walter C. Noyes and Joseph Larocque for petitioner.

Messrs. John A. Garver, J. Parker Kirlin, Charles R. Hickox, Edward E. Blodgett, and James M. Beck for respondents.

March 12, 1917. Granted.

PRAIRIE OIL & GAS COMPANY et al., Plaintiffs in Error, v. ANNIE CARTER. [No. 849.]

Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Messrs. Joseph W. Bailey, George S. Ramsey, and Villard Martin for plaintiffs in error.

Mr. S. W. Hayes for defendant in error.

March 12, 1917. Denied.

CHARLES JEROME EDWARDS, Petitioner, v. HENRY P. KEITH, as Collector of Internal Revenue, etc. [No. 866.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Meier Steinbrink for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

March 12, 1917. Denied.

THOMAS R. SHERIDAN, Petitioner, v. UNITED STATES. [No. 873.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. John L. McNab for petitioner.

Mr. Solicitor General Davis for respondent.

March 12, 1917. Denied.

J. H. HERNDON et al., Petitioners, v. T. S. Sloan et al. [No. 891.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Ben B. Cain and Cone Johnson for petitioners.

No appearance for respondent.

March 12, 1917. Denied.

R. B. SIMPSON, as Trustee, etc., et al., Petitioners, v. THOMAS W. BRENT et al. [No. 892.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. William H. Watson for petitioners.

Messrs. A. C. Blount, W. A. Blount, and F. B. Carter for respondents.

March 12, 1917. Denied.

P. W. WILLIAMS, Petitioner, v. HOME INSURANCE COMPANY OF NEW YORK. [No. 920.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Alexander C. Birch for petitioner.

Mr. B. P. Crum for respondent.

March 12, 1917. Denied.

ARTHUR A. BONVILLAIN, Petitioner, v. H. B. HOWELL, Trustee, etc. [No. 953.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. H. Generes Dufour for petitioner.

Mr. E. A. O'Sullivan for respondent.

March 12, 1917. Granted.

FRANCESCO MASSARI ZAVAGLIA, Plaintiff in Error, v. EMANUELA NOTARBARTOLO. [No. 226.]

In Error to the Supreme Court of the State of Louisiana.

Messrs. Henry L. Lazarus, David Sessler, and Hannis Taylor for plaintiff in error.

Messrs. W. B. Spencer and Charles Payne Fenner for defendant in error.

March 19, 1917. Per Curiam: Dismissed for want of jurisdiction, upon the authority of *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Leathe v. Thomas*, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *Gaar, S. & Co. v. Shannon*, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; *Holden Land & Live Stock Co. v. Interstate Trading Co.* 233 U. S. 536, 541, 58 L. ed. 1083, 1086, 34 Sup. Ct. Rep. 661; *Mellon Co. v. McCafferty*, 239 U. S. 134, 60 L. ed. 181, 36 Sup. Ct. Rep. 94.

ESTEBAN HUERTAS et al., Appellants, v. JOSÉ VAZQUEZ MONTES, as Warden of the District Jail of Humacao. [No. 303.]

Appeal from the Supreme Court of Porto Rico.

Mr. Jackson H. Ralston for appellants.

Mr. Samuel T. Ansell for appellee.

March 19, 1917. Per Curiam: Judgment affirmed with costs, upon the authority of *Flemister v. United States*, 207 U. S. 372, 52 L. ed. 252, 28 Sup. Ct. Rep. 129; *Gavieres v. United States*, 220 U. S. 338, 55 L. ed. 489, 31 Sup. Ct. Rep. 421; *Morgan v. Devine*, 237 U. S. 632, 641, 59 L. ed. 1153, 1156, 35 Sup. Ct. Rep. 712.

EUGENIO KILAYCO, Plaintiff in Error, v. UNITED STATES. [No. 596.]

In Error to the Supreme Court of the Philippine Islands.

Messrs. Newton W. Gilbert and H. W. Van Dyke for plaintiff in error.

Mr. Assistant Attorney General Warren for defendant in error.

March 19, 1917. Per Curiam: Judgment affirmed upon the authority of *Schick v. United States*, 195 U. S. 65, 71, 72, 49 L. ed. 99, 102, 103, 24 Sup. Ct. Rep. 826, 1 Ann. Cas. 585; *Mullan v. United States*, 212 U. S. 516, 520, 53 L. ed. 632, 634, 29 Sup. Ct. Rep. 330.

FRANK W. TILLINGHAST, Leonard L. Barber, and Sam A. Fenner, Appellants, v. JOHN J. RICHARDS, Marshal of the United States for the District of Rhode Island. [No. 652.]

Appeal from the District Court of the United States for the District of Rhode Island.

Mr. Percy W. Gardner for appellants.

Mr. Solicitor General Davis for appellee.

March 19, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of *Franklin v. United States*, 216 U. S. 559, 570, 54 L. ed. 615, 619, 30 Sup. Ct. Rep. 434; *Brolan v. United States*, 236 U. S. 216, 59 L. ed. 544, 35 Sup. Ct. Rep. 285; *Lamar v. United States*, 240 U. S. 60, 60 L. ed. 526, 36 Sup. Ct. Rep. 255.

EX PARTE: IN THE MATTER OF EDGAR F. HATHAWAY and Charles Lea, Petitioners. [No. —, Original.]

Motion for leave to file a petition for a Writ of Mandamus herein.

Messrs. Charles D. Lanning, William G. Johnson, and Irving U. Townsend for petitioners.

No appearance for respondent.

March 19, 1917. Denied.

BALTIMORE & OHIO RAILROAD COMPANY et al., Petitioners, v. J. G. LEACH. [No. 938.]

Petition for Writ of Certiorari to the Court of Appeals of the State of Kentucky. Messrs. Charles H. Gibson and William G. Crawford for petitioners.

No appearance for respondent.

March 19, 1917. Granted.

INTERBORO BREWING COMPANY (Inc.) Petitioner, v. STANDARD BREWERY COMPANY OF BALTIMORE CITY. [No. 950.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Warren H. Small and George Ramsey for petitioner.

No appearance for respondent.

March 19, 1917. Granted.

E. J. LYNCH, Collector, etc., Petitioner, v. HENRY TURBISH. [No. 964.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Solicitor General Davis for petitioner.

Messrs. H. Oldenburg, Newel H. Clapp, and A. W. Clapp for respondent.

March 19, 1917. Granted.

E. J. LYNCH, Collector, etc., Petitioner, v. H. C. HORNBY. [No. 965.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Solicitor General Davis for petitioner.

Messrs. H. Oldenburg, Newel H. Clapp, and A. W. Clapp for respondent.

March 19, 1917. Granted.

W. T. HENDRICKSON, Judge, etc., Petitioner, v. LEWIS APPERSON. [No. 974.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Helm Bruce for petitioner.

Mr. W. Overton Harris for respondent.

March 19, 1917. Granted.

W. T. HENDRICKSON, Judge, etc., Petitioner, v. ELIZABETH CREAGER. [No. 975.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Helm Bruce for petitioner.

Mr. W. Overton Harris for respondent.

March 19, 1917. Granted.

W. T. HENDRICKSON, Judge, etc., Petitioner, v. HUGH S. GARDNER. [No. 976.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Helm Bruce for petitioner.

Mr. W. Overton Harris for respondent.

March 19, 1917. Granted.

W. T. HENDRICKSON, Judge, etc., Petitioner, v. MILDRED E. HOCKER. [No. 977.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Helm Bruce for petitioner.

Mr. W. Overton Harris for respondent.

March 19, 1917. Granted.

W. T. HENDRICKSON, Judge, etc., Petitioner, v. STERLING LAND & INVESTMENT COMPANY. [No. 978.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Helm Bruce for petitioner.

Messrs. A. E. Richards and W. Overton Harris for respondent.

March 19, 1917. Granted.

HELA VAN THYN et al., Petitioners, v. RALPH WOLF, Receiver, etc. [No. 923.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Samuel P. Goldman and M. L. Heide for petitioners.

Mr. John B. Stanchfield for respondent.

March 19, 1917. Denied.

CLEVELAND, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, Petitioner, v. ERNEST H. OHME et al. [No. 932.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Frank L. Littleton and George B. Gillespie for petitioner.

Messrs. Alexander Britton and Evans Browne for respondents.

March 19, 1917. Denied.

MERGENTHAUER LINOTYPE COMPANY, Petitioner, v. INTERNATIONAL TYPESETTING MACHINE COMPANY et al. [No. 933.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Frederic D. McKenney and Robert Fletcher Rogers for petitioner.

Mr. Edmund Wetmore for respondents.

March 19, 1917. Denied.

MERGENTHALER LINOTYPE COMPANY, Petitioner, v. INTERTYPE CORPORATION. [No. 934.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Frederic D. McKenney and Robert Fletcher Rogers for petitioner.

Mr. Edmund Wetmore for respondent.

March 19, 1917. Denied.

MARY E. SIMS et al., Petitioners, v. W. H. STARK et al. [No. 939.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. E. E. Townes for petitioners.

No appearance for respondents.

March 19, 1917. Denied.

PAUL A. EWERT, Petitioner, v. G. W. BECK. [No. 940.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Paul A. Ewert and Henry Lewis for petitioner.

Mr. W. H. Kornegay for respondent.

March 19, 1917. Denied.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Petitioner, v. JOHN MANNING. [No. 958.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota.

Messrs. Asa G. Briggs and John Everall for petitioner.

Mr. Harlow E. Leach for respondent.

March 19, 1917. Denied.

LEE LINE STEAMERS, Petitioner, v. ATLAS TRANSPORTATION COMPANY. [No. 963.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. John F. Green for petitioner.

Messrs. George A. Mahan and Dulany Mahan for respondent.

March 19, 1917. Denied.

GLASGOW NAVIGATION COMPANY, Ltd., Petitioner, v. MUNSON STEAMSHIP LINE. [No. 936.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. J. Parker Kirlin and Charles R. Hickox for petitioner.

Mr. John W. Griffin for respondent.

March 19, 1917. Denied.

WINFIELD S. PENDLETON, Petitioner, v. AMERICAN WAREHOUSE & TRADING COMPANY et al. [No. 951.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Avery F. Cushman for petitioner.

Mr. John W. Griffin for respondents.

March 19, 1917. Denied.

GEORGIA COAST & PIEDMONT RAILROAD COMPANY, Petitioner, v. DAVID LOEWENTHAL. [No. 967.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Robert M. Hitch, Samuel B. Adams, and Henry V. Poor for petitioner.

Messrs. C. Henry Cohen, Alex C. King, Max Isaac, and Jack J. Spalding for respondent.

March 19, 1917. Denied.

RED JACKET, JR., COAL COMPANY et al., Petitioners, v. UNITED THACKER COAL COMPANY. [No. 971.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. E. Spencer Miller and John H. Holt for petitioners.

Messrs. Malcolm Jackson and C. W. Campbell for respondent.

March 19, 1917. Denied.

AMERICAN BANK NOTE COMPANY, Petitioner, v. BLUE RIDGE ELECTRIC COMPANY. [No. 972.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Henry A. Alexander for petitioner.

Mr. Robert C. Alston for respondent.

March 19, 1917. Denied.

JOHN A. GARDNER, Petitioner, v. WESTERN UNION TELEGRAPH COMPANY. [No. 885.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Charles A. Loomis for petitioner.

Messrs. Rush Taggart and Francis Raymond Stark for respondent.

March 19, 1917. Denied.

ROBERT H. ONEAL, Petitioner, v. JULIA G. STEWART et al. [No. 956.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Reeve Lewis and Malcolm McAvay for petitioner.

Messrs. Oscar W. Kuhn, Alfred M. Cohen, and Charles W. Baker for respondents.

March 19, 1917. Denied.

ROBERT A. WOODS, etc., Petitioner, v. ATLANTIC COAST LINE RAILROAD COMPANY. [No. 980.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. W. Boyd Evans for petitioner.

No appearance for respondent.

March 19, 1917. Denied.

J. SCHUELER et al., Petitioners, v. MANITOU SPRINGS MINERAL WATER COMPANY. [No. 987.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Charles W. Waterman for petitioners.

Mr. Ralph Hartzell for respondent.

March 19, 1917. Denied.

CENTRAL FORTUNA, Plaintiff in Error, v. PEOPLE OF PORTO RICO. [No. 167.]

In Error to the Supreme Court of Porto Rico.

Mr. Francis E. Neagle for plaintiff in error.

Mr. S. T. Ansell for defendant in error.

March 20, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error.

GRATIOT COUNTY STATE BANK, Petitioner, v. D. LLOYD JOHNSON, as Trustee, etc. [No. 985.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan.

Mr. William L. Carpenter for petitioner.

Messrs. Edward J. Moinet and William A. Bahlke for respondent.

March 26, 1917. Granted.

MRS. W. H. LEE, etc., et al., Petitioners, v. FORT WORTH SAVINGS BANK & TRUST COMPANY. [No. 954.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. D. T. Bomar for petitioners.

Mr. R. W. Flournoy for respondent.

March 26, 1917. Denied.

SOUTHERN RAILWAY COMPANY, Petitioner, v. MRS. VINNIE BUTLER. [No. 984.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Millard Reese for petitioner.

No appearance for respondent.

March 26, 1917. Denied.

CLARA KELLY, Executrix, etc., Petitioner, v. PENNSYLVANIA RAILROAD COMPANY. [No. 991.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. John B. Brooks for petitioner.

Mr. F. D. McKenney for respondent.

March 26, 1917. Denied.

ELLIOTT FREDERICK, Trustee, etc., Petitioner, v. METROPOLITAN LIFE INSURANCE COMPANY OF NEW YORK. [No. 993.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Lounie C. Barton for petitioner.

Mr. W. K. Jennings for respondent.

March 26, 1917. Denied.

STANDARD FASHION COMPANY, Petitioner, v. JOHN J. KUHN, as Trustee, etc. [No. 994.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Herbert Noble for petitioner.

Mr. Jacob J. Lesser for respondent.

March 26, 1917. Denied.

NATIONAL CITY BANK OF CHICAGO, Petitioner, v. KALAMAZOO CITY SAVINGS BANK. [No. 1005.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. F. D. McKenney and J. S. Flannery for petitioner.

Mr. Dallas Boudeman for respondent.

March 26, 1917. Denied.

(243 U. S. 476)

UNITED STATES, Plff. in Err.,
v.

MATHEW T. GRADWELL et al. (No. 683.)

UNITED STATES, Plff. in Err.,
v.

CHARLES HAMBLY et al. (No. 684.)

UNITED STATES, Plff. in Err.,
v.

EDWARD O'TOOLE et al. (No. 775.)

UNITED STATES, Plff. in Err.,
v.

EDWARD O'TOOLE et al. (No. 776.)

CONSPIRACY $\S$ 33—**TO DEFRAUD UNITED STATES—BRIBERY OR ILLEGAL VOTING AT STATE ELECTIONS.**

1. A conspiracy to bribe electors at a congressional election, or to cause them to vote illegally at a primary election for the nomination of candidates for the United States Senate, cannot be regarded as one to defraud the United States, within the meaning of U. S. Crim. Code, $\S$ 37,* punishing criminally a conspiracy "to defraud the United States in any manner for any purpose," in view of the origin, classification, and use made of this section, which was originally a part of an act for the protection of the revenue, and now appears in a chapter of the Criminal Code devoted to "Offenses against the Operation of the Government," rather than in the chapter which deals with the "Offenses against the Elective Franchise and Civil Rights of Citizens," and of the history of the conduct and policy of the Federal government in dealing with congressional elections.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. $\S$ 60.

For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

CONSPIRACY $\S$ 34 — **AGAINST CIVIL RIGHTS — ILLEGAL VOTING AT STATE PRIMARY ELECTION — "INJURE"—"OPPRESS."**

2. A conspiracy to compass the defeat of certain candidates for the nomination for United States Senator by causing illegal voting for an opposing party candidate at a nominating primary election cannot be said to "injure" or "oppress" them in the free exercise or enjoyment of rights or privileges secured to them by the Federal Constitution or laws, or because of their having exercised the same within the meaning of U. S. Crim. Code, $\S$ 19 (originally enacted for the protection of the civil rights of the then lately enfranchised negro), even if, in general, a nominating primary should be treated as an election within the meaning of the Federal Constitution, where, by the local law under which the primary in question was held, only candidates for Congress belonging to a political party which polled 3 per cent of the vote of the entire state at the last preceding general election could be voted for, and, after the nominating primary, candidates, even persons who had failed at the primary, could be nominated by certificate signed by not less than 5 per cent of the

entire vote polled at the last preceding election.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. $\S$ 61-67.

For other definitions, see Words and Phrases, First and Second Series, Injure.]

ELECTIONS $\S$ 317—**STATE PRIMARY LAWS —ADOPTION BY CONGRESS.**

3. All the primary laws of a state applicable to nominations for United States Senator were not in effect adopted by Congress by the enactment of the Corrupt Practices Act of June 25, 1910 (36 Stat. at L. 822, chap. 392, Comp. Stat. 1913, $\S$ 188), and the amendments of August 19, 1911 (37 Stat. at L. 25, chap. 33, Comp. Stat. 1913, $\S$ 192), and August 23, 1912 (37 Stat. at L. 360, chap. 349, Comp. Stat. 1913, $\S$ 195), recognizing primary elections and limiting the expenditures of candidates for Senator in connection with them.

[Ed. Note.—For other cases, see Elections, Cent. Dig. $\S$ 344.]

ELECTIONS $\S$ 120—**CONGRESSIONAL REGULATIONS—NOMINATION AND ELECTION OF SENATORS—STATE PRIMARY.**

4. The temporary measure enacted by Congress for the conduct of the nomination and election of United States Senator until other provisions should be made by state legislation (Act of June 4, 1914, 38 Stat. at L. 384, chap. 103) was superseded by a state primary election law upon the effective date of such law.

[Nos. 683, 684, 775, and 776.]

Argued March 16, 1917. Decided April 9, 1917.

TWO WRITS OF ERROR to the District Court of the United States for the District of Rhode Island to review judgments sustaining demurrers to indictments charging conspiracies to defraud the United States by bribing voters at a congressional election. Affirmed. Also

IN ERROR to the District Court of the United States for the Southern District of West Virginia to review a judgment sustaining a demurrer to an indictment charging a conspiracy to defraud the United States by causing illegal voting at a primary election for the nomination of candidates for the United States Senate. Affirmed. Also

IN ERROR to the District Court of the United States for the Southern District of West Virginia to review a judgment sustaining a demurrer to an indictment charging a conspiracy to injure or oppress candidates for the nomination of Senator of the United States by causing illegal voting for an opposing party candidate at a state primary nominating election. Affirmed.

See same case below, in No. 683, 234 Fed. 446; in Nos. 775, 776, 236 Fed. 993.

The facts are stated in the opinion.

Assistant Attorney General Wallace for plaintiff in error.

Mr. Alexander L. Churchill for defendants in error in No. 683.

Messrs. Alexander L. Churchill, John W. Cummings, James T. Cummings, and

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Act March 4, 1909, c. 321, 35 Stat. 1096 (Comp. St. 1913, $\S$ 10201).

John J. Fitzgerald for defendants in error in No. 684.

Messrs. John H. Holt and Luther C. Anderson for defendants in error in Nos. 775 and 776.

* Mr. Justice Clarke delivered the opinion of the court:

These four cases were argued together because the indictments in the first three must be justified, if at all, under the same section (§ 37) of the Criminal Code of the United States [35 Stat. at L. 1096, chap. 321, Comp. Stat. 1913, § 10,201], while the fourth involves the application of § 19 of that Code to the same state of facts which we have in the third case.

In the Gradwell Case (No. 683) and in the Hamby Case (No. 684) the fourteen defendants are charged in the indictments with having conspired together "to defraud the United States," and to commit a wilful fraud upon the laws of the state of Rhode Island, by corrupting and debauching, by bribery of voters, the general election held on the 3d of November, 1914, at which a Representative in Congress was voted for and elected in the second congressional district of Rhode Island in the Gradwell Case, and in the first congressional district in the Hamby Case, thereby preventing "a fair and clean" election.

No. 775 relates to the conduct of a primary election held in the state of West Virginia on the 6th of June, 1916, under a law of that state providing for a state-wide nomination of candidates for the United States Senate. In the indictment twenty defendants are charged with conspiring "to defraud the United States in the matter of its governmental right to have a candidate of the true choice and preference of the Republican and Democratic parties nominated for said office and one of them elected," by causing and procuring a large number of persons who had not resided in the state a sufficient length of time to entitle them to vote under the state law, to vote at the primary for a candidate named, and also to procure four hundred of such persons to vote more than once at such primary election.

The indictment in No. 776 charges that the same defendants named in No. 775 conspired together to "injure and oppress" White, Sutherland, and Rosenbloom, three candidates for the Republican nomination for United States Senator who were voted for at the primary election held in West Virginia on June 6th, 1916, under a law of that state, by depriving them of the "right and privilege of having each Republican voter vote, and vote once only, for some one" of the Republican candidates

for such nomination, and of not having any votes counted at such election except such as were cast by Republican voters duly qualified *under the West Virginia law.* The charge is that the defendants conspired to accomplish this result by procuring a thousand persons, who were not qualified to vote under the state law, because they had not resided in that state a sufficient length of time, to vote for an opposing candidate, William F. Hite, and many of them to vote more than once, and to have their votes cast, counted, and returned as cast in favor of such candidate.

A demurrer to the indictment by each of the defendants in each case, on the ground that it fails to set forth any offense under the laws of the United States, was sustained by the district court of the district of Rhode Island in the first two cases and of the southern district of West Virginia in the third. The cases are here on error.

It is plain from the foregoing statement that the indictments in the first three cases are based solely upon the charge that the defendants conspired "to defraud the United States," in violation of § 37 of the Criminal Code, and that the indictment in No. 776 is based upon the charge that three candidates for the nomination for Senator of the United States were "injured and oppressed" within the meaning of § 19 of the Criminal Code, by a conspiracy on the part of the defendants to compass their defeat by causing illegal voting for an opposing party candidate at the primary election.

The applicable portions of §§ 37 and 19 are as follows:

"Section 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner for any purpose, . . . each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

"Section 19. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise of enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, . . . they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

The argument of counsel for plaintiff in error in the first three cases is that the United States government has the right to honest, free, and fair elections, that a conspiracy to corrupt electors by bribery has

for its object the denial and defeat of this right, and that it therefore is a scheme to defraud the United States within the meaning of § 37. This presents for decision the questions:

Is § 37 of the Criminal Code applicable to congressional elections, and, if it is, has the United States such an interest or right in the result of such elections that to bribe electors constitutes a fraud upon the government within the meaning of this section?

To admit, as it must be admitted, that the people of the United States, and so their government, considered as a political entity, have an interest in and a right to honest and fair elections, advances us but little toward determining whether § 37 was enacted to protect that right, and whether a conspiracy to bribe voters is a violation of it. Obviously the government may have this right and yet not have enacted this law to protect it. It may be, as is claimed, that Congress intended to rely upon state laws and the administration of them by state officials to secure honest elections, and that this section was enacted for purposes wholly apart from those here claimed for it.

To answer the questions presented requires that we look to the origin and history of § 37, and that we consider what has been, and is now, the policy of Congress in dealing with the regulation of elections of Representatives in Congress.

1916.

*Section 37 first appears as § 30 of "An Act to Amend Existing Law Relating to Internal Revenue, and for Other Purposes," enacted on March 2, 1867 (14 Stat. at L. p. 471, chap. 169, Comp. Stat. 1913, § 5895), and, except for an omitted not relevant provision, the section has continued from that time to this, in almost precisely its present form. It was carried into the revision of the United States Statutes of 1873-74 as § 5440 of chapter 5, the title of which is "Crimes against Operations of the Government," while another chapter, chapter 7 of the revision, deals with "Crimes against the Elective Franchise and Civil Rights of Citizens." Forty-two years after its first enactment the section was carried into the Criminal Code (in force on and after January 1st, 1910), where it now appears as § 37, again in a chapter, now chapter 4, devoted to "Offenses against the Operation of the Government," while chapter 3 of the Code deals with "Offenses against the Elective Franchise and Civil Rights of Citizens."

The section has been widely applied in the prosecution of frauds upon the revenue, in land cases, and to other operations of the government, and while no inference or presumption of legislative construction is

to be drawn from the chapter headings under which it is found in the Criminal Code (§ 339), nevertheless the history of the origin, classification, and use made of the section, which we have just detailed, are not without significance, and taken with the fact that confessedly this is the first time that it has been attempted to extend its application to the conduct of elections, they suggest strongly that it was not intended by Congress for such a purpose.

Further aid in determining the application and construction of the section may be derived from the history of the conduct and policy of the government in dealing with congressional elections.

The power of Congress to deal with the election of Senators and Representatives is derived from § 4, article 1,* of the Constitution of the United States, providing that:

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law, make or alter such regulations, except as to the places of choosing Senators."

Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise under this constitutional sanction in the prescribing of regulations for the conduct of elections for Representatives in Congress, or in adopting regulations which states have prescribed for that purpose, has been settled by repeated decisions of this court, in *Ex parte Siebold*, 100 U. S. 371, 391, 25 L. ed. 717, 724 (1879); *Ex parte Clark*, 100 U. S. 399, 25 L. ed. 715 (1879); *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152 (1884); and in *United States v. Mosley*, 238 U. S. 383, 59 L. ed. 1355, 35 Sup. Ct. Rep. 904 (1915).

Although Congress has had this power of regulating the conduct of congressional elections from the organization of the government, our legislative history upon the subject shows that except for about twenty-four of the one hundred and twenty-eight years since the government was organized, it has been its policy to leave such regulations almost entirely to the states, whose representatives Congressmen are. For more than fifty years no congressional action whatever was taken on the subject until 1842, when a law was enacted requiring that Representatives be elected by districts (5 Stat. at L. p. 491, chap. 47), thus doing away with the practice which had prevailed in some states of electing on a single state ticket all of the members of Congress to which the state was entitled.

Then followed twenty-four years more before further action was taken on the subject, when Congress provided for the time

and mode of electing United States Senators (14 Stat. at L. 243, chap. 245), and it was not until four years later, in 1870, that, for the first time, a comprehensive system for dealing with congressional elections was enacted. This system was comprised in §§ 19-22 of the act approved May 31st, 1870 (16 Stat. at L. p. 144, chap. 114), in §§ 5 and 6 of the act approved July 14, 1870 (16 Stat. at L. p. 254, chap. 254), and in the act amending and supplementing these acts, approved June 10, 1872 (17 Stat. at L. pp. 347-349, chap. 415).

These laws provided extensive regulations for the conduct of congressional elections. They made unlawful false registration, bribery, voting without legal right, making false returns of votes cast, interfering in any manner with officers of election, and the neglect by any such officer of any duty required of him by state or Federal law; they provided for appointment by circuit judges of the United States of persons to attend at places of registration and at elections, with authority to challenge any person proposing to register or vote unlawfully, to witness the counting of votes, and to identify by their signatures the registration of voters and election tally sheets; and they made it lawful for the marshals of the United States to appoint special deputies to preserve order at such elections, with authority to arrest for any breach of the peace committed in their view.

These laws were carried into the revision of the United States Statutes of 1873-74, under the title, "Crimes against the Elective Franchise and Civil Rights of Citizens," Rev. Stat. §§ 5506 to 5532, inclusive.

It will be seen from this statement of the important features of these enactments that Congress by them committed to Federal officers a very full participation in the process of the election of Congressmen, from the registration of voters to the final certifying of the results, and that the control thus established over such elections was comprehensive and complete. It is a matter of general as of legal history that Congress, after twenty-four years of experience, returned to its former attitude toward such elections, and repealed all of these laws with the exception of a few sections not relevant here. (Act approved February 8, 1894, 28 Stat. at L. p. 36, chap. 25, Comp. Stat. 1913, § 1015.) This repealing act left in effect, as apparently relating to the elective franchise, only the provisions contained in the eight sections of chapter 3 of the Criminal Code, §§ 19 to 26, inclusive, which have not been added to or substantially modified during the twenty-three years which have since elapsed.

The policy of thus intrusting the conduct of elections to state laws, administered by state officers, which has prevailed from the foundation of the government to our day, with the exception, as we have seen, of twenty-four years, was proposed by the makers of the Constitution, and was entered upon advisedly by the people who adopted it, as clearly appears from the reply of Madison to Monroe in the debates in the Virginia Convention, saying that:

"It was found impossible to fix the time, place, and manner of election of Representatives in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity and prevent its own dissolution. . . . Were they exclusively under the control of the state governments, the general government might easily be dissolved. But if they be regulated properly by the state legislatures the congressional control will probably never be exercised. The power appears to me satisfactory, and as unlikely to be abused as any part of the Constitution." Records of the Federal Convention. Farrand, vol. 3, p. 311.

And, in Essay No. LIX. of the *Federalist*, Hamilton writes:

"They (the convention) have submitted the regulation of elections for the Federal government, in the first instance, to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety."

With it thus clearly established that the policy of Congress for so great a part of our constitutional life has been, and now is, to leave the conduct of the election of its members to state laws, administered by state officers, and that whenever it has assumed to regulate such elections it has done so by positive and clear statutes, such as were enacted in 1870, it would be a strained and unreasonable construction to apply to such elections this § 37, originally a law for the protection of the revenue, and for now fifty years confined in its application to "Offenses against the Operations of the Government," as distinguished from the processes by which men are selected to conduct such operations.

When to all this we add that there are no common-law offenses against the United

States (*United States v. Hudson*, 7 Cranch, 32, 3 L. ed. 259; *United States v. Eaton*, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764), that before a man can be punished as a criminal under the Federal law his case must be "plainly and unmistakably" within the provisions of some statute (*United States v. Lacher*, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625), and that Congress has always under its control the means of defeating frauds in the election of its members by enacting appropriate legislation and by resort to the constitutional grant of power to judge of the elections, returns, and qualifications of its own members, we cannot doubt that the district court was right in holding that the section was never intended to apply to elections, and that to bribe voters to vote at such an election is not such a fraud upon the United States or upon candidates or the laws of Rhode Island as falls within either the terms or purposes of the section.

There remains to be considered the second West Virginia case, No. 776. The indictment in this case charges that the defendants conspired to procure and did procure a large number of persons, not legal voters of West Virginia, to vote, and a number of them to vote more than once, in favor of one of the four candidates for the Republican nomination for United States Senator at a state primary. The claim is that such illegal voting "injured and oppressed" the three other party candidates, within the meaning of § 19 of the Criminal Code of the United States, by depriving them of a right which it is argued they had "by the Constitution and laws of the United States," to have only qualified Republican voters of the state vote, not more than once, for some one of the candidates of that party for Senator at such election.

Here again, confessedly, an attempt is being made to make a new application of an old law to an old type of crime; for § 19 has been in force, in substance, since 1870, but has never before been resorted to as applicable to the punishment of offenses committed in the conduct of primary elections or nominating caucuses or conventions, and the question presented for decision is:

Did the candidates named in the indictment have such a right under the applicable West Virginia law that a conspiracy to corrupt the primary election held under that law on the 6th day of last June "injured and oppressed" them within the meaning of § 19 of the Federal Criminal Code?

That this § 19 of the Criminal Code is applicable to certain conspiracies against the elective franchise is decided by this

court in *United States v. Mosley*, 238 U. S. 383, 59 L. ed. 1355, 35 Sup. Ct. Rep. 904, but that decision falls far short of making the section applicable to the conduct of a state nominating primary, and does not advance us far toward the claimed conclusion that illegal voting for one candidate at such a primary so violates a right secured to the other candidates by the United States Constitution and laws as to constitute an offense within the meaning and purpose of the section.

The constitutional warrant under which regulations relating to congressional elections may be provided by Congress is in terms applicable to the "times, places, and manner of holding elections (not nominating primaries) for Senators and Representatives." Primary elections, such as it is claimed the defendants corrupted, were not only unknown when the Constitution was adopted, but they were equally unknown for many years after the law, now § 19, was first enacted. They are a development of comparatively recent years, designed to take the place of the nominating caucus or convention, as these existed before the change, and even yet the new system must be considered in an experimental stage of development, under a variety of state laws.

The claim that such a nominating primary, as distinguished from a final election, is included within the provision of the Constitution of the United States, applicable to the election of Senators and Representatives, is by no means indisputable. Many state supreme courts have held that similar provisions of state Constitutions relating to elections do not include a nominating primary. *Ledgerwood v. Pitts*, 122 Tenn. 570, 125 S. W. 1036; *Montgomery v. Chelf*, 118 Ky. 766, 82 S. W. 388; *State ex rel. Von Stade v. Taylor*, 220 Mo. 619, 119 S. W. 373; *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728; *Gray v. Seitz*, 162 Ind. 1, 69 N. E. 456; *State ex rel. Nordin v. Erickson*, 119 Minn. 152, 137 N. W. 385.

But even if it be admitted that, in general, a primary should be treated as an election within the meaning of the Constitution, which we need not and do not decide, such admission would not be of value in determining the case before us, because of some strikingly unusual features of the West Virginia law under which the primary was held, out of which this prosecution grows. By its terms this law provided that only candidates for Congress belonging to a political party which polled 3 per cent of the vote of the entire state at the last preceding general election could be voted for at this primary, and thereby, it

is said at the bar, only Democratic and Republican candidates could be and were voted for, while candidates of the Prohibition and Socialist parties were excluded, as were also independent voters who declined to make oath that they were "regular and qualified members and voters" of one of the greater parties. Even more notable is the provision of the law that, after the nominating primary, candidates, even persons who have failed at the primary, may be nominated by certificate signed by not less than 5 per cent of the entire vote polled at the last preceding election. Acts West Va. 1915, chap. 26, pp. 222, 246.

Such provisions as these, adapted though they may be to the selection of party candidates for office, obviously could not be lawfully applied to a final election at which officers are chosen, and it cannot reasonably be said that rights which candidates for the nomination for Senator of the United States may have in such a primary under such a law are derived from the Constitution and laws of the United States. They are derived wholly from the state law, and nothing of the kind can be found in any Federal statute. Even when Congress assumed, as we have seen, to provide an elaborate system of supervision over congressional elections, no action was taken looking to the regulation of nominating caucuses or conventions, which were the nominating agencies in use at the time such laws were enacted.

What power Congress would have to make regulations for nominating primaries, or to alter such regulations when made by a state, we need not inquire. It is sufficient to say that as yet it has shown no disposition to assume control of such primaries or to participate in them in any way, and that it is not for the courts, in the absence of such legislation, to attempt to supply it by stretching old statutes to new uses, to which they are not adapted and for which they were not intended. In this case, as in the others, we conclude that the section of the Criminal Code relied upon, originally enacted for the protection of the civil rights of the then lately enfranchised negro, cannot be extended so as to make it an agency for enforcing a state primary law, such as this one of West Virginia.

The claim that the effect of the Federal Corrupt Practices Act (June 25, 1910, 36 Stat. at L. chap. 392, p. 822, Comp. Stat. 1913, § 188, amended August 19, 1911 [37 Stat. at L. 25, chap. 33, Comp. Stat. 1913, § 192], and August 23d, 1912 [37 Stat. at L. 360, chap. 349, Comp. Stat. 1913, § 195]), recognizing primary elections and limiting the expenditures of candidates for

senator in connection with them, is, in effect, an adoption by Congress of all state primary laws, is too unsubstantial for discussion; and the like claim that the temporary measure (Act of June 4, 1914, 38 Stat. at L. p. 384, chap. 103), enacted by Congress for the conduct of the nomination and election of Senators until other provisions should be made by state legislation cannot be entertained, because this act was superseded by the West Virginia primary election law, passed February 20th, 1914, effective ninety days after its passage.

It results that the judgments of the District Court in each of these cases must be affirmed.

(243 U. S. 490)

JESSE ISIDOR STRAUS et al., Petitioners,
v.

VICTOR TALKING MACHINE COMPANY.

PATENTS ⇐ 216—SALE OR LICENSE—PRICE
RESTRICTIONS—NOTICE.

The illegal function of controlling the price at which a patented machine may be resold after the manufacturer has been paid therefor, and after it has passed into the hands of dealers and the public, is the sole purpose that can be attributed to the attaching of a notice to such machine which states that such machine is licensed for the term of the patent having the longest time to run, and that it may not be delivered to any unlicensed member of the general public until "the full license price" stated in the notice is paid, since this notice is not intended as a security for any further payment, as the full price, called a "royalty," is paid before the manufacturer parts with the possession of the machine, and is not to be used as a basis for keeping the manufacturer informed as to the condition or use of the machine, as no report of any character is required from the "ultimate user" after he has paid the stipulated price, and since such notice, notwithstanding its apparently studied avoidance of the use of the word "sale," and its frequent reference to the word "use," omits the most obvious requirements for securing a bona fide enforcement of the restrictions of the notice as to "use," and under it, even by its own terms, the title to the machines ultimately vests in the "ultimate users" without any further payment or action on their part upon the expiration of patents which, so far as the notice shows, may or may not be incorporated in the machine.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329.]

[No. 374.]

Argued January 12, 1917. Decided April 9, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which, on a second appeal, reversed a decree of the District Court of the United States for the Southern District of New York, dismissing the bill in a suit charging the violation of a license restriction made by the owner of a patent. Reversed, and decree of District Court affirmed.

See same case below, on first appeal in 140 C. C. A. 519, 225 Fed. 535; on second appeal in 144 C. C. A. 591, 230 Fed. 449.

The facts are stated in the opinion.

Messrs. Edmond E. Wise and Walter C. Noyes for petitioners.

Messrs. Hector T. Fenton and Frederick A. Blount for respondent.

Messrs. Elisha K. Camp, Daniel N. Kirby, and Taylor E. Brown as amici curiæ.

* Mr. Justice Clarke delivered the opinion of the court:

It will contribute to brevity to designate the parties to this proceeding as they were in the trial court,—the respondent as plaintiff and the petitioners as defendants.

The plaintiff in its bill alleges: that it is a corporation of New Jersey; that for many years it has been manufacturing sound-reproducing machines embodying various features covered by patents of which it is the owner, and that, for the purpose of marketing these machines to the best advantage, about August 1st, 1913, it adopted a form of contract which it calls a "License Contract" and a form of notice called a "License Notice," under which it alleges all of its machines have, since that date, been furnished to dealers and to the public.

This "License Notice," which is attached to each machine and is set out in full in the bill, declares that the machine to which it is attached is manufactured under patents, is licensed for the term of the patent under which it is licensed having the longest time to run, and may be used only with sound records, sound boxes, and needles manufactured by the plaintiff; that only the right to use the machine "for demonstrating purposes" is granted to "distributors" (wholesale dealers), but that these "distributors" may assign a like right "to the public" or to "regularly licensed Victor dealers" (retailers) "at the dealer's regular discount royalty;" that the "dealers" may convey the "license to use the machine" only when a "royalty" of not less than \$200 shall have been paid, and upon the "consideration" that all of the conditions of the "license" shall have been observed; that the title to the machine shall remain in the plaintiff, which shall have the right to repossess it upon breach of any of the con-

ditions of the notice, by paying to the user the amount paid by him, less 5 per cent for each year that the machine has been used. The notice in terms reserves the right to the plaintiff to inspect, test, and repair the machine at all times and to instruct the user in its use, "but it assumes no obligation to do so;" it provides that "any excessive use or violation of the conditions shall be an infringement of plaintiff's patent," and that any erasure or removal of the notice will be considered as a violation of the license. Finally, it provides that at the expiration of the patent "under which it is licensed" having the longest time to run the machine shall become the property of the licensee provided all the conditions recited in the notice shall have been complied with, and the acceptance of the machine is declared to be "an acceptance of these conditions."

The contract between the plaintiff and its dealers is not set out in full in the bill, but it is alleged that since August 1st, 1913, the plaintiff has had with each of its 7,000 licensed dealers a written contract in which all the terms of the "License Notice" are in substance repeated, and in addition it is alleged that each dealer, "if he has signed the assent thereto," is authorized to dispose of any machines received from "the plaintiff directly or through a *paramount* distributing dealer," but subject to all of the conditions expressed in the "License Notice." It is alleged that this contract contains the provision that "a breach of any of the conditions on the part of a distributor will render him liable, not only for an infringement of the patent, but to an action on the contract or other proper remedy."

As to the defendants, the bill alleges that they conduct a large mercantile business in New York city; that with full knowledge of the terms of the contract, as described, between the plaintiff and its distributors, and of the "License Notice" attached to each machine, the defendants, "being members of the general unlicensed public," and having no contract relation with the plaintiff or with any of its licensed distributors or licensed dealers, induced "covertly and on various pretenses," one or more of plaintiff's licensed distributors or dealers to violate his or their contracts with the plaintiff, providing that no machines should be delivered to any unlicensed member of the general public until "the full license price" stated in the "License Notice" affixed to each machine was paid, and thereby obtained possession of a large number of such machines at much less than the prices stated in the "License Notice;" that under the terms of the said license agreement and

notice, they have no title to the same, and that they have sold large numbers thereof to the public, and are proposing and threatening to dispose of the remainder of those which they have acquired to "the unlicensed general public," at much less than the price stated in the notice affixed to each machine.

The prayer is for an injunction restraining the defendants from selling any of the machines, possession of which they have acquired, from other and further violation of plaintiff's rights under its letters patent, and for the usual accounting and for damages.

The district court regarded the transaction described in the "License Notice" as in substance a sale which exhausted the interest of the plaintiff in the machine, except as to the right to have it used with records and needles as provided for therein, and this right not being involved in this case, it dismissed the bill. 222 Fed. 524.

On appeal, the circuit court of appeals affirmed this judgment and remanded the case, but with instructions to allow the plaintiff to amend its bill "if it be so advised." 140 C. C. A. 519, 225 Fed. 535.

The bill was thereafter so amended as to allege that the defendants had in their possession a large number of machines which they had obtained from plaintiff's distributors and dealers at much less in each case than the price stated in the "License Notice," and that they were proposing to dispose of these machines to the "unlicensed general public" at less than the prices stated in the "License Notice," in disregard of plaintiff's rights.

Again, the district court, on the same ground as before, sustained a motion to dismiss the bill, but the circuit court of appeals reversed this holding (144 C. C. A. 591, 230 Fed. 449) and the case is here for review on certiorari.

The abstract of the bill which we have given makes it plain: That whatever rights the plaintiff has against the defendants must be derived from the "License Notice" attached to each machine, for no contract rights existed between them, the defendants being only "members of the unlicensed general public;" and that the sole act of infringement charged against the defendants is that they exceeded the terms of the license notice by obtaining machines from the plaintiff's wholesale or retail agents, and by selling them at less than the price fixed by the plaintiff.

It is apparent from the foregoing statement that we are called upon to determine whether the system adopted by the plaintiff was selected as a means of securing to the owner of the patent that exclusive right to use its invention which is granted through

the patent law, or whether, under color of such a purpose, it is a device unlawfully resorted to in an effort to profitably extend the scope of its patent at the expense of the general public. Is it the fact, as is claimed, that this "License Notice" of the plaintiff is a means or agency designed in candor and good faith to enable the plaintiff to make only that full, reasonable, and exclusive use of its invention which is contemplated by the patent law, or is it a disguised attempt to control the prices of its machines after they have been sold and paid for?

First of all, it is plainly apparent that this plan of marketing, adopted by the plaintiff, is, in substance, the one dealt with by this court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376, and in *Bauer v. O'Donnell*, 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A.(N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150, adroitly modified on the one hand to take advantage, if possible, of distinctions suggested by these decisions, and, on the other hand, to evade certain supposed effects of them.

If we look through the words and forms with which the plaintiff has most elaborately enveloped its purpose, to the substance and realities of the transaction contemplated, we shall discover several notable and significant features. First, while, as if looking to the future, the notice, in terms, imposes various restrictions as to title and as to the "use" of the machines by plaintiff's agents, wholesale and retail, and by the "unlicensed members of the public," for itself, the plaintiff makes sure that the future shall have no risks, for it requires that all that it asks or expects at any time to receive for each machine must be paid in full before it parts with the possession of it.

Second, while in terms the "use" of each machine is restricted, and forfeiture for failure to strictly comply with the many conditions and requirements of the notice is provided for, this system, elaborate to the extent of confusion, fails utterly to provide for entering any evidence of a qualified title in any public office or in any public record, and no requirement is found in it for reporting by users or licensees, who may remove from one place to another, taking the machine with them, as would very certainly be required if the plaintiff intended to enforce the rights so elaborately asserted in this notice,—if the system were really a genuine provision designed to protect through many years to come the restricted right to "use" and the seemingly qualified title which it purports to grant to dealers and to the public, from being exceeded or departed from.

Third. The fact that under this system "at different times" "large numbers" of machines, as is alleged in the plaintiff's bill, have been "covertly" sold to the defendants by the plaintiff's wholesale and retail agents at less than the price fixed for them, is persuasive evidence that the transaction is not what it purports on its face to be. If it were a reasonably guarded plan, really intended to keep the plaintiff in touch with each of its machines until the expiration of the patent of latest date, for the purpose of insisting upon its being used in the manner provided for in the "License Notice," the plaintiff's prompt and sufficient remedy for such an invasion of its right as is claimed in this case would be found in its sales department, or rather in its "license" department, and not in the courts. That the plaintiff comes into court with a bill to enjoin the defendants from reselling machines secretly sold to them in large numbers by the plaintiff's agents indicates very clearly that at least until the exigency out of which this case grew arose, the scheme was regarded by the plaintiff itself and by its agents simply as one for maintaining prices by holding a patent infringement suit in terrorem over the ignorant and the timid.

And finally, while the notice permits the use of the machines, which have been fully paid for, by the "unlicensed members of the general public," significantly called in the bill "the ultimate users," until "the expiration of the patent having the longest term to run" (which, under the copy of the notice set out in the bill, would be July 22d, 1930), it provides that if the licensee shall not have failed to observe the conditions of the license, and the Victor Company shall not have previously taken possession of the machine, as in the notice provided, then, perhaps sixteen years or more after he has paid for it, and in all probability long after it has been worn out or become obsolete and worthless, "it shall become the property of the licensee."

It thus becomes clear that this "License Notice" is not intended as a security for any further payment upon the machine, for the full price, called a "royalty," was paid before the plaintiff parted with the possession of it; that it is not to be used as a basis for tracing and keeping the plaintiff informed as to the condition or use of the machine, for no report of any character is required from the "ultimate user" after he has paid the stipulated price; that, notwithstanding its apparently studied avoidance of the use of the word "sale," and its frequent reference to the word "use," the most obvious requirements for securing a bona fide enforcement of the restrictions of

the notice as to "use" are omitted; and that, even by its own terms, the title to the machines ultimately vests in the "ultimate users," without further payment or action on their part, except patiently waiting for patents to expire on inventions which, so far as this notice shows, may or may not be incorporated in the machine. There remains for this "License Notice," so far as we can discover, the function only of fixing and maintaining the price of plaintiff's machines to its agents and to the public, and this, we cannot doubt, is the purpose for which it really was designed.

Courts would be perversely blind if they failed to look through such an attempt as this "License Notice" thus plainly is to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest. The scheme of distribution is not a system designed to secure to the plaintiff and to the public a reasonable use of its machines, within the grant of the patent laws, but is in substance and in fact a mere price-fixing enterprise, which, if given effect, would work great and widespread injustice to innocent purchasers, for it must be recognized that not one purchaser in many would read such a notice, and that not one in a much greater number, if he did read it, could understand its involved and intricate phraseology, which bears many evidences of being framed to conceal rather than to make clear its real meaning and purpose. It would be a perversion of terms to call the transaction intended to be embodied in this system of marketing plaintiff's machines a "license to use the invention." *Bauer v. O'Donnell*, 229 U. S. 1, 16, 57 L. ed. 1041, 1046, 50 L.R.A. (N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150.

Convinced, as we are, that the purpose and effect of this "License Notice" of plaintiff, considered as a part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, and as is contemplated by the patent statutes, but that its real and poorly-concealed purpose is to restrict the price of them, after the plaintiff had been paid for them and after they have passed into the possession of dealers and of the public, we conclude that it falls within the principles of *Adams v. Burke*, 17 Wall. 453, 456, 21 L. ed. 700, 703; and of *Bauer v. O'Donnell*, 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A. (N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150; that it is, therefore, invalid, and that the district court properly held that the bill must fail for want of equity.

It results that the decree of the Circuit Court of Appeals will be reversed and that of the District Court affirmed.

Reversed.

Dissenting: Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Van Devanter.

(243 U. S. 502)

MOTION PICTURE PATENTS COMPANY,
Petitioner,

v.

UNIVERSAL FILM MANUFACTURING
COMPANY et al.

PATENTS $\S$ 216—RESTRICTIONS ON USE —
SPECIFIC SUPPLIES—FUTURE CONDITIONS
—NOTICE.

1. The owner of a patent may not, under U. S. Rev. Stat. $\S$ 4884 (Comp. Stat. 1913, $\S$ 9428), giving him the exclusive right to use the invention, restrict its use by a purchaser, by a notice attached to the machine embodying the patent, to specific materials necessary to its operation, but which are no part of the patented machine, and are not themselves patented, nor can he, by such notice, make the use of the machine subject to further conditions as to use or royalties that may be imposed thereafter in his discretion.

[Ed. Note.—For other cases, see Patents, Cent. Dig. $\S$ 329.]

PATENTS $\S$ 203—RESTRICTIONS ON USE —
SPECIFIC SUPPLIES—FUTURE CONDITIONS
—NOTICE.

2. The exclusive right to use the invention or discovery granted by U. S. Rev. Stat. $\S$ 4884 (Comp. Stat. 1913, $\S$ 9428), to the patentee, his heirs or assignees, did not invest the assignee of the Latham patent No. 707,934, who had licensed another to make and sell a motion picture exhibiting machine embodying the invention, with the power to limit, by a notice attached to the machine, its use by a purchaser or the latter's lessee to films containing the invention of the reissued Edison patent No. 12,192, so long as the assignee continues to own such patents, nor by such notice to condition the use upon other terms to be fixed by such assignee and complied with by the user while the machine is in use and while the assignee owns the patents.

[Ed. Note.—For other cases, see Patents, Cent. Dig. $\S$ 290-294.]

[No. 715.]

Argued January 12 and 15, 1917. Decided
April 9, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York, dismissing the bill in a suit to enjoin the vio-

lation of an alleged license restriction on the use of a patented machine. Affirmed.

See same case below, 235 Fed. 398.

The facts are stated in the opinion.

Mr. Melville Church for petitioner.

Messrs. Oscar W. Jeffery, Edmund Wetmore, and John B. Stanchfield for respondents.

*Mr. Justice Clarke delivered the opinion of the court:

In this suit relief is sought against three defendant corporations as joint infringers of claim number 7 of United States letters patent No. 707,934, granted to Woodville Latham, assignor, on August 26, 1902, for improvements in projecting-kinetoscopes. It is sufficient description of the patent to say that it covers a part of the mechanism used in motion picture exhibiting machines for feeding a film through the machine with a regular, uniform, and accurate movement, and so as not to expose the film to excessive strain or wear.

The defendants, in a joint answer, do not dispute the title* of the plaintiff to the patent, but they deny the validity of it, deny infringement, and claim an implied license to use the patented machine.

Evidence which is undisputed shows that the plaintiff, on June 20, 1912, in a paper styled "License Agreement," granted to the Precision Machine Company a right and license to manufacture and sell machines embodying the inventions described and claimed in the patent in suit, and in other patents, throughout the United States, its territories and possessions. This agreement contains a covenant on the part of the grantee that every machine sold by it, except those for export, shall be sold "under the restriction and condition that such exhibiting or projecting machine shall be used solely for exhibiting or projecting motion pictures containing the inventions of reissued letters patent No. 12,192, leased by a licensee of the licensor while it owns said patents and upon other terms to be fixed by the licensor and complied with by the user while the said machine is in use and while the licensor owns said patents (which other terms shall only be the payment of a royalty or rental to the licensor while in use)."

The grantee further covenants and agrees that to each machine sold by it, except for export, it will attach a plate showing plainly not only the dates of the letters patent under which the machine is "licensed," but also the following words and figures:

Serial No. _____.

Patented _____ No. _____.

The sale and purchase of this machine gives only the right to use it solely with

* 507 moving pictures containing the invention of reissued patent No. 12,192, leased by a licensee of the Motion Picture Patents Company, the owner of the above patents and reissued patent, while it owns said patents, and upon other terms to be fixed by the Motion Picture Patents Company and complied with by the user while it is in use and while the Motion Picture Patents Company owns said patents. The removal or defacement of this plate terminates the right to use this machine.

The agreement further provides that the grantee shall not sell any machine at less than the plaintiff's list price, except to jobbers and others for purposes of resale, and that it will require such jobbers and others to sell at not less than plaintiff's list price. The price fixed in the license contract for sale of machines after May 1st, 1909, is not less than \$150 for each machine, and the licensee agrees to pay a royalty of \$5 on some machines and a percentage of the selling price on others.

It is admitted that the machine, the use of which is charged to be an infringement of the patent in suit, was manufactured by the Precision Machine Company, and was sold and delivered under its "License Agreement" to the Seventy-second Street Amusement Company, then operating a playhouse on Seventy-second street, in New York, and that when sold it was fully paid for and had attached to it a plate with the inscription which we have quoted as required by the agreement.

Reissued patent 12,192, referred to in the notice attached to the machine, expired on August 31, 1914. The defendant Prague Amusement Company, on November 2, 1914, leased the Seventy-second street playhouse from the Seventy-second Street Amusement Company, and acquired the alleged infringing machine as a part of the equipment of the leased playhouse. Subsequent to the expiration of reissued patent 12,192, the defendant Universal Film Manufacturing Company made two films or reels, which, between March 4th and 17th, 1915, were sold to the defendant the Universal Film Exchange, and on March 17, 1915, were supplied to the defendant Prague Amusement Company for use on the machine, acquired as we have stated, and were used upon it at the Seventy-second Street playhouse on March 18th, 1915.

* On January 18, 1915, the plaintiff sent a letter to the Seventy-second Street Amusement Company, notifying it in general terms that it was using without a license a machine embodying the invention of pat-

ent No. 707,934 and warning it that such use constituted an infringement of the patent, and on the same day the plaintiff addressed a letter to the defendant Universal Film Exchange, notifying it that it also was infringing the same patents by supplying films for use upon the machine of the Seventy-second street playhouse and elsewhere. The bill in this case was filed on March 18, 1915.

The district court held that the limitation on the use of the machine attempted to be made by the notice attached to it after it had been sold and paid for, was invalid, and that the Seventy-second Street Amusement Company, the purchaser, and its lessee, the Prague Amusement Company, had an implied license to use the machine as it had been used, and it dismissed the bill without passing on the question raised in the pleadings as to the validity of the patent. The circuit court of appeals affirmed the district court (148 C. C. A. 660, 235 Fed. 398), and the case is here for review on certiorari.

It was admitted at the bar that 40,000 of the plaintiff's machines are now in use in this country, and that the mechanism covered by the patent in suit is the only one with which motion picture films can be used successfully.

This state of facts presents two questions for decision:

First: May a patentee or his assignee license another to manufacture and sell a patented machine, and by a mere notice attached to it limit its use by the purchaser or by the purchaser's lessee, to films which are no part of the patented machine, and which are not patented?

Second. May the assignee of a patent, which has licensed another to make and sell the machine covered by it, by a mere notice attached to such machine, limit the use of it by the purchaser or by the purchaser's lessee to terms not stated in the notice, but which are to be fixed, after sale, by such assignee, in its discretion?

It is obvious that in this case we have presented anew the inquiry, which is arising with increasing frequency in recent years, as to the extent to which a patentee or his assignee is authorized by our patent laws to prescribe by notice attached to a patented machine the conditions of its use and the supplies which must be used in the operation of it, under pain of infringement of the patent.

The statutes relating to patents do not provide for any such notice and it can derive no aid from them. Rev. Stat. § 4900, Comp. Stat. 1913, § 9446, requiring that patented articles shall be marked with the

word "Patented," affects only the damages recoverable for infringement (*Dunlap v. Schofield*, 152 U. S. 244, 38 L. ed. 426, 14 Sup. Ct. Rep. 576); and Rev. Stat. § 4901, Comp. Stat. 1913, § 9447, protects by its penalties the inventor, but neither one contemplates the use of such a "License Notice" as we have here, and whatever validity it has must be derived from the general, and not from the patent, law.

The extent to which the use of the patented machine may validly be restricted to specific supplies or otherwise by special contract between the owner of a patent and the purchaser or licensee is a question outside the patent law, and with it we are not here concerned. *Keeler v. Standard Folding Bed Co.* 157 U. S. 659, 39 L. ed. 848, 15 Sup. Ct. Rep. 738.

The inquiry presented by this record, as we have stated it, is important and fundamental, and it requires that we shall determine the meaning of Congress when, in Rev. Stat. § 4884, Comp. Stat. 1913, § 9428, it provided that "every patent shall contain . . . a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States, and the territories thereof." We are concerned only with the right to "use," authorized to be granted by this statute, for it is under warrant of this right only that the plaintiff can and does claim validity for its warning notice.

The words used in the statute are few, simple, and familiar, they have not been changed substantially since they were first used in the act of 1790 (1 Stat. at L. chap. 7, p. 109), *Bauer v. O'Donnell*, 229 U. S. 1, 9, 57 L. ed. 1041, 1043, 50 L.R.A. (N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150, and their meaning would seem not to be doubtful if we can avoid reading into them that which they really do not contain.

In interpreting this language of the statute it will be of service to keep in mind three rules long established by this court, applicable to the patent law and to the construction of patents, viz.:

1st. The scope of every patent is limited to the invention described in the claims contained in it, read in the light of the specification. These so mark where the progress claimed by the patent begins and where it ends that they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains. It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the ex-

clusive use of which is given to the inventor by the grant provided for by the statute,— "He can claim nothing beyond them." *Keystone Bridge Co. v. Phoenix Iron Co.* 95 U. S. 274, 24 L. ed. 344; *Lehigh Valley R. Co. v. Mellon*, 104 U. S. 112, 118, 26 L. ed. 639, 641; *Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 554, 559, 29 L. ed. 952, 953, 6 Sup. Ct. Rep. 846; *McClain v. Ort-mayer*, 141 U. S. 419, 424, 35 L. ed. 800, 802, 12 Sup. Ct. Rep. 76.

2d. It has long been settled that the patentee receives nothing from the law which he did not have before, and that the only effect of his patent is to restrain others from manufacturing, using, or selling that which he has invented. The patent law simply protects him in the monopoly of that which he has invented and has described in the claims of his patent. *United States v. American Bell Teleph. Co.* 167 U. S. 224, 239, 42 L. ed. 144, 154, 17 Sup. Ct. Rep. 809; *Continental Paper Bag Co. v. Eastern Paper Bag Co.* 210 U. S. 405, 424, 52 L. ed. 1122, 1130, 28 Sup. Ct. Rep. 748; *Bauer v. O'Donnell*, 229 U. S. 1, 10, 57 L. ed. 1041, 1043, 50 L.R.A. (N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150.

3d. Since *Pennock v. Dialogue*, 2 Pet. 1, 7¹¹ L. ed. 327, was decided in 1829, this court has consistently held that the primary purpose of our patent laws is not the creation of private fortunes for the owners of patents, but is "to promote the progress of science and the useful arts" (Constitution, art. 1, § 8),—an object and purpose authoritatively expressed by Mr. Justice Story, in that decision, saying:

"While one great object [of our patent laws] was, by holding out a reasonable reward to inventors and giving them an exclusive right to their inventions for a limited period, to stimulate the efforts of genius, the main object was 'to promote the progress of science and useful arts.'"

Thirty years later this court, returning to the subject, in *Kendall v. Winsor*, 21 How. 322, 16 L. ed. 165, again pointedly and significantly says:

"It is undeniably true, that the limited and temporary monopoly granted to inventors was never designed for their exclusive profit or advantage; the benefit to the public or community at large was another and doubtless the primary object in granting and securing that monopoly."

This court has never modified this statement of the relative importance of the public and private interests involved in every grant of a patent, even while declaring that, in the construction of patents and the patent laws, inventors shall be fairly, even liberally, treated. *Grant v. Raymond*,

6 Pet. 218, 241, 8 L. ed. 376, 384; Winans v. Denmead, 15 How. 330, 14 L. ed. 717; Walker, Patents, § 185.

These rules of law make it very clear that the scope of the grant which may be made to an inventor in a patent, pursuant to the statute, must be limited to the invention described in the claims of his patent (104 U. S. 118, supra); and to determine what grant may lawfully be so made we must hold fast to the language of the act of Congress providing for it, which is found in two sections of the Revised Statutes. Section 4886 (Comp. Stat. 1913, § 9430) provides that "any person who has invented or discovered any new and useful art,* machine, manufacture or composition of matter, or any new and useful improvement thereof, . . . may . . . obtain a patent therefor;" and § 4884 (Comp. Stat. 1913, § 9428), provides that such patent when obtained "shall contain . . . a grant to the patentee, his heirs or assigns . . . of the exclusive right to . . . use . . . the invention or discovery."

Thus, the inventor may apply for, and, if he meets the required conditions, may obtain, a patent for the new and useful invention which he has discovered, which patent shall contain a grant of the right to the exclusive use of his discovery.

Plainly, this language of the statute and the established rules to which we have referred restrict the patent granted on a machine, such as we have in this case, to the mechanism described in the patent as necessary to produce the described results. It is not concerned with and has nothing to do with the materials with which or on which the machine operates. The grant is of the exclusive right to use the mechanism to produce the result with any appropriate material, and the materials with which the machine is operated are no part of the patented machine or of the combination which produces the patented result. The difference is clear and vital between the exclusive right to use the machine, which the law gives to the inventor, and the right to use it exclusively with prescribed materials to which such a license notice as we have here seeks to restrict it. The restrictions of the law relate to the useful and novel features of the machine which are described in the claims of the patent; they have nothing to do with the materials used in the operation of the machine; while the notice restrictions have nothing to do with the invention which is patented, but relate wholly to the materials to be used with it. Both in form and in substance the notice attempts a restriction upon the use of the supplies only, and it cannot, with any regard to propriety

in the use of language, be termed a restriction upon the use of the machine itself.

Whatever the right of the owner may be to control by restriction the materials to be used in operating the machine, it must be a right derived through the general law from the ownership of the property in the machine, and it cannot be derived from or protected by the patent law, which allows a grant only of the right to an exclusive use of the new and useful discovery which has been made,—this and nothing more.

This construction gives to the inventor the exclusive use of just what his inventive genius has discovered. It is all that the statute provides shall be given to him and it is all that he should receive, for it is the fair as well as the statutory measure of his reward for his contribution to the public stock of knowledge. If his discovery is an important one, his reward under such a construction of the law will be large, as experience has abundantly proved; and if it be unimportant, he should not be permitted by legal devices to impose an unjust charge upon the public in return for the use of it. For more than a century this plain meaning of the statute was accepted as its technical meaning, and that it afforded ample incentive to exertion by inventive genius is proved by the fact that, under it, the greatest inventions of our time, teeming with inventions, were made. It would serve no good purpose to amplify by argument or illustration this plain meaning of the statute. It is so plain that to argue it would obscure it.

It was not until the time came in which the full possibilities seem first to have been appreciated of uniting, in one, many branches of business through corporate organization, and of gathering great profits in small payments, which are not realized or resented, from many, rather than smaller or even equal profits in larger payments, which are felt and may be refused, from a few, that it came to be thought that the "right to use . . . the invention"* of a patent gave to the patentee or his assigns the right to restrict the use of it to materials or supplies not described in the patent, and not by its terms made a part of the thing patented.

The construction of the patent law which justifies as valid the restriction of patented machines, by notice, to use with unpatented supplies necessary in the operation of them, but which are no part of them, is believed to have originated in Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288 (which has come to be widely referred to

as the Button-Fastener Case), decided by the circuit court of appeals of the sixth circuit in 1896. In this case the court, recognizing the pioneer character of the decision it was rendering, speaks of the "novel restrictions" which it is considering, and says that it is called upon "to mark another boundary line around the patentee's monopoly which will *debar him from engrossing the market for an article not the subject of a patent,*" which it declined to do.

This decision proceeds upon the argument that, since the patentee may withhold his patent altogether from public use, he must logically and necessarily be permitted to impose any conditions which he chooses upon any use which he may allow of it. The defect in this thinking springs from the substituting of inference and argument for the language of the statute, and from failure to distinguish between the rights which are given to the inventor by the patent law and which he may assert against all the world through an infringement proceeding, and rights which he may create for himself by private contract, which, however, are subject to the rules of general, as distinguished from those of the patent, law. While it is true that under the statutes as they were (and now are) a patentee might withhold his patented machine from public use, yet if he consented to use it himself or through others, such use immediately fell within the terms of the statute, and, as we have seen, he is thereby restricted to the use of the invention as it is described in the claims of his patent, and not as it may be expanded by limitations as to materials and supplies necessary to the operation of it, imposed by mere notice to the public.

The high standing of the court rendering this decision and the obvious possibilities for gain in the method which it approved led to an immediate and widespread adoption of the system, in which these restrictions expanded into more and more comprehensive forms until at length the case at bar is reached, with a machine sold and paid for, yet claimed still to be subject not only to restriction as to supplies to be used, but also subject to any restrictions or conditions as to use or royalty which the company which authorized its sale may see fit, after the sale, from time to time to impose. The perfect instrument of favoritism and oppression which such a system of doing business, if valid, would put into the control of the owner of such a patent, should make courts astute, if need be, to defeat its operation. If these restrictions were sustained, plainly the plaintiff might, for its own profit or that of its favorites,

by the obviously simple expedient of varying its royalty charge, ruin anyone unfortunate enough to be dependent upon its confessedly important improvements for the doing of business.

Through the twenty years since the decision in the Button-Fastener Case was announced there have not been wanting courts and judges who have dissented from its conclusions, as is sufficiently shown in the division of this court when the question involved first came before it in *Henry v. A. B. Dick Co.* 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364, and in the disposition shown not to extend the doctrine in *Bauer v. O'Donnell*, 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A.(N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150.

The exclusive right to "vend" a patented article is derived from the same clause of the section of the statute which gives the exclusive right to "use" such an article,* and following the decision of the Button-Fastener Case, it was widely contended as obviously sound, that the right existed in the owner of a patent to fix a price at which the patented article might be sold and resold under penalty of patent infringement. But this court, when the question came before it in *Bauer v. O'Donnell*, supra, rejecting plausible argument, and adhering to the language of the statute from which all patent right is derived, refused to give such a construction to the act of Congress, and decided that the owner of a patent is not authorized by either the letter or the purpose of the law to fix, by notice, the price at which a patented article must be sold after the first sale of it, declaring that the right to vend is exhausted by a single, unconditional sale, the article sold being thereby carried outside the monopoly of the patent law and rendered free of every restriction which the vendor may attempt to put upon it. The statutory authority to grant the exclusive right to "use" a patented machine is not greater, indeed, it is precisely the same, as the authority to grant the exclusive right to "vend," and, looking to that authority, for the reasons stated in this opinion, we are convinced that the exclusive right granted in every patent must be limited to the invention described in the claims of the patent, and that it is not competent for the owner of a patent, by notice attached to its machine, to, in effect, extend the scope of its patent monopoly by restricting the use of it to materials necessary in its operation, but which are no part of the patented invention, or to send its machines forth into the channels of trade of the country subject to conditions as to use or royalty to be paid,

to be imposed thereafter at the discretion of such patent owner. The patent law furnishes no warrant for such a practice, and the cost, inconvenience, and annoyance to the public which the opposite conclusion would occasion forbid it.

It is argued as a merit of this system of sale under a license notice that the public is benefited by the sale of the machine at what is practically its cost, and by the fact that the owner of the patent makes its entire profit from the sale of the supplies with which it is operated. This fact, if it be a fact, instead of commending, is the clearest possible condemnation of, the practice adopted, for it proves that, under color of its patent, the owner intends to and does derive its profit, not from the invention on which the law gives it a monopoly, but from the unpatented supplies with which it is used, and which are wholly without the scope of the patent monopoly, thus in effect extending the power to the owner of the patent to fix the price to the public of the unpatented supplies as effectively as he may fix the price on the patented machine.

We are confirmed in the conclusion which we are announcing by the fact that since the decision of *Henry v. A. B. Dick Co.* supra, the Congress of the United States, the source of all rights under patents, as if in response to this decision, has enacted a law making it unlawful for any person engaged in interstate commerce "to lease or make a sale or contract for sale of goods, . . . machinery, supplies or other commodities, *whether patented or unpatented*, for use, consumption or resale . . . or fix a price charged therefor, . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use . . . the goods . . . machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale, or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." (38 Stat. at L. 730, chap. 323.)

Our conclusion renders it unnecessary to make the application of this statute to the case at bar which the circuit court of appeals made of it, but it must be accepted by us as a most persuasive expression of the public policy of our country with respect to the question before us.

It is obvious that the conclusions arrived at in this opinion are such that the decision in *Henry v. A. B. Dick Co.* supra, must be regarded as overruled.

Coming now to the terms of the notice attached to the machine sold to the Seventy-second Street Amusement Company under

the license of the plaintiff, and to the first question as we have stated it.

This notice first provides that the machine, which was sold to and paid for by the Amusement Company, may be used only with moving picture films containing the invention of reissued patent No. 12,192, so long as the plaintiff continues to own this reissued patent.

Such a restriction is invalid because such a film is obviously not any part of the invention of the patent in suit; because it is an attempt, without statutory warrant, to continue the patent monopoly in this particular character of film after it has expired, and because to enforce it would be to create a monopoly in the manufacture and use of moving picture films, wholly outside of the patent in suit and of the patent law as we have interpreted it.

The notice further provides that the machine shall be used only upon other terms (than those stated in the notice), to be fixed by the plaintiff, while it is in use and while the plaintiff "owns said patents." And it is stated at the bar that, under this warrant, a charge was imposed upon the purchaser, graduated by the size of the theater in which the machine was to be used.

Assuming that the plaintiff has been paid an average royalty of \$5 on each machine sold, prescribed in the license agreement, it has already received over \$200,000 for the use of its patented improvement, which relates only to the method of using the films which another had invented, and yet it seeks by this device to collect during the life of the patent in suit what would doubtless aggregate many times this amount for the use of this same invention, after its machines have been sold and paid for.

A restriction which would give to the plaintiff such a potential power for evil over an industry which must be recognized as an important element in the amusement life of the nation, under the conclusions we have stated in this opinion, is plainly void, because wholly without the scope and purpose of our patent laws, and because, if sustained, it would be gravely injurious to that public interest, which we have seen is more a favorite of the law than is the promotion of private fortunes.

Both questions as stated must be answered in the negative, and the decree of the Circuit Court of Appeals is affirmed.

Mr. Justice McReynolds concurs in the result.

Mr. Justice Holmes, dissenting:

I suppose that a patentee has no less property in his patented machine than any other owner, and that, in addition to keep-

ing the machine to himself, the patent gives him the further right to forbid the rest of the world from making others like it. In short, for whatever motive, he may keep his device wholly out of use. *Continental Paper Bag Co. v. Eastern Paper Bag Co.* 210 U. S. 405, 422, 52 L. ed. 1122, 1129, 28 Sup. Ct. Rep. 748. So much being undisputed, I cannot understand why he may not keep it out of use unless the licensee, or, for the matter of that, the buyer, will use some unpatented thing in connection with it. Generally speaking, the measure of a condition is the consequence of a breach, and if that consequence is one that the owner may impose unconditionally, he may impose it conditionally upon a certain event. *Ashley v. Ryan*, 153 U. S. 436, 443, 38 L. ed. 773, 777, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 445, 449, 48 L. ed. 1062, 1066, 24 Sup. Ct. Rep. 703. Non debet cui plus licet, quod minus est non licere. D. 50, 17, 21.

* No doubt this principle might be limited or excluded in cases where the condition tends to bring about a state of things that there is a predominant public interest to prevent. But there is no predominant public interest to prevent a patented teapot or film feeder from being kept from the public, because, as I have said, the patentee may keep them tied up at will while his patent lasts. Neither is there any such interest to prevent the purchase of the tea or films that is made the condition of the use of the machine. The supposed contravention of public interest sometimes is stated as an attempt to extend the patent law to unpatented articles, which of course it is not, and more accurately as a possible domination to be established by such means. But the domination is one only to the extent of the desire for the teapot or film feeder, and if the owner prefers to keep the pot or the feeder unless you will buy his tea or films, I cannot see, in allowing him the right to do so, anything more than an ordinary incident of ownership, or, at most, a consequence of the Paper Bag Case, on which, as it seems to me, this case ought to turn. See *Grant v. Raymond*, 6 Pet. 218, 242, 8 L. ed. 376, 384.

Not only do I believe that the rule that I advocate is right under the Paper Bag Case, but I think that it has become a rule of property that law and justice require to be retained. For fifteen years, at least since *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 88-93, 46 L. ed. 1058, 1067-1070, 22 Sup. Ct. Rep. 747, if not considerably earlier, the public has been encouraged by this court to believe that the law is as it was laid down in

Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. A. 267, 47 U. S. App. 146, 77 Fed. 288, and numerous other decisions of the lower courts. I believe that many and important transactions have taken place on the faith of those decisions, and that for that reason as well as for the first that I have given, the rule last announced in *Henry v. A. B. Dick Co.* 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364, should be maintained.

I will add, for its bearing upon *Straus v. Victor Talking Mach. Co.* 243 U. S. 490, 61 L. ed. 866, 37 Sup. Ct. Rep. 412, that a conditional sale retaining the title until a future event after delivery has been decided to be lawful again and again by this court. *Bailey v. Baker Ice Mach. Co.* 239 U. S. 268, 272, 60 L. ed. 275, 285, 36 Sup. Ct. Rep. 50. I confine myself to expressing my views upon the general and important questions upon which I have the misfortune to differ from the majority of the court. I leave on one side the question of the effect of the Clayton Act, as the court has done, and also what I might think if the Paper Bag Case were not upheld, or if the question were upon the effect of a combination of patents such as to be contrary to the policy that I am bound to accept from the Congress of the United States.

Mr. Justice McKenna and Mr. Justice Van Devanter concur in this dissent.

(243 U. S. 472)

UNITED STATES OF AMERICA

v.

SOLOMON LOUIS GINSBERG.

ALIENS $\Leftrightarrow$ 68—NATURALIZATION — FINAL HEARING—"OPEN COURT."

1. The final hearing of a petition for naturalization is not had in "open court," as required by the Act of June 29, 1906 (34 Stat. at L. 599, chap. 3592, Comp. Stat. 1913, § 4368), § 9, if, after the petition is first presented in open court, the hearing thereof is passed to and finally held in the chambers of the judge adjoining the court room, on a subsequent day, and at an hour earlier than that to which the court has been regularly adjourned.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 138-145.

For other definitions, see *Words and Phrases*, First and Second Series, Open Court.]

ALIENS $\Leftrightarrow$ 71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELING CERTIFICATE ILLEGALLY PROCURED.

2. A certificate of citizenship may be set aside and canceled in an independent suit brought under the Act of June 29, 1906 (34 Stat. at L. 601, chap. 3592, Comp. Stat. 1913, § 4374), § 15, on the ground that it was illegally procured, if the uncontradicted evidence at the hearing of the petition shows indisputably that the petitioner was not

qualified by residence for citizenship, and that the court or judge who heard the petition and ordered the certificate misapplied the law and the facts.

[No. 401.]

Argued March 15, 1917. Decided April 9, 1917.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit presenting the questions, inter alia, whether the final hearing of a petition for naturalization was had in open court, and whether a certificate of citizenship should be set aside as illegally procured. First question answered in the negative. Other question answered in the affirmative.

The certificate in question is as follows:

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on an appeal now pending before it discloses the following:

The United States of America brought a suit in the district court of the United States for the western district of Missouri to cancel a certificate of citizenship issued December 18, 1912, to Solomon Louis Ginsberg, a native of Russia. The suit was brought under the provision of § 15 of the Act of June 29, 1906 (34 Stat. at L. 601, chap. 3592, Comp. Stat. 1913, § 4374), authorizing "proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured." On final hearing the trial court dismissed the bill. The government appealed.

The grounds for cancelation averred in the bill were: (a) The certificate of citizenship was illegally procured in that there was a violation of the provision of § 9 of the Act of June 29, 1906, "that every final hearing upon such petition (for naturalization) shall be had in open court before a judge or judges thereof," the hearing in question having been before a judge in chambers, and not in open court. (b) The certificate of citizenship was illegally procured because, though the averments of Ginsberg's petition and the verifying affidavits of his witnesses were in due form and sufficient on their face, yet the undisputed facts disclosed at the hearing of the petition showed he was not qualified to be admitted to citizenship; and the petition was also a fraud upon the law.

At the trial of the suit below there was no conflict in the evidence as to time, place, and circumstances of the hearing of the petition for naturalization nor as to Ginsberg's qualifications for citizenship, and the disclosures thereof to the judge who awarded the certificate. Sworn statements of these matters by Ginsberg and the two men who acted as his witnesses were made part of the bill of complaint, and, with the court records, of which judicial notice was taken, constituted the sole evidence upon which the trial court refused to cancel the certificate and dismissed the bill. This evidence showed the following:

The petition for naturalization was heard by a United States district judge assigned for service at Kansas City in the western district of Missouri, not the regular judge of that district. The petition was first brought up at a night session of the court December 16, 1912, and the hearing thereof was postponed by the court, with direction to Ginsberg and his witnesses to appear at the judge's chambers some time after 8 o'clock A. M. December 18, 1912. The judge's chambers were separate from but contiguous to the court room. According to direction they appeared at the chambers about half past 8 o'clock in the morning, the hearing was then had, and the certificate of citizenship was awarded. As shown by the court records for the previous day, court had adjourned until a later hour on the 18th than that at which the petition was heard. The petition for naturalization was filed June 7, 1912. The proofs at the hearing of it showed that Ginsberg had not resided continuously within the United States five years, nor within the state of Missouri one year, immediately preceding the date of his application, as required by § 4, pp. 2 and 4 of the Act of June 29, 1906. Ginsberg was a native subject of Russia. He finished his school studies in England in 1890. He then went to Brazil and engaged in missionary work. In 1893 he identified himself with a foreign mission board in that country, with which he served continuously thereafter. At the end of each seven years of service he was allowed a vacation of about fourteen months, and, having married in Brazil, in 1893, a native of the state of Missouri, he was accustomed to spend his vacations with his wife's relatives in the latter place, following which, to use his expression, "he would return to his home in Brazil." When he declared his intention to become a citizen of the United States, in 1904, it was his intention to sever his connection with the mission board and remain in this country; but the condition of his work in Brazil made it necessary for him to resume his

residence there. In the five years preceding June 7, 1912, when his petition for naturalization was filed, he had been "actually and physically resident within the United States" but fifty-eight days; that is, from the 10th of the preceding April. When he filed his petition for naturalization and testified in support thereof he had no intention of claiming continuous residence in the United States, but whenever asked he stated the facts about his actual residence in Brazil as above recited. He said the clerk of the court prepared his petition, the averments of which, if true, were sufficient under the law.

It is further certified that the following questions of law arise from the record and are presented, the decision of which is indispensable to a determination of the case. To the end that this court may properly discharge its duty it desires the instruction of the Supreme Court upon them:

1. Is the final hearing of a petition for naturalization had in open court, as required by § 9 of the Act of June 29, 1906, 34 Stat. at L. 599, chap. 3592, Comp. Stat. 1913, § 4368, if, after the petition is first presented in open court, the hearing thereof is passed to and finally held in the chambers of the judge adjoining the court room, on a subsequent day and at an hour earlier than that to which the court has been regularly adjourned?

2. If, under the above circumstances, the final hearing of the petition was not in open court, as required, may the certificate of citizenship issued on such a hearing and the order pursuant thereto be set aside and canceled in an independent suit brought under § 15 of the Act of June 29, 1906, chap. 3592, on the ground that it was illegally procured or is a fraud upon the law?

3. Is it a fraud for which a certificate of citizenship may be set aside and canceled in an independent suit brought under § 15 of the Act of June 29, 1906, chap. 3592, if the essential averments of residence in the petition for naturalization are sufficient on their face, but are false in fact, the petitioner having acted in good faith and in reliance upon the officer who prepared the petition for him, and having disclosed the truth at the hearing thereof?

4. May a certificate of citizenship be set aside and canceled in an independent suit brought under § 15 of the Act of June 29, 1906, chap. 3592, on the ground that it was illegally procured, if the uncontradicted evidence at the hearing of the petition showed indisputably that the petitioner was not qualified by residence for citizenship, and that the court or judge who heard the peti-

tion and ordered the certificate misapplied the law and the facts?

Assistant Attorneys General Warren and Wallace for the United States.

No appearance for Solomon Louis Ginsberg.

Mr. Justice McReynolds delivered the opinion of the court:

Four questions have been certified (Judicial Code, § 239 [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1216]); but considering the accompanying statement of facts and our views in respect of the law, answers to the first and fourth will enable the circuit court of appeals properly to determine the issues involved. *United States v. Britton*, 108 U. S. 199, 207, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531.

Question "1. Is the final hearing of a petition for naturalization had in open court as required by § 9 of the Act of June 29, 1906, chap. 3592, 34 Stat. at L. 599, Comp. Stat. 1913, § 4368, if, after the petition is first presented in open court, the hearing thereof is passed to and finally held in the chambers of the judge adjoining the court room, on a subsequent day and at an hour earlier than that to which the court has been regularly adjourned?"

Question "4. May a certificate of citizenship be set aside and canceled in an independent suit brought under § 15 of the Act of June 29, 1906, chap. 3592, on the ground that it was illegally procured, if the uncontradicted evidence at the hearing of the petition showed indisputably that the petitioner was not qualified by residence for citizenship, and that the court or judge who heard the petition and ordered the certificate misapplied the law and the facts?"

Prior to 1906 "the Uniform Rule of Naturalization" authorized by the Constitution was found in the Act of 1802 [2 Stat. at L. 153, chap. 28], and a few amendments thereto. This enumerated only general controlling principles. Grievous abuses having arisen, Congress undertook, by the Act of June 29, 1906 (34 Stat. at L. 596, chap. 3592, Comp. Stat. 1913, § 963), to prescribe "and fix a uniform system and a code of procedure in naturalization matters." Report Committee on Immigration and Naturalization, H. R. 1789, Feb. 26, 1906. This specifies with circumstantiality the manner ("and not otherwise") in which an alien may be admitted to become a citizen of the United States; what his preliminary declaration shall be; form and contents of his sworn petition to the court and witnesses by which it must be verified; form of oath to be taken in open court; necessary proof concerning residence, character, etc. The clerk is required to post notice of the peti-

tion with details concerning applicant, when final hearing will take place, names of witnesses by which alleged facts are to be established, etc. And it is further provided:

*474 Section 9. "That every final hearing upon such petition*shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court."

Section 15. "That it shall be the duty of the United States district attorney for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days' personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absenteers by the laws of the state or the place where such suit is brought."

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In *Johannessen v. United States*, 225 U. S. 227, 56 L. ed. 1066, 32 Sup. Ct. Rep. 613, we discussed the purpose and effect of the act.

An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

*475 Section 9 requires a final hearing upon the petition in*open court. The term "open court" is used in contradistinction to a judge sitting in chambers. Bouvier's Law Dict. The whole statute indicates a studied purpose to prevent well-known abuses by means of publicity throughout the entire proceedings. Its plain language repels the

idea that any part of a final hearing may take place in chambers, whether adjoining the court room or elsewhere.

No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it, as provided in § 15, and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact, it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence nonessential.

Question numbered 1 must be answered in the negative; numbered 4 in the affirmative. And it is so ordered.

(243 U. S. 464)

UNITED STATES, Plff. in Err.,

v.

JAMES F. ROWELL et al.

INDIANS ⇨13 — ALLOTMENTS — VESTED RIGHTS—PUBLIC LANDS.

1. The direction to the Secretary of the Interior in the Act of June 17, 1910 (36 Stat. at L. 533, chap. 299), § 3, to issue, in lieu of allotment, a patent in fee for a quarter section in an Indian school reserve to a person whose enrolment as an adopted member of the Kiowa Tribe had been directed in the Act of April 4, 1910 (36 Stat. at L. 280, chap. 140), was not a grant in presenti, and Congress could therefore, without impairing any vested rights, recall such direction before it was carried out, as it did by the Act of December 19, 1910 (36 Stat. at L. 887, chap. 3), upon discovering that the land designated was lawfully devoted to a special use from which it could not be withdrawn with due regard for the tribe in general, or that its situation and value were such that to allot or convey it to him would invest him with much more than a fair distributive share of the common property of the tribe.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30.]

INDIANS ⇨13 — ALLOTMENTS — PUBLIC LANDS.

2. No right to have carried into effect the direction of the Secretary of the Interior in the Act of June 17, 1910 (36 Stat. at L. 533, chap. 299), § 3, to issue in lieu of allotment a patent in fee for a quarter section in an Indian school reserve to a person whose enrolment as an adopted member of the Kiowa Tribe had been directed in the Act of April 4, 1910 (36 Stat. at L. 280, chap. 140), was acquired by the application for a patent thereunder, and Congress could, therefore, consistently with due process of law, thereafter recall such direction, as it did by the Act of December 19, 1910 (36 Stat. at L. 887, chap. 3), upon discovering that the land designated was

lawfully devoted to a special use from which it could not be withdrawn with due regard for the tribe in general, or that its situation and value were such that to allot or convey it to him would invest him with much more than a fair distributive share of the common property of the tribe.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30.]

[No. 63.]

Argued November 2 and 3, 1916. Decided April 9, 1917.

IN ERROR to the District Court of the United States for the Western District of Oklahoma to review a judgment in favor of defendants in an action in ejectment. Reversed.

The facts are stated in the opinion.

Assistant Attorney General **Warren** and Mr. S. W. Williams for plaintiff in error.

Messrs. **Henry E. Asp**, **Henry G. Snyder**, **Frederick B. Owen**, and **Walter A. Lybrand** for defendants in error.

*Mr. Justice **Van Devanter** delivered the opinion of the court:

This is an action in ejectment, brought by the United States against **James F. Rowell** and two others. The land in controversy is a quarter section—160 acres—in an Indian school reserve in Comanche county, Oklahoma.

Three statutes, all enacted in the same year, must be noticed. The first of these is a provision in the Act of April 4, 1910, chap. 140, 36 Stat. at L. 269, 280, authorizing and directing the Secretary of the Interior "to enroll and allot" **James F. Rowell** as an adopted member of the Kiowa Tribe of Indians. The second is the following provision in the Act of June 17, 1910, chap. 299, § 3, 36 Stat. at L. 533: "That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for" the tract in controversy "to **James F. Rowell**, a full member of the Kiowa, Comanche and Apache Tribes of Indians of Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment." And the third is the express repeal of the provision just quoted by the Act of December 19, 1910, chap. 3, 36 Stat. at L. 887. The controversy turns chiefly upon the true construction and effect of the provision of June 17 and the constitutional validity of the repealing provision of December 19. These questions are to be solved in the light of the following facts:

A patent was not issued to **Rowell**. He asked for one, but, at the suggestion of the chairman of the Committees on Indian Af-

fairs in the Senate and House of Representatives, the President, in whose name such patents are issued, withheld his signature from the patent and directed that nothing be done until Congress could further consider the matter. Congress was not then in session, and when it reconvened the matter was again considered, with the result that the provision in the Act of June 17 was repealed.

The tract in controversy was part of a large reservation established by treaties in 1868 as a permanent home for the Kiowa, Comanche, and Apache Indians. 15 Stat. at L. 581, 589. In 1901 the members of these tribes were given allotments in severalty in this reservation and the greater part of the remaining lands was disposed of by the United States,—what was deemed to be their fair value being credited to the Indians as a trust fund. 31 Stat. at L. chap. 813, § 6, p. 676. At that time a portion of the reservation, embracing the tract in controversy, was set apart for school purposes for these Indians, and this school reserve is still maintained and used for their benefit. The tribal relation of these Indians has not been terminated. They are still in a state of pupillage and under the control of the United States. It retains the title to their allotments and administers their tribal affairs and property.

James F. Rowell is a white man who went to the large reservation as an Indian trader in 1899 and has since lived with these Indians. He is a physician and has practised among them. In 1903 he married a Kiowa woman and in 1909 was adopted as a member of the tribe. His wife received an allotment from the tribal lands in 1900, and some of their children received allotments in 1906 or 1908. 34 Stat. at L. chap. 2580, § 6, p. 214; 35 Stat. at L. chap. 216, § 24, p. 456. But no allotment had been made to him when the provision of June 17, 1910, was enacted. It was enacted at his solicitation, and the Committees on Indian Affairs in the Senate and House of Representatives, in recommending its repeal, reported that it was enacted in the belief that the tract described was of no greater value than the average of those allotted to other members of the tribe, or than other tracts still subject to allotment, when in truth it was of vastly greater value, and that misrepresentation and deception were practised by **Rowell** in securing the legislation. Senate Report No. 924 and House Report No. 1741, 61st Cong. 3d Sess. About two years before, the south half of the same section—320 acres—had been sold for town-site purposes under the Act of March 27, 1908, chap. 106, 35 Stat. at L. 49, for upwards of \$250,000.

In June, 1911, six months after the date of the repealing act, Rowell entered upon the tract in controversy and since then has remained in possession, although promptly notified, through the Indian agent, that he was a trespasser and must vacate the premises. One of the defendants is Rowell's wife and another is the wife of a lawyer who assisted him in securing the passage of the provision which Congress felt called upon to repeal. She holds a deed from Rowell, made after the date of the repealing act, and purporting to convey to her an undivided one-half interest in the tract for a recited consideration of \$50,000. The three defendants had come to be in possession when the action was begun. In the district court* there was a directed verdict and a judgment for the defendants.

Congress was here concerned with the affairs of Indians whose tribal relation had not been dissolved,—Indians who were still wards of the United States and entitled to look to it for protection. The plan of giving them individual allotments in the reservation theretofore established as a tribal home, and of converting the surplus lands into interest-bearing funds, was not theirs. But it was obligatory on them, because it was adopted by Congress in the exercise of its control over them. As in other instances, the wish of the ward had to yield to the will of the guardian. And Congress was free to exert this guardianship in any manner which it deemed appropriate, and to adjust its action to new or changing conditions, so long as no fundamental right was violated.¹

In view of the scope of this power, as reflected by over a century of practice and by the decisions of this court, we think it was quite admissible for Congress to give effect to Rowell's status as an adopted member of the tribe, to recognize his claim to an allotment out of the tribal lands, to designate the land which he should receive, and to direct that it be conveyed to him by a patent in fee without awaiting the expiration of the usual trust period of twenty-five years. And if, before that direction was complied with, it was discovered that the land designated was lawfully devoted

to a special use from which it could not be withdrawn with due regard for the tribe in general, or that its situation and value were such that to allot or to convey it to him would invest him with much more than a fair distributive share of the common property of the tribe, we think it was equally admissible for Congress* to recall that direction in the interest of the tribe as a whole. At most, that direction was but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect. *Gritts v. Fisher*, 224 U. S. 640, 648, 56 L. ed. 928, 933, 32 Sup. Ct. Rep. 580. If the rule were otherwise and the quarter section upon which the Indian school buildings are situate had been inadvertently designated as the land which he should receive, the situation might have been one of great embarrassment. See *United States v. Des Moines Nav. & R. Co.* 142 U. S. 510, 544, 35 L. ed. 1099, 1109, 12 Sup. Ct. Rep. 308; *United States v. Old Settlers*, 148 U. S. 427, 466, 37 L. ed. 509, 523, 13 Sup. Ct. Rep. 650; *Cooley, Const. Lim.* 7th ed. 257-259.

But it is insisted that the provision of June 17, 1910, was a grant in presenti and operated in itself to pass the full title to Rowell, and therefore that he had a vested right in the land which the repealing act could not affect. If the premise be right the conclusion is obviously so. But is the premise right? Of course, a grant may be made by a law as well as by a patent issued pursuant to a law, but whether a particular law operates in itself as a present grant is always a question of intention. We turn, therefore, to the provision relied upon to ascertain whether it discloses a purpose to make such a grant; that is to say, a purpose to pass the title immediately without awaiting the issue of a patent. We find in it no words of present grant, but only a direction to the Secretary of the Interior "to issue a patent in fee" to Rowell for the tract described. Only through this express provision for a patent do we learn that a grant is intended, and, if it were eliminated, nothing having any force would remain. This, we think, shows that a present statutory grant was not intended, but only such a grant as would result from the issue of a patent as directed. The cases cited as making for a different conclusion are plainly distinguishable in that they deal with laws or treaties making grants, and either containing no provision for a patent, or providing for one merely by way of further assurance.

It is also insisted that, by applying for a patent before the provision therefor was re-

¹ *Stephens v. Cherokee Nation*, 174 U. S. 445, 488, 43 L. ed. 1041, 1056, 19 Sup. Ct. Rep. 722; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307, 47 L. ed. 183, 190, 23 Sup. Ct. Rep. 115; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 564, 47 L. ed. 299, 305, 23 Sup. Ct. Rep. 216; *Gritts v. Fisher*, 224 U. S. 640, 648, 56 L. ed. 928, 933, 32 Sup. Ct. Rep. 580; *Choate v. Trapp*, 224 U. S. 665, 671, 56 L. ed. 941, 944, 32 Sup. Ct. Rep. 565; *Sizemore v. Brady*, 235 U. S. 441, 449, 59 L. ed. 308, 311, 35 Sup. Ct. Rep. 135.

pealed, Rowell accepted that provision, and thereby acquired a right to have it carried into effect of which he could not be divested by the repealing act, consistently with due process of law. But the provision did not call for an acceptance and it is evident that none was contemplated, other than such as would be implied from taking the patent when issued. Besides, statutes of this type are not to be regarded as proposals by the government to enter into executory contracts, but as laws which are amendable and repealable at the will of Congress, save that rights created by carrying them into effect cannot be divested or impaired. *Gritts v. Fisher*, supra; *Choate v. Trapp*, 224 U. S. 665, 671, 56 L. ed. 941, 944, 32 Sup. Ct. Rep. 565; *Sizemore v. Brady*, 235 U. S. 441, 449, 59 L. ed. 308, 311, 35 Sup. Ct. Rep. 135. A case much in point is *United States ex rel. Levey v. Stockslager*, 129 U. S. 470, 32 L. ed. 785, 9 Sup. Ct. Rep. 382. The facts out of which it arose are these: By an Act of March 2, 1867 [14 Stat. at L. 635, chap. 208], Congress confirmed to the widow and children of a deceased claimant the one-sixth part, amounting to 75,840 acres, of an old land claim, and then, after reciting that the government had appropriated the land to other purposes, directed the Commissioner of the General Land Office to issue to the widow and children certificates of location in 80-acre lots locatable upon public lands at any land office, in lieu of their asserted interest in the old claim. Four days later the widow and children requested the Commissioner to issue the certificates, but the request was not complied with. On the 30th of the same month Congress by a joint resolution [15 Stat. at L. 353] approved by the President, directed that the execution of the act be suspended, and the suspension was not subsequently removed. The widow and children contended that, in view of what was done, they were entitled, in a contractual sense, to the certificates, and had acquired a vested right to them of which they could not be deprived by the joint resolution without denying them due process of law. But both phases of their contention were denied, it being said in the course of the opinion that "the whole thing remained in fieri and subject to the control of Congress;" that "there was here no contract between the United States and the widow and children" in the sense contended, that the joint resolution "did not deprive the widow and children of any property, or right of property, in violation of the Constitution," and that "the transaction was merely the ordinary one of a direction by statute to a public officer to perform a cer-

tain duty, and a subsequent direction to him by statute, before he had performed that duty or had entered upon its performance, not to perform it."

For these reasons we conclude that the repealing provision was valid, and that while it did not affect Rowell's status as an adopted member of the tribe, or his right to obtain in the usual way an allotment from the tribal lands not specially reserved, it did revoke the special provision made in his behalf in the Act of June 17, 1910.

It results that the verdict, instead of being directed for the defendants, should have been directed for the government, as was requested. This requires that the judgment be reversed and the cause remanded for a new trial.

Judgment reversed.

(243 U. S. 447)

PULLMAN COMPANY, Plff. in Err.,
v.

W. V. KNOTT, as Comptroller of the State of Florida.

ABATEMENT AND REVIVAL §45—ERROR TO STATE COURT—SUIT AGAINST STATE OFFICER—EXPIRATION OF TERM OF OFFICE.

The expiration of the term of office of the state comptroller, and the succession of another person to that office, requires the dismissal for want of a proper defendant to stand in judgment of a writ of error directed to the highest court of the state to review a decree which affirmed a decree below, dismissing the bill in a suit to enjoin such official and his successors in office from estimating, levying, and assessing a tax on the gross receipts of a foreign corporation, on the ground that the state law authorizing the tax was void under the Federal Constitution, there being no statutory authority for bringing in his successor in office.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 226-236.]

[No. 262.]

Submitted March 19, 1917. Decided April 9, 1917.

IN ERROR to the Supreme Court of the State of Florida to review a decree which affirmed a decree of the Circuit Court of Leon County, in that state, dismissing the bill in a suit to enjoin the enforcement of a tax on the gross receipts of a foreign corporation. Dismissed.

See same case below, 70 Fla. 9, 69 So. 703.

The facts are stated in the opinion.

Messrs. **Frank B. Kellogg, Cordenio A. Severance, Robert E. Olds, Gustavus S. Fernald, and John E. Hartridge** for plaintiff in error.

Mr. Thomas F. West, Attorney General of Florida, for defendant in error.

* Mr. Justice Day delivered the opinion of the court:

Suit was brought in the circuit court of Leon county, Florida, by the Pullman Company against Knott, comptroller of the state of Florida, to enjoin him and his successors in office from estimating, levying, and assessing a tax on the gross receipts of the Pullman Company, on the ground that the state law authorizing the tax was void under the Constitution of the United States. The circuit court held that the law was constitutional, and dismissed the bill; that decree was affirmed by the supreme court of the state. (70 Fla. 9, 69 So. 703.) The case was then brought here upon writ of error.

It is now before us upon a motion of the defendant in error, by the attorney general of the state, to dismiss the proceeding in this court upon the ground that there is no proper person defendant to stand in judgment in the action. It is averred, and is not disputed, that Knott, the defendant in error, is no longer comptroller of the state of Florida, his term of office having expired on January 2, 1917, and that thereupon he retired from the office of comptroller and has been succeeded by another, who is the duly commissioned and acting comptroller of the state.

The original suit was against Knott; the bill stated that he was the duly elected, qualified, and acting comptroller of the state of Florida. The bill sets forth the duties required of him in that connection in levying the tax against the enforcement of which the injunction was sought by the Pullman Company.

While it is true that the duty required concerns the state, the suit is against Knott as an individual, and he alone can be punished for the failure to obey an injunction, should one issue, as prayed for in the bill. Whether the court below was right in refusing the injunction and dismissing the bill against Knott is the question presented. In such cases, a long line of decisions in this court has settled that the action abates upon the expiration of the defendant's term of office, and cannot be revived against his successor in office, in the absence of a statute so providing.

We had occasion to review and consider these cases in the case of *Pullman Co. v. Croom*, 231 U. S. 571, 58 L. ed. 375, 34 Sup. Ct. Rep. 182, in which this court held, va-

cating the former order of substitution granted without discussion, that the action for an injunction against the enforcement of the tax abated upon the death of Croom, comptroller, and there being no statute covering such cases, no order of substitution could be made, and thereupon dismissed the appeal for want of a proper party to stand in judgment.

The case upon which the subsequent decisions are rested is *United States v. Boutwell*, 17 Wall. 604, 21 L. ed. 721. In that case the rule and the reasons for it were stated by the court. That was a suit for mandamus against the Secretary of the Treasury, and involved the right to substitute the successor of the Secretary, his term of office having expired since the suit was commenced. The court held that the right to a writ of mandamus ceased to exist upon the defendant retiring from the office of Secretary, and that, in the absence of a statute, the writ must necessarily abate. The court further held that the duty sought to be enforced was a personal one, and existed only so long as the office was held; that the court could not compel the defendant to perform such duty after his power so to do had ceased; that if the successor in office could be substituted he might be mulcted in costs for the fault of his predecessor, without any delinquency of his own; and that were a demand made upon him, he might discharge the duty, rendering the interposition of a court unnecessary; and, in any event, the successor was not in privity with his predecessor, nor was he his personal representative. (17 Wall. 604, 607, 608.)

In *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 41 L. ed. 621, 17 Sup. Ct. Rep. 225, the previous cases were reviewed by Mr. Justice Gray, speaking for the court, and the principle was applied to a suit for an injunction.

In *United States ex rel. Bernardin v. Butterworth*, 169 U. S. 600, 42 L. ed. 873, 18 Sup. Ct. Rep. 441, it was held that the substitution could not be made, even with the consent of the successor in office. In that case it was stated that it seemed desirable that Congress should provide for the difficulty by enacting a statute that would permit the successors of heads of departments who had died or resigned to be brought into the case by a proper method. Congress thereupon passed the Act of February 8, 1899 (30 Stat. at L. 822, chap. 121, Comp. Stat. 1913, § 1594), under the terms of which successors of officers of the United States may be substituted in suits brought against them in their official capacity. This statute has no application to other than Federal officers.

In *Richardson v. McChesney*, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43, an action was brought against McChesney, as secretary of the commonwealth of Kentucky. This court took judicial notice that his term of office had expired pending the suit, and that a successor had been inducted into office, and held that the former rule applied, and that the only exception to it was where the application sought to be enforced devolved upon a corporation or a continuing body. *Marshall v. Dye*, 231 U. S. 250, 58 L. ed. 206, 34 Sup. Ct. Rep. 92. This seems to be the rule in the Florida courts. *Columbia County v. Bryson*, 13 Fla. 281. In the *McChesney* Case this court held that as the official authority of the secretary had terminated, the case, so far as it sought to accomplish its object, was at an end, and there being no statute providing for the substitution of the successor, the writ of error was dismissed; citing *United States v. Boutwell*, and *United States ex rel. Bernardin v. Butterworth*, supra; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 441, 49 L. ed. 540, 544, 25 Sup. Ct. Rep. 375.

It is argued for the plaintiff in error that this court has held that former judgments adjudicating rights against the state are binding in subsequent actions; that the mere fact that there has been a change of person holding the office does not destroy the effect of the thing adjudged. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 388, 389, 42 L. ed. 202, 208, 209, 17 Sup. Ct. Rep. 905. But that argument does not touch the question here. It was held in the *Citizens Bank* Case that a holding that a contract for exemption from taxation existed bound subsequent officers of the state. The difficulty here is that this proceeding in error, since the expiration of Knott's term of office, leaves no party defendant in error to stand in judgment.

It is said that this ruling involves great hardship and that official terms will expire so that cases of this sort cannot be reviewed at all in this court. In this case the judgment of the state court was rendered on June 26, 1915; the order allowing the writ of error to this court was filed September 24, 1915; and the record was filed in this court on October 8, 1915. It does not appear that any attempt was made to advance the case, in view of the expiration of Knott's terms of office as comptroller in January, 1917. As the law now stands, we have no alternative except to dismiss the writ of error for want of a proper defendant to stand in judgment.

And it is so ordered.

UNITED STATES

v.

LUCKY S. WALLER and Mamie S. Waller.

INDIANS $\Rightarrow$ 27(5)—RIGHT TO SUE—AVOIDING CONVEYANCES OF INDIAN ALLOTMENTS.

The United States was without capacity to bring suit on behalf of Indian grantors to set aside, because of the fraud of the grantees and the incapacity of such grantors, certain conveyances by adult mixed-blood Chippewa Indians of their patented allotments in the White Earth Indian Reservation, where such conveyances were made after the adoption of the Acts of June 21, 1906 (34 Stat. at L. 325, chap. 3504), and March 1, 1907 (34 Stat. at L. 1015, chap. 2285), which removed all restrictions as to sale or encumbrance of allotments within such reservation theretofore or thereafter held by adult mixed-blood Indians, and declared that the trust deeds therefor should pass the title in fee simple, or that such mixed-bloods, upon application, should be entitled to receive a patent in fee simple for such allotments.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 19.]

[No. 697.]

Argued March 14 and 15, 1917. Decided April 9, 1917.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit presenting the question whether the United States could maintain, on behalf of certain Indian grantors, a suit to set aside conveyances made by those Indians of their allotments. Answered in the negative.

The facts are stated in the opinion.

Mr. Francis J. Kearful for the United States.

Mr. Marshall A. Spooner for Lucky S. Waller et al.

* Mr. Justice Day delivered the opinion of the court:

This case is here upon a certificate from the circuit court of appeals for the eighth circuit, from which it appears that the United States brought a suit in the district court of the United States for the district of Minnesota for the purpose of canceling and annulling a warranty timber deed from Ah-be-daun-ah-quod and Ah-sum, Indian allottees on the White Earth Reservation in Minnesota, to Mamie S. Waller, dated November 4, 1907, and a certain warranty deed from the same Indians to L. S. Waller, dated January 6, 1908. The district court dismissed the bill on the ground that the plaintiff had no capacity to maintain the suit, and upon a further ground that the court had no jurisdiction to hear and consider the same.

The court of appeals certifies the bill upon which suit was brought in the district court, wherein it is alleged that the United States brought the action upon behalf of Ah-be-daun-ah-quod and Ah-sum, Indian allottees in the White Earth Reservation in Minnesota. The acts of Congress under which the allotments were made to the Indians named are set forth, and it is averred that these acts provided that the lands in question should be held in trust by the United States for a period of twenty-five years; that the Indians for whom the suit was brought were Chippewa Indians of the White Earth Reservation, residing on the reservation, and were husband and wife and adult mixed-blood Indians.

It is averred that since the establishment of the White Earth Reservation the United States, in pursuance of its treaties and agreements with the tribes and bands of Chippewa Indians in the state of Minnesota, and in pursuance of its laws, has had and exercised through the Department of the Interior and the Office of Indian Affairs the function of guardian, protecting and defending said tribes and bands and the individual members thereof in the enjoyment and possession of their property rights. That before the commission of the acts of the defendants complained of there were duly allotted to Ah-be-daun-ah-quod and *Ah-sum certain tracts of land in the White Earth Reservation, which are described.

That afterwards, in December, 1907, the defendant Lucky S. Waller, negotiating with these two Indians for the purchase of a portion of the timber upon their allotments, paid to them \$50 as partial payment for such timber, and caused them to sign a certain paper, produced by him, by placing their thumb marks thereon. That as an inducement to procuring the execution of this paper, Waller falsely and fraudulently stated that it was merely a receipt for the payment. That neither Indian could read or write, and each was obliged to rely on Waller for understanding and knowledge of the contents of the instrument, and that so relying upon him and upon his false statements, they believed the instrument to be but a receipt for the money paid.

That in January, 1908, a further payment of \$75 was made by Waller to the two Indians, and another paper executed by them under similar circumstances and representations. That in June, 1910, and December, 1911, sums of \$10 were paid by Waller to the Indians; that such sums, aggregating \$145, were all paid with the understanding and belief on the part of the Indians that they were part of the purchase price of a part of the timber upon

the lands; and that no other or further moneys have been paid by Waller to the Indians.

That in December, 1911, the Indians for the first time learned, and plaintiff was thereafter advised, that the land records in the offices of the registers of deeds of Mahnomon and Clearwater counties, Minnesota, showed that there had been filed for record in said offices, respectively, two instruments in writing: one, an instrument purporting to be a warranty timber deed from Ah-be-daun-ah-quod and Ah-sum to Mamie S. Waller, dated November 4, 1907, reciting the consideration for the property therein conveyed to be \$500, and purporting to convey the timber upon the lands patented to the Indians with the exception of one parcel, and the other an instrument purporting to be a warranty deed from Ah-be-daun-ah-quod and Ah-sum to L. S. Waller, dated January 6, 1908, reciting the consideration paid to be \$200, and purporting to convey all of the lands patented.

That the instruments so recorded were the instruments executed by the Indians, by their thumb marks in the custom of Indians unable to read or write, and that the instruments which the Indians executed in December, 1907, and January, 1908, were not in truth and in fact the receipts which the defendant Waller falsely and fraudulently represented them to be, but were the instruments so recorded, which the Indians signed in ignorance of their contents, nature, and effect, and in reliance upon the false and fraudulent representations in regard thereto made by the defendant Waller, all of which was well known to the defendant.

That Mamie S. Waller is the wife of defendant Lucky S. Waller, and the person mentioned as the grantee in the timber deed; that she gave no consideration for the timber deed or the property purporting to be conveyed thereby; that the deed was caused to be taken in her name as grantee for the mutual benefit of the defendants; that she pretends to have and claims the title to the property therein described by virtue of said timber deed, and thereby seeks to avail herself of the benefit of the fraud perpetrated in securing the timber deed from the two Indians.

That the Indians never had any negotiations with either of the defendants, directly or indirectly, as to the sale of the lands or of any timber thereon, or in any respect other than as set forth in the bill; that they never intended to sell the lands and never did sell them or any part thereof; and that they never knowingly signed or executed any instrument conveying or in any manner alienating the lands or any

part thereof or interests or rights therein, or any timber thereon. That the instruments which were executed and recorded had and have the apparent legal effect of vesting the title to the lands and the timber thereon in the defendants, and of divesting the Indians of whatever right, title, and interest in and to said lands and timber were intended and provided for them by the laws of the United States. That the sum of \$145, paid by Waller to the Indians, is grossly inadequate and disproportionate to the value of the lands and of the timber thereupon, and that the value of the lands is not less than \$2,500, and of the timber not less than \$2,000.

The prayer of the bill is for surrender and cancelation of the warranty timber deed and the warranty deed for the lands. The case was appealed to the circuit court of appeals for the eighth circuit, which court has certified to this court the following question: Has the United States capacity to maintain the suit in question on behalf of the Indians named?

The answer to the question propounded depends upon a consideration of the acts of Congress relating to these Indians. The controlling act is the so-called Clapp Amendment of June 21, 1906 [34 Stat. at L. 325, 353, chap. 3504]; March 1, 1907 (34 Stat. at L. 1015, 1034, chap. 2285).

Before dealing with its interpretation, it is necessary to have in mind certain matters which are well-settled by the previous decisions of this court. The tribal Indians are wards of the government, and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens, the relation of guardian and ward for some purposes may continue. On the other hand, Congress may relieve the Indians from such guardianship and control,*in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property, or give to them a partial emancipation if it thinks that course better for their protection. *United States v. Nice*, 241 U. S. 591, 598, 60 L. ed. 1192, 1195, 36 Sup. Ct. Rep. 696, and cases cited.

To comprehend what Congress intended to accomplish by the act in question, it is necessary to have in view the previous legislation upon this subject. Its history was given in *United States v. First Nat. Bank*, 234 U. S. 245, 58 L. ed. 1298, 34 Sup. Ct. Rep. 846, and may be briefly summarized here.

By the Treaty of March 19, 1867 (16 Stat. at L. 719), creating the White Earth Reser-

vation, the Chippewas of the Mississippi ceded all their land in Minnesota, except certain described tracts, to the United States, and the government set apart the White Earth Reservation for their use, and provision was made for the certification to each Indian of not to exceed 160 acres of land in lots of 40 acres each, upon the cultivation of 10 acres, provided that the land should be exempt from taxation and sale for debt and should not be alienated except with the approval of the Secretary of the Interior, and then only to a Chippewa Indian. Under the General Allotment Act of February 8, 1887 (24 Stat. at L. 388, chap. 119, Comp. Stat. 1913, § 4195), provision was made for the allotment of lands in the Indian reservations in severalty, and it was provided that upon the approval of the allotments, patent therefor should issue in the name of the allottees, which should have the legal effect and declare that the United States held the land for twenty-five years in trust, for the use and benefit of the Indian to whom the allotment was made, or, in case of his death, for his heirs, according to the laws of the state or territory where the land was located. At the expiration of that time the United States was required to convey the same to the Indian or his heirs in fee, discharged of the trust and free of encumbrances, provided that the President of the United States might, at his discretion, extend the period. Conveyances or*contracts touching the lands before the expiration of the trust period were declared null and void. The Nelson Act of January 14, 1889 (25 Stat. at L. 642, chap. 24), provided for the relinquishment to the United States of that part of the reservation remaining after the allotment, the act to become operative only upon the assent of a certain number of Indians being obtained. By the Act of February 28, 1891 (26 Stat. at L. 794, chap. 383, Comp. Stat. 1913, § 4195), the allotments were limited to 80 acres to each Indian, but by the Act of April 28, 1904 (33 Stat. at L. 539, chap. 1786), the maximum allotments of the White Earth Reservation were made 160 acres. While the lands were thus held in trust and subject to the provisions of the Act of February 8, 1887, the Clapp Amendment was passed (34 Stat. at L. 1015, 1034, chap. 2285), which provides:

"That all restrictions as to the sale, encumbrance, or taxation for allotments within the White Earth Reservation in the state of Minnesota, heretofore [amended March 1, 1907, the word 'heretofore' being substituted for the word 'now'] or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department

for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application."

As stated in the certificate, the Indians involved are adults of mixed blood, and the lands in question were duly allotted and patented to them (by trust patents, counsel agree) before the deeds in controversy were made. We cannot escape the conviction ^{that the plain language of this act evidences} the intent and purpose of Congress ^{to} make such lands allotted to mixed-blood Indians subject to alienation with all the incidents and rights which inhere in full ownership in persons of full capacity.

The act deals with two classes: First, adult mixed-blood Indians, as to whom all restrictions as to sale or encumbrance are removed and the trust deeds declared to pass title in fee simple, or, upon application, such mixed bloods are to receive fee-simple patents for their allotments; and, second, full-blood Indians, as to whom the restrictions are to continue until the Secretary of the Interior is satisfied that such Indians "are competent to handle their own affairs," at which time they are to receive patents in fee simple. This distinction between the qualifications of adult mixed and full-blood Indians is one which Congress has not infrequently applied. *Marchie Tiger v. Western Invest. Co.* 221 U. S. 286, 306, 308, 55 L. ed. 738, 745, 746, 31 Sup. Ct. Rep. 578; *United States v. First Nat. Bank*, supra, at page 260.

The act thus evidences a legislative judgment that adult mixed-blood Indians are, in the respects dealt with in the act, capable of managing their own affairs, and for that reason they are given full power and authority to dispose of allotted lands. This may be a mistake of judgment as to some cases, and if the allegations of the bill set forth in the certificate in this case are true, it is quite evident that the Indians here involved were incapable of making an intelligent disposition of their lands. But Congress dealt with general conditions, and with these classes of Indians as a whole, and, with authority over the subject, has given to adult mixed-blood Indians the full right to dispose of the lands in question. It is not for the courts to question this legislative judgment.

In this view of the legislation and the particular act in question, we are unable to find any authority in the United States
 37 S. C.—28.

to maintain this suit in behalf of the Indians named.

In *Heckman v. United States*, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424, it ^{was held} that the United States could maintain a bill to cancel conveyances made by members of the Cherokee Nation in violation of restrictions imposed by acts of Congress. That case differs from the present one, in which there has been no disposition of the lands in violation of restrictions imposed by Congress upon alienation by the Indians. In the case now before us, in whatever other respect the government of the United States may continue to hold these Indians as wards, needing and receiving protection from its authority over their persons and property, as to the lands in question the United States, in the passage of the Clapp Amendment, evidenced its purpose to grant full power and control to the class named. As to them the government has no further interest in or control over the lands.

It does not follow that the Indians are without remedy in proper actions brought by themselves or their guardians, if there be such, for the protection of their rights. In *Dickson v. Luck Land Co.* decided at this term and reported in 242 U. S. 371, 61 L. ed. 371, 37 Sup. Ct. Rep. 167, this court had occasion to deal with rights concerning lands allotted and patented under the Clapp Amendment to adult mixed-blood Chippewa Indians, and speaking of the effect of the removal of the restrictions, this court said, at page 375:

"With those restrictions entirely removed and the fee-simple patent issued it would seem that the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the state. And that Congress so intended is shown by the Act of May 8, 1906, chap. 2348 (34 Stat. at L. 182, Comp. Stat. 1913, § 4203), which provides that when an Indian allottee is given a patent in fee for his allotment he 'shall have the benefit of and be subject to the laws, both civil and criminal, of the state.' Among the laws to which the allottee became subject, and to the benefit of which he became entitled, under this enactment, were those governing the ^{transfer} of real property, fixing the age of majority, and declaring the disability of minors."

We reach the conclusion that in this suit the United States was without capacity to bring the action for the benefit of the Indians named, and it follows that the question propounded must be answered in the negative.

And it is so ordered.

(243 U. S. 444)

LEHIGH VALLEY RAILROAD COM-
PANY, Appt.,
v.

UNITED STATES.

CARRIERS $\S$ 13(2) — DISCRIMINATION —
CHARGING LESS THAN PUBLISHED RATES
— ALLOWANCE TO SHIPPER FOR TRANS-
PORTATION SERVICE.

A corporation engaged in forwarding or bringing goods for importers from the place of purchase in Europe to their destination in the United States, charging the importers for the transportation and such other services as it may perform, may not be allowed by a railway company a percentage upon the latter's published rates, and a salary as an inducement to ship by its line, without violating the prohibition of the Act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8564), § 6, as amended by the Act of June 29, 1906 (34 Stat. at L. 587, chap. 3591, Comp. Stat. 1913, § 8569), § 2; and such allowance cannot be justified under § 15 of the earlier act as amended by § 4 of the later act, as being an allowance for a transportation service furnished by a shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 22, 24.]

[No. 124.]

Argued March 23, 1917. Decided April 9, 1917.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree enjoining a railway company from making an allowance to a forwarding company as an inducement to ship by the former's line. Affirmed.

See same case below, 222 Fed. 685.

The facts are stated in the opinion.

Messrs. George T. Buckingham, Allan McCulloh, Edgar H. Boles, and Stewart C. Platt for appellant.

Assistant to the Attorney General Todd for appellee.

Messrs. Joseph W. Folk and Charles W. Needham for the Interstate Commerce Commission.

* Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding instituted by direction of the Attorney General at the request of the Interstate Commerce Commission to prevent the appellant railroad from carrying freight at less than its published rates on file. The case was heard upon bill and answer and a stipulation, and the question is whether the facts warrant an injunction, as matter of law.

George W. Sheldon & Company is an Illinois corporation engaged in forwarding, or bringing goods for importers from the place

of purchase in Europe to their destination in the United States, and charging the importers for the transportation and such other services as it may perform. Of course the expectation is that it will make a profit from the transaction, although from the uncertainty of ocean freight charges it may lose, as the contract is made in advance. By arrangement with the appellant, so far as it is able it sends the goods over the appellant's line, and for doing so receives from it a varying percentage upon the published rates and also a salary of \$5,000 a year. These payments by the appellant are the ground of the bill. The district court issued an injunction as prayed. 222 Fed. 685.

As toward the railroad, George W. Sheldon & Company is consignor and consignee; and although it may be in no case the owner, that does not concern the appellant. Upon the admitted facts there can be no doubt, and it is not denied that it is to all legal intents the shipper of the goods. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.* 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392; *Great Northern R. Co. v. O'Connor*, 232 U. S. 509, 58 L. ed. 704, 34 Sup. Ct. Rep. 330, 8 N. C. C. A. 53. If the shipper* were the owner, an allowance to him of a percentage upon the freight as an inducement to ship by that line, however honest and however justifiable on commercial principles, would be contrary to the Act to Regulate Commerce as it now stands. Act of June 29, 1906, chap. 3591, § 2, 34 Stat. at L. 586, 587, Comp. Stat. 1913, § 8569, amending § 6 of the original act, etc. See also the original Act of February 4, 1887, chap. 104, § 2, 24 Stat. at L. 379, Comp. Stat. 1913, § 8564; *Wight v. United States*, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822. But the above cases show that the carrier cannot inquire whether the shipper is the owner, and therefore the statute expresses a necessary policy when it forbids in universal terms refunding in any manner any portion of the rates specified in the published tariffs, or extending to "any shipper" any privilege not so specified. Of course it does not matter whether the allowance takes the form of a deduction or a cross payment. Any payment made by a carrier to a shipper in consideration of his shipping goods over the carrier's line comes within the prohibiting words.

It is true, no doubt, that George W. Sheldon & Company in the performance of the services for which it is paid, maintains offices here and abroad, advertises the railroad, solicits traffic for it, does various other useful things, and, in short, we as-

sume, benefits the road and earns its money, if it were allowable to earn money in that way. It is true also that in Interstate Commerce Commission v. F. H. Peavey & Co. 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22, an owner of property transported was held entitled, under § 15 of the Act to Regulate Commerce, to an allowance for furnishing a part of the transportation that the carrier was bound to furnish. So Union P. R. Co. v. Updike Grain Co. 222 U. S. 215, 56 L. ed. 171, 32 Sup. Ct. Rep. 39, and United States v. Baltimore & O. R. Co. 231 U. S. 274, 58 L. ed. 218, 34 Sup. Ct. Rep. 75. But that case goes to the verge of what is permitted by the act. The services rendered by George W. Sheldon & Company, although in a practical sense "connected with such transportation," were not connected with it as a necessary part of the carriage,—were not "transportation service," in the language of Union P. R. Co. v. Updike Grain Co. 222 U. S. 215, 220, 56 L. ed. 171, 173, 32 Sup. Ct. Rep. 39,—and, in our opinion, were not such services as were contemplated in the Act of June 29, 1906, chap. 3591, § 4, 34 Stat. at L. 589, Comp. Stat. 1913, § 8583, amending § 15 of the original act. On the other hand, the allowance for them falls within the plain meaning of § 2 of the Act of 1906, to which we referred above.

There is some criticism of the form of the decree, but it prohibits with sufficient plainness all payments to George W. Sheldon & Company, whether by way of salary, commission, or otherwise, in consideration of the shipment of goods by George W. Sheldon & Company over the appellant's line.

Decree affirmed.

(243 U. S. 426)

FRANKLIN O. BUNTING, Plff. in Err.,
v.

STATE OF OREGON.

CONSTITUTIONAL LAW §296(1) — MASTER AND SERVANT §13 — DUE PROCESS OF LAW — REGULATING HOURS OF LABOR — POLICE POWER.

1. A regulation of hours of service—not of wages—and one, therefore, which the state, in the exercise of its police power, could, consistently with due process of law, enact, is what was made by the provisions of Or. Laws 1913, chap. 102, § 2, purporting to have been enacted as a health measure, that "no person shall be employed in any mill, factory, or manufacturing establishment in this state more than ten hours in any one day except watchmen and employees when engaged in making necessary repairs or in case of emergency where life or property is in imminent danger," notwithstanding a proviso to such section that "em-

ployees may work overtime not to exceed three hours in any one day, conditioned that payment be made for such overtime at the rate of time and one half of the regular wage."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 843; Master and Servant, Cent. Dig. § 14.]

MASTER AND SERVANT §13—REGULATING HOURS OF LABOR — DISCRIMINATION — CLASSIFICATION.

2. An hours-of-service law may be limited to employees in mills, factories, or manufacturing establishments, as is done by Or. Laws 1913, chap. 102, § 2, without invalidating the law as making an unconstitutional discrimination.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

[No. 38.]

Argued April 18, 1916. Restored to docket for reargument June 12, 1916. Reargued January 19, 1917. Decided April 9, 1917.

IN ERROR to the Supreme Court of the State of Oregon to review a judgment which affirmed a conviction in the Circuit Court of Lake County, in that state, for violating a statutory limitation of hours of labor without paying the rate prescribed for overtime. Affirmed.

See same case below, 71 Or. 259, L.R.A. 1917C, 1162, 139 Pac. 731, Ann. Cas. 1916C, 1003.

The facts are stated in the opinion.

Messrs. W. Lair Thompson and C. W. Fulton for plaintiff in error.

Messrs. Felix Frankfurter and J. O. Bailey, and Mr. George M. Brown, Attorney General of Oregon, for defendant in error.

* Mr. Justice McKenna delivered the opinion of the court:

Indictment charging a violation of a statute of the state of Oregon, § 2 of which provides as follows:

"No person shall be employed in any mill, factory or manufacturing establishment in this state more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; provided, however, employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for such overtime at the rate of time and one half of the regular wage." [Laws 1913, chap. 102, p. 169.]

A violation of the act is made a misdemeanor, and in pursuance of this provision the indictment was found. It charges a violation of the act by plaintiff in error, Bunting, by employing and causing to work in a flour mill belonging to the Lake View

Flouring Mills, a corporation, one Hammersly for thirteen hours in one day, Hammersly not being within the excepted conditions, and not being paid the rate prescribed for overtime.

A demurrer was filed to the indictment, alleging against its sufficiency that the law upon which it was based is invalid because it violates the 14th Amendment of the Constitution of the United States and the Constitution of Oregon.

The demurrer was overruled; and the defendant, after arraignment, plea of not guilty, and trial, was found guilty. A motion in arrest of judgment was denied and he was fined \$50. The judgment was affirmed by the supreme court of the state. The chief justice of the court then allowed this writ of error.

The consonance of the Oregon law with the 14th Amendment is the question in the case, and this depends upon whether it is a proper exercise of the police power of the state, as the supreme court of the state decided that it is.

That the police power extends to health regulations is not denied, but it is denied that the law has such purpose or justification. It is contended that it is a wage law, not a health regulation, and takes the property of plaintiff in error without due process. The contention presents two questions: (1) Is the law a wage law, or an hours-of-service law? And (2) if the latter, has it equality of operation?

Section 1 of the law expresses the policy that impelled its enactment to be the interest of the state in the physical well-being of its citizens and that it is injurious to their health for them to work "in any mill, factory or manufacturing establishment" more than ten hours in any one day; and § 2, as we have seen, forbids their employment in those places for a longer time. If, therefore, we take the law at its word, there can be no doubt of its purpose, and the supreme court of the state has added the confirmation of its decision, by declaring that "the aim of the statute is to fix the maximum hours of service in certain industries. The act makes no attempt to fix the standard of wages. No maximum or minimum wage is named. That is left wholly to the contracting parties." [71 Or. 275, L.R.A. 1917C, 1162, 139 Pac. 731, Ann. Cas. 1916C, 1003.]

It is, however, urged that we are not bound by the declaration of the law or the decision of the court. In other words, and to use counsel's language, "the legislative declaration of necessity, even if the act followed such declaration, is not binding upon this court. *Coppage v. Kansas*, 236

U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240." Of course, mere declaration cannot give character to a law nor turn illegal into legal operation, and when such attempt is palpable, this court necessarily has the power of review.

But does either the declaration or the decision reach such extreme? Plaintiff in error, in contending for this and to establish it, makes paramount the provision for overtime; in other words, makes a limitation of the act the extent of the act,—indeed, asserts that it gives, besides, character to the act,—illegal character.

To assent to this is to ascribe to the legislation such improvidence of expression as to intend one thing and effect another; or artfulness of expression to disguise illegal purpose. We are reluctant to do either, and we think all the provisions of the law can be accommodated without doing either.

First, as to plaintiff in error's attack upon the law. He says: "The law is not a ten-hour law; it is a thirteen-hour law designed solely for the purpose of compelling the employer of labor in mills, factories, and manufacturing establishments to pay more for labor than the actual market value thereof." And further: "It is a ten-hour law for the purpose of taking the employer's property from him and giving it to the employee; it is a thirteen-hour law for the purpose of protecting the health of the employee." To this plaintiff in error adds that he was convicted, not for working an employee during a busy season for more than ten hours, but for not paying him more than the market value of his services.

The elements in this contention it is difficult to resolve or estimate. The charge of pretense against the legislation we, as we have already said, cannot assent to. The assumption that plaintiff in error was convicted for not paying more in a busy season than the market value of the services rendered him, or that, under the law, he will have to do so, he gives us no evidence to support. If there was or should be an increase of demand for his products, there might have been or may be an increase of profits. However, these are circumstances that cannot be measured, and we prefer to consider with more exactness the overtime provision.

There is a certain verbal plausibility in the contention that it was intended to permit thirteen hours' work if there be fifteen and one-half hours' pay, but the plausibility disappears upon reflection. The provision for overtime is permissive, in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its

burden, and its adequacy for this was a matter of legislative judgment under the particular circumstances. It may not achieve its end, but its insufficiency cannot change its character*from penalty to permission. Besides, it is to be borne in mind that the legislature was dealing with a matter in which many elements were to be considered. It might not have been possible, it might not have been wise, to make a rigid prohibition. We can easily realize that the legislature deemed it sufficient for its policy to give to the law an adaptation to occasions different from special cases of emergency for which it provided,—occasions not of such imperative necessity, and yet which should have some accommodation; abuses prevented by the requirement of higher wages. Or even a broader contention might be made that the legislature considered it a proper policy to meet the conditions long existent by a tentative restraint of conduct rather than by an absolute restraint, and achieve its purpose through the interest of those affected rather than by the positive fiat of the law.

We cannot know all of the conditions that impelled the law or its particular form. The supreme court, nearer to them, describes the law as follows: "It is clear that the intent of the law is to make ten hours a regular day's labor in the occupations to which reference is made. Apparently the provisions permitting labor for the overtime on express conditions were made in order to facilitate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours overtime. It might be regarded as more difficult to detect violations of the law by an employment for a shorter time than for a longer time. This penalty also goes to the employee in case the employer avails himself of the overtime clause."

But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise, or be convinced of the wisdom of its exercise. *Rast v. Van Deman & L. Co.* 240 U. S. 342, 365, 60 L. ed. 679, 690, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370. It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as*it might be, not as rigid in its prohibitions as it might be, gives, perhaps, evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality. This may be a blemish, giving opportunity for criticism and difference in characterization, but the constitutional va-

lidity of legislation cannot be determined by the degree of exactness of its provisions or remedies. New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. They do not at a particular moment of time spring full-perfect in extent or means from the legislative brain. Time may be necessary to fashion them to precedent customs and conditions, and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal.

But passing general considerations and coming back to our immediate concern, which is the validity of the particular exertion of power in the Oregon law, our judgment of it is that it does not transcend constitutional limits.

This case is submitted by plaintiff in error upon the contention that the law is a wage law, not an hours-of-service law, and he rests his case on that contention. To that contention we address our decision and do not discuss or consider the broader contentions of counsel for the state that would justify the law even as a regulation of wages.

There is a contention made that the law, even regarded as regulating hours of service, is not either necessary or useful "for preservation of the health of employees in mills, factories, and manufacturing establishments." The record contains no facts to support the contention, and against it is the judgment of the legislature and the supreme court, which said: "In view of the well-known fact that the custom in our industries does not sanction a longer service than ten hours per day, it cannot be held, as a matter of law, that the legislative requirement is unreasonable or arbitrary as to hours of labor. Statistics*show that*the average daily working time among workmen in different countries is, in Australia, 8 hours; in Britain, 9; in the United States, 9½; in Denmark, 9½; in Norway, 10; Sweden, France, and Switzerland, 10½; Germany, 10½; Belgium, Italy, and Austria, 11; and in Russia, 12 hours."

The next contention of plaintiff in error is that the law discriminates against mills, factories, and manufacturing establishments in that it requires that a manufacturer, without reason other than the fiat of the legislature, shall pay for a commodity, meaning labor, one and one-half times the market value thereof while other people, purchasing labor in like manner in the open market, are not subjected to the same burden. But the basis of the contention is that which we have already disposed of; that is, that the law regulates wages, not hours of service. Regarding it

as the latter, there is a basis for the classification.

Further discussion we deem unnecessary. Judgment affirmed.

The CHIEF JUSTICE, Mr. Justice Van Devanter, and Mr. Justice McReynolds, dissent.

Mr. Justice Brandeis took no part in the consideration and decision of the case.

(243 U. S. 440)

UNITED STATES, Plff. in Err.,

v.

SOLOMON KENOFSKEY.

POST OFFICE ~~35~~—OFFENSES — USE OF
MAILS TO DEFRAUD.

A life insurance agent who, in pursuance of a scheme to defraud the insurance company, delivered to his superior officer a fraudulent death claim, supported by false proofs, knowing that the claim would (as in fact it was) be mailed by the latter in the usual course of business to the home office for approval before payment, thereby violated the provisions of the United States Criminal Code, § 215,* for the punishment of anyone who, having devised any scheme or artifice to defraud, shall, for the purpose of executing such scheme, "place or cause to be placed" any letter, package, or writing in any postoffice, to be sent or delivered by the postoffice establishment.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55.]

[No. 649.]

Submitted March 16, 1917. Decided April 9, 1917.

IN ERROR to the District Court of the United States for the Eastern District of Louisiana to review a judgment sustaining a demurrer to an indictment which charged a scheme to defraud by the use of the mails. Reversed and remanded for further proceedings.

See same case below, 235 Fed. 1019.

The facts are stated in the opinion.

Assistant Attorney General Warren for plaintiff in error.

No appearance for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

Indictment charging a scheme to defraud by use of the mails, in violation of § 215 of the Criminal Code. [35 Stat. at L. 1130, chap. 321, Comp. Stat. 1913, § 10,385.]

The indictment is in the usual volume of such instruments, but may be sufficiently summarized as presenting the following facts:

Kenofskey was the agent and assistant superintendent at New Orleans, Louisiana,

of the Life Insurance Company of Virginia. It was part of his duty to obtain certificates and proofs of death of persons insured in the company and also to view the remains of deceased policy holders, have them identified, and deliver the certificates and proofs of death to the superintendent of the local office at New Orleans, to be forwarded in the usual course of business through the United States mails to the home office of the company at Richmond, Virginia. In pursuance of a fraudulent scheme Kenofskey falsely represented to the insurance company that he had received and obtained a valid and genuine claim, proof of death and certificates executed, signed, and presented by Sarah Thompson, the beneficiary in a policy which had been issued upon the life of one Frederick Wicker. Kenofskey signed the certificates as assistant superintendent. Frederick Wicker is still living, and Kenofskey knew that all claims required the approval of the main office and were to be transmitted from the local office through the United States mails, and, if handed by him to the superintendent, would be so transmitted, and, for that purpose, he delivered the proofs to the superintendent. The superintendent examined them, and, without knowledge of their fraudulent character, affixed his signature thereto, inclosed them in an envelop, and deposited them, postage paid, in the United States mails.

A demurrer was filed to the indictment, stating as grounds thereof that it was not sufficient to constitute a violation of § 215 of the Criminal Code of the United States, properly construed and understood, or of any other law of the United States.

The demurrer was sustained, the court, giving as its reasons therefor the following:

* "The depositing of the letter in the mail for the purpose of executing the scheme is the crime. The defendant did not mail the letter, and the local superintendent of the insurance company was not his agent. It is charged it was the duty of the defendant either to prepare for mailing or to actually mail the papers. He is sought to be held on the theory that, as he knew the claim would be mailed to the home office, in the usual course of the business, for approval before payment, he knowingly caused it to be deposited. This theory is too far-fetched to be tenable. Furthermore, in order to constitute a crime, the mailing of the letter must have been a step in the execution of the fraudulent scheme. The scheme devised by defendant was completely executed when he handed the false claim to the local agent at New Orleans.

"However desirable it may be from the viewpoint of the victim to try all perpe-

*For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Act March 4, 1909, c. 321, 35 Stat. 1130 (Comp. Stat. 1913, § 10385).

trators of fraudulent schemes in the Federal courts, this court cannot assume jurisdiction except in clear cases.

"The demurrer will be sustained."

This appeal was then prosecuted under the Criminal Appeals Act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, Comp. Stat. 1913, § 1704).

Section 215 of the Criminal Code is as follows:

"Whoever, having devised . . . any scheme or artifice to defraud . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, . . . package, writing, . . . in any postoffice, . . . to be sent or delivered by the post-office establishment of the United States, . . . " shall be punished, etc.

The short point in the case is whether the facts charged show that Kenofskey offended against the statute. The district court was of opinion that they did not, for two reasons: (1) The superintendent at New Orleans was not the agent of Kenofskey. (2) § 215 is directed at steps in the execution of fraudulent schemes, and the scheme devised by Kenofskey was completely executed when he delivered the false claim to the local agent at New Orleans.

We are unable to concur. The words of § 215 are "*place, or cause to be placed, [italics ours] any letter, . . . package, writing, . . . in any postoffice, . . . to be sent or delivered. . . .*"

"Cause" is a word of very broad import and its meaning is generally known. It is used in the section in its well-known sense of bringing about, and in such sense it is applicable to the conduct of Kenofskey. He deliberately calculated the effect of giving the false proofs to his superior officer; and the effect followed, demonstrating the efficacy of his selection of means. It certainly cannot be said that the superintendent received authority from the insurance company to transmit to it false proofs. He became Kenofskey's agent for that purpose and the means by which he offended against the provisions of the statute. *Demolli v. United States* (C. C. A. 8th C.) 6 L.R.A. (N.S.) 424, 75 C. C. A. 365, 144 Fed. 363, 7 Ann. Cas. 121.

We do not think the scheme ended when Kenofskey handed the false proofs to his superior officer. As said by the Assistant Attorney General: "The most vital element in the transaction both to the insurance company and to Kenofskey remained yet to become an actuality, i. e., the payment and receipt of the money; . . . " Such payment and receipt would indeed have executed the scheme, but they would not have served to "trammel up the consequence" of the fraudulent use of the mails.

Judgment reversed and cause remanded for further proceedings in conformity with this opinion.

SEABOARD AIR LINE RAILWAY, Plff. in
Err.,
v.
J. H. LORICK.

COURTS ⇐399(2)—ERROR TO STATE COURT
—FOLLOWING DECISION BELOW — QUES-
TION FOR JURY.

A unanimous ruling of the highest court of a state that the trial court had properly left to the jury a case brought under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, §§ 8657-8665), will not be disturbed by the Federal Supreme Court on writ of error unless clear and palpable error is shown.

[No. 762.]

Argued April 10, 1917. Decided April 23,
1917.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which, on a second appeal, affirmed a judgment of the Court of Common Pleas of Lexington County, in that state, in favor of plaintiff in an action under the Federal Employers' Liability Act. Affirmed.

See same case below, on first appeal, 102 S. C. 276, 86 S. E. 675.

The facts are stated in the opinion.

Mr. J. B. S. Lyles for plaintiff in error.

Messrs. Frank G. Tompkins and George Bell Timmerman for defendant in error.

* Mr. Justice Brandeis delivered the opinion of the court:

The Federal Safety Appliance Acts (as supplemented by Act of April 14, 1910, chap. 160, 36 Stat. at L. 299, Comp. Stat. 1913, § 8621) prohibit a carrier engaged in interstate commerce from hauling a car with a defective coupler, if it can be repaired at the place where the defect is discovered. *United States v. Erie R. Co.* 237 U. S. 402, 409, 59 L. ed. 1019, 1023, 35 Sup. Ct. Rep. 621. The Seaboard Air Line Railway received such a car at one of its yards. Lorick, the local car inspector and repairer, who discovered the defect, undertook to make the repairs, as was in the line of his duty. To do so it was necessary to raise the coupler; and for this a jack was the appropriate appliance. None having been furnished him, he sat down under the coupler and raised it with his shoulder, which was thereby seriously strained. Occasion to make similar repairs had previously arisen at this yard at short intervals. Lorick had for this purpose repeatedly asked the chief car inspector for a jack; and a few weeks before the accident had been promised one. Lorick sued the com-

pany under the Federal Employers' Liability Act, in a state court of South Carolina, and testified to the facts above stated.

The case was tried twice before a jury and was twice reviewed by the supreme court of South Carolina. At the first trial the court directed a nonsuit on the ground that Lorick had assumed the risk. The supreme court set aside the nonsuit (102 S. C. 276, 86 S. E. 675), holding that, in view of the promise to supply a jack, the question of assumption of risk should have been left to the jury, citing *McGovern v. Philadelphia & R. R. Co.* 235 U. S. 389, 59 L. ed. 283, 35 Sup. Ct. Rep. 127, 8 N. C. C. A. 67. At the second trial defendant asked for a directed verdict on the grounds both that Lorick had assumed the risk and that there was no evidence of negligence on defendant's part. This request being refused, the case was submitted to the jury under instructions which were not objected to; and a verdict was rendered for plaintiff. Defendant's exceptions to the refusal to direct a verdict were overruled by the supreme court. The case comes here on writ of error where only these same alleged errors may be considered.

The appellate court was unanimous in holding that the trial court had properly left the case to the jury. No clear and palpable error is shown which would justify us in disturbing that ruling. *Great Northern R. Co. v. Knapp*, 240 U. S. 464, 466, 60 L. ed. 745, 751, 36 Sup. Ct. Rep. 399; *Baltimore & O. R. Co. v. Whitacre*, 242 U. S. 169, 171, 61 L. ed. 228, 37 Sup. Ct. Rep. 33. The judgment is affirmed.

Mr. Justice Van Devanter and Mr. Justice McReynolds dissent.

(243 U. S. 563)

HENDERSONVILLE LIGHT & POWER
COMPANY and Saluda-Hendersonville
Interurban Railway Company, Plffs. in
Err.,

v.

BLUE RIDGE INTERURBAN RAILWAY
COMPANY.

COURTS ⇐394(10)—ERROR TO STATE COURT
—DECISION OF FEDERAL QUESTION—DUE
PROCESS OF LAW.

1. A decision of the highest court of a state sustaining the condemnation of certain water rights of riparian owners who asserted that such condemnation would be the taking of private property without due process of law, contrary to U. S. Const. 14th Amend., is reviewable in the Federal Supreme Court, although the state court discusses only matters of state law, a dissenting judge, however, intimating that the taking infringed the Federal Constitution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1056.]

EMINENT DOMAIN $\hookrightarrow$ 20(6)—PUBLIC USE
— GENERATING ELECTRIC POWER FOR
STREET RAILWAY COMPANY — SALE OF
SURPLUS POWER—DUE PROCESS OF LAW.

2. The condemnation of certain water rights by a street and interurban railway company, conformably to the local law, cannot be said to be for a private use, and hence wanting in due process of law, on the ground that the contemplated works will produce much more power than will be needed for the railway, and that the company's charter empowers it to sell the surplus power, where the taking, according to the findings of the state courts, was with intent in good faith to carry on the public business authorized by the charter, i. e., to build and operate a railway between points named, and it was further found that it was necessary to generate electric power on the stream in order to operate the railway, that the proceeding was for a public use, and that, in order fully to develop the company's water power for such purpose, it was necessary to condemn the rights in question.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 67.]

[No. 497.]

Argued April 10, 1917. Decided April 23, 1917.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which, on rehearing, affirmed a judgment of the Superior Court of Henderson County, in that state, condemning certain water rights. Affirmed.

See same case below, 171 N. C. 314, 88 S. E. 245.

The facts are stated in the opinion.

Messrs. Michael Schenck, C. P. Sanders, J. C. Martin, Thomas S. Rollins, and George H. Wright for plaintiffs in error.

Messrs. Charles W. Tillett, Horace L. Bomar, William A. Smith, James E. Shipman, and Thomas C. Guthrie for defendant in error.

* * * Mr. Justice Holmes delivered the opinion of the court:

This is a special proceeding to condemn the water rights incident to land belonging to the plaintiffs in error upon a bow of Green river. It has resulted in a judgment of condemnation subject to the payment of \$10,000. The petitioner, the defendant in error, owns land on the side of the stream opposite to that of the plaintiffs in error, the respondents, and on both sides of the stream above and below that land. It proposes to cut off the bow by a dam above, and a steel flume that re-enters the river below that land, all upon its own ground. The respondents in their answer set up that the condemnation in this man-

ner and for the purpose alleged would be the taking of private property without due process of law, in violation of the 14th Amendment, and we assume that the record discloses a technical right to come to this court. *Minneapolis & St. L. R. Co. v. Minnesota*, 193 U. S. 53, 62, 48 L. ed. 614, 618, 24 Sup. Ct. Rep. 396; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 91, 45 L. ed. 102, 103, 21 Sup. Ct. Rep. 43. The decision of the supreme court in sustaining the condemnation discusses only matters of state law, but the Chief Justice, dissenting, intimated that the taking infringed the Constitution of the United States. 171 N. C. 314, 88 S. E. 245.

The defendant in error, the Blue Ridge Interurban Railway Company, seems to have been incorporated with power to build and operate a street and interurban railway from Hendersonville through Saluda to a point on Green river, and to extend its lines to any other points not exceeding 50 miles from Saluda; also with power to maintain a water power plant on Green river for the purpose of generating electricity to be used in operating the railway; and with all other powers granted by the laws of the state to corporations of that character, including all rights of condemnation and the right to sell and dispose of the surplus electric power generated at its plant. It has also a somewhat general authority to construct buildings and factories, operate machinery, etc.; but limited, as we understand it, to acts expedient for the proper prosecution of the objects for which the corporation was created.

This taking, according to the findings before us, was with intent in good faith to carry on the public business authorized by the charter,—that is, to build and operate a street and interurban railway between points named. It is found further that it was necessary to generate electric power on Green river in order to operate the railway; that the present proceeding was for a public use, and that in order fully to develop the Blue Ridge Company's water power on Green river for the above-mentioned purposes, it was necessary to condemn the rights in question. Subject to provisos that were held to have been satisfied, and that are not in question here, a statute of 1907, as amended in 1913, authorized street and interurban railways situated as the petitioner was to condemn water power. The objection that is urged against this statute and the charter as applied in the present case is that taking the whole water power is unnecessary for the purposes of the railway, that the plan is a covert device for selling the greater part of the power to mills, that this last is a private use, and

that the two objects being so intermingled, the taking must fall.

We are asked to go behind the finding that the taking was for a public use, on the ground that the charter authorizes the sale of surplus power, that the contemplated works will produce fifty thousand horse-power, and that this, according to the evidence, is much more than will be needed for the railway. But the surplus is a matter of estimate, and no reason is shown for our not accepting the findings below. We are in no way warranted in assuming that the sale of surplus power, if there is any, is the real object of the enterprise, or anything more than a possible incident, necessary to prevent waste, of the primary public use. Furthermore, if there are likely to be such sales, nothing appears sufficient to take the case out of the scope of a recent decision of this court. *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.* 240 U. S. 30, 32, 60 L. ed. 507, 511, 36 Sup. Ct. Rep. 234.

Judgment affirmed.

(243 U. S. 570)

UNITED STATES OF AMERICA, Plff. in Err.,
v.

FOSTER L. DAVIS.

EMBEZZLEMENT — 21 — BY DEPUTY CLERK — COSTS AND FEES.

The conversion by a deputy clerk of the district court of the United States for the territory of Hawaii to his own use of moneys of persons other than the United States, deposited with the clerk of that court to secure the payment of costs, is punishable under the United States Criminal Code, § 97,¹ declaring that "any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, . . . whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States," be fined or imprisoned, or both, since, whether the moneys in question belonged to the United States or to the clerk, they did not belong to the deputy clerk.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 24-29.]

[No. 621.]

Submitted April 11, 1917. Decided April 23, 1917.

IN ERROR to the District Court of the United States for the Territory of

Hawaii to review a judgment which sustained a demurrer to an indictment charging embezzlement by the deputy clerk of such District Court. Reversed.

The facts are stated in the opinion.

Assistant Attorney General Warren for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an indictment of a deputy clerk of the district court of Hawaii for converting to his own use moneys of persons other than the United States, deposited with the clerk to secure the payment of costs, by parties to proceedings other than proceedings in bankruptcy (counts 1, 3, 4, 7, 8), or by parties to proceedings in bankruptcy (counts 2, 5, 9). The sixth count charges the defendant, as clerk, with a like conversion. A demurrer to the indictment was sustained and the United States brings the case here. The judge assumed that the costs referred to in the several counts were fees of the clerk, and, we presume, in case of proceedings in bankruptcy, fees collected for the referee and trustee, and also that the funds were funds to be accounted for by the clerk as debtor, not as trustee, under the decision in *United States v. Mason*, 218 U. S. 517, 531, 54 L. ed. 1133, 1138, 31 Sup. Ct. Rep. 28. He therefore was of opinion that the money was not within the purview of § 99 of the Penal Code [35 Stat. at L. 1106, chap. 321, Comp. Stat. 1913, § 10,267], punishing the embezzlement of money belonging in the registry of the court, etc. The same reasoning led him to the conclusion that § 97 did not apply, and it is the latter proposition that the United States seeks to have revised.

The judge objected that the charges in the indictment did not follow the language of § 97, but as he went on to consider whether the statute applied to the facts alleged, we shall deal with the latter question. Concerning the sufficiency of the indictment in other aspects, of course, we have nothing to say. By § 97 "any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, . . . whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States," be fined or imprisoned or both. If, as assumed, the defendant was not punishable under § 99, he was punishable under this. *As pointed out by the government,

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

¹ Act March 4, 1909, c. 321, 35 Stat. 1106 (Comp. St. 1913, § 10265).

the court below seems to have overlooked the fact that, except in the sixth count, the defendant is alleged to have been an assistant clerk, not the clerk. Whether it belonged to the United States or to the clerk, the money was not his and the case is within the words just quoted from the act. We confine our decision to the point raised by the assignment of error; upon that the decision was wrong.

Judgment reversed.

Mr. Justice McKenna dissents for the reasons given by Judge Morrow.

(243 U. S. 549)

OREGON & CALIFORNIA RAILROAD
COMPANY et al.

v.

UNITED STATES OF AMERICA.

APPEAL AND ERROR ⇨1207(4)—COMPLIANCE WITH MANDATE — VIOLATION OF COVENANT IN RAILWAY LAND GRANT—EXTENT OF RELIEF.

1. A decree of a Federal district court which, in addition to restraining sales by certain railway companies in violation of the covenants in the congressional land grant acts that the lands granted shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and at a price not exceeding \$2.50 an acre, also enjoined such companies from selling any timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land itself, and, except in connection with the sale of the land, from cutting or removing or authorizing the cutting or removal of any of the timber thereon, or from removing or authorizing the removal of mineral or other deposits therein, was warranted by the mandate of the Federal Supreme Court, which, having reversed a prior decree of the district court, had remanded the cause for further proceedings in accordance with the opinion of the Supreme Court, where such opinion expressed the view that the railway companies should not only be enjoined from future sales in violation of the covenants, but should be enjoined from any disposition whatever of the lands or the timber thereon, and from cutting or authorizing the cutting or removal of such timber until Congress should have reasonable opportunity to provide by legislation for their disposition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4699.]

CONSTITUTIONAL LAW ⇨277(1)—DUE PROCESS OF LAW—VESTED RIGHTS—RAILWAY LAND GRANT—ENFORCING PERFORMANCE OF COVENANTS.

2. Vested rights of railway companies whose disregard of the covenants in certain congressional land grant acts that the lands granted shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and

at a price not exceeding \$2.50 an acre, had made the lands more inviting for speculation than for settlement, were not destroyed without due process of law by the enactment, in the exercise of the reserved power to alter or repeal, of the provisions of the Act of June 9, 1916 (39 Stat. at L. 218, chap. 137), which revest the title to the unsold lands in the United States, excepting rights of way and lands in actual use for depots, sidetracks, etc., and regulate the disposition of such lands and the distribution of the proceeds, securing to the railway companies \$2.50 an acre, less any offsets properly chargeable against the railway companies on account of prior sales, the use of the timber, the evading of taxation, etc.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 762.]

PUBLIC LANDS ⇨90—MORTGAGE OF RAILWAY LAND GRANT—RIGHTS OF TRUSTEE.

3. Rights acquired by the trustee for bondholders under a mortgage executed by a railway company upon the lands embraced in its congressional land grants were subject to the obligations of the railway company to keep, and to the power of the government to exact performance of, the covenants in these grants that the lands granted shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding \$2.50 an acre.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 273.]

UNITED STATES ⇨147—APPEAL—COSTS — WHEN UNITED STATES IS PARTY.

4. The costs of an appeal to the Federal Supreme Court in a case in which the United States is a party should not be allowed to the United States by the decree of a Federal district court, entered pursuant to the mandate from the Supreme Court, where the latter court did not, and could not, make any orders respecting such costs, because of the declaration of the Supreme Court rule 24, that the provisions of that section giving costs to the prevailing party do not "apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States."

[Ed. Note.—For other cases, see United States, Cent. Dig. § 148.]

[No. 492.]

Argued March 8 and 9, 1917. Decided April 23, 1917.

ON A CERTIFICATE from, and WRIT OF CERTIORARI to, the United States Circuit Court of Appeals for the Ninth Circuit, bringing up for review a decree of a District Court for the District of Oregon, enjoining certain railway companies from selling any part of the lands granted to them by Congress in violation of the covenants in the land grant acts, and from dis-

posing of any of the timber, or mineral, or other deposits. Affirmed.

The facts are stated in the opinion.

Messrs. P. F. Dunne, William F. Her-
rin, William D. Fenton, and Frank C.
Cleary for the Oregon & California Railroad
Company et al.

Mr. Perry D. Trafford for the Union
Trust Company.

Special Assistant to the Attorney General
Smyth and Solicitor General Davis for
the United States.

Mr. Francis J. Heney as amicus curiæ.

* Mr. Justice McKenna delivered the opin-
ion of the court:

This is the second appearance of the case
in this court. It is on certificate from and
certiorari to the circuit court of appeals
for the ninth circuit, to which court it was
taken by appeal to review a decree of the
district court for the district of Oregon,
entered in fulfilment of the mandate of this
court.

The decree of the district court was re-
versed, and the present controversy is as to
what our mandate required. As expressing
their different views of it the government
and the railroad company—we shall so refer
to the defendants, except where a distinction
is necessary—submitted forms of decrees to
the district court. The court adopted the
decree submitted by the government, and
that action is assigned as error.

The case as made in this court on its first
appearance is reported in 238 U. S. 393-
438, 59 L. ed. 1360-1397, 35 Sup. Ct. Rep.
908, and contains all of the elements for
the decision of the questions now presented.
Before detailing those elements we may say
preliminarily that the difference between
the decree entered and that proposed by the
railroad company was in the extent of the
restraint upon the company in the disposi-
tion of lands granted in aid of the construc-
tion of certain railroads and telegraph lines.
The acts making the grants contained the
provision that the lands granted should be
sold to actual settlers only, in quantities
not greater than one quarter section to one
purchaser, and for a price not exceeding
\$2.50 an acre.

The decree restrained the railroad com-
pany from selling "to any person not an
actual settler on the land sold to him," with
limitation of quantity and price stated, "and
from selling any of the timber on said lands,
or any mineral or other deposits therein,
except as a part of and in conjunction with
the land on which the timber stands or in
which the mineral or other deposits are
found; and from cutting or removing or
authorizing the cutting or removal of any
of the timber thereon; or from removing

or authorizing the removal of mineral or
other deposits therein, except in connection
with the sale of the land bearing the timber
or containing the mineral or other deposits."

The decree as proposed by the railroad
company omitted the injunction against sell-
ing the timber and mineral deposits.

* Upon these differences in the proposed
and entered decree the railroad company
bases its contention that the latter is not
in accordance with the mandate of this
court, and in support of it it has presented
elaborate arguments to establish a distinc-
tion between lands and the timber on them
and the mineral deposits in them, and that
the command of the acts of Congress to sell
the lands did not include the timber or de-
posits. In other words, it is contended that
the acts of Congress gave the railroad com-
pany "the right of an owner by absolute
grant to the use of the timber on his land"
and to avail himself of the minerals there-
in; and that, therefore, the restraint that
the district court put upon the railroad
company was in excess of the mandate. "It
was what this court has termed an 'inter-
meddling' with matters outside of the scope
of the mandate. It proceeded to determine
that the railroad had no right to use the
timber upon its lands while they were still
unsold and in its possession and occupancy;
it determined that the railroad company
could not even make a clearing in anticipa-
tion of a sale to some settler, or dig out a
ton of coal; and it adjudged that the owner
of the land had no right in the timber or
the coal except to pass it, as part of the
realty, when it sold the land to a settler
at \$2.50 an acre."

The complaint is graphic. Its attempted
justification is the assertion of a grant in
absolute ownership. Such ownership is the
foundation of the railroad company's con-
tention, and on this foundation it builds its
argument and upon the insistence that the
lands having been granted, necessarily as
incidents to them the timber and minerals
on and within them were granted. An im-
mediate and sufficient answer to the conten-
tion would seem to be that the grant was
not absolute, but was qualified by a condi-
tion in favor of settlers, and that if the
"lands" granted had such incidents, the
"lands" directed to be sold to actual set-
tlers were intended to have such incidents.
That is, if the "lands" granted carried by
necessary implication all that was above
the surface and all below the surface to
the railroad company, they carried such
implication to the actual settler. In other
words, what "lands" meant to the railroad
company they meant to the settler, em-
braced within his right to purchase and
acquire. We are not disposed, however, to

rest upon this summary answer, but will consider with more particularity our mandate.

It is not necessary to trace the title of the lands to the railroad company. It is sufficient to say that the source of the title was an act of Congress approved July 25, 1866, chap. 242, 14 Stat. at L. 239, as amended by the acts approved June 25, 1868, chap. 80, 15 Stat. at L. 80; April 10, 1869, chap. 27, 16 Stat. at L. 47; and May 4, 1870, chap. 69, 16 Stat. at L. 94, which acts granted lands to aid in the construction of certain railroads and telegraph lines. The Act of 1869 contained this proviso: "And provided further, That the lands granted by the act aforesaid [Act of 1866] shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre." There was a like provision in the Act of 1870.

The government brought suit against the railroad company, alleging that these provisos constituted conditions subsequent, charging breaches of the conditions by the company, and praying for a forfeiture of the unsold lands.

The railroad company denied that the provisos were to be so construed, and alleged that they constituted restrictive and unenforceable covenants, and set up other defenses.

The district court adopted the view of the government as to the provisos, and entered a decree forfeiting the lands, and the case came here for review.

The contentions of the government and the railroad company were repeated in this court, and it was, besides,¹ contended that the provisos only applied to lands susceptible of actual settlement and cultivation, and did not include timber lands.¹

We rejected the contention of the government; we rejected in part the contention of the railroad company, saying: "Our conclusions, then, on the contentions of the government and the railroad company are that the provisos are not conditions subsequent; that they are covenants and enforceable."

But how enforceable? And what was the remedy for breaches?—and breaches there were, many, gross, and determined. It was

¹ There were cross complainants and interveners, the first asserting that the provisos created trusts in favor of actual settlers, and the second that the trust had the scope of including all persons who desired to make actual settlements upon the lands. The decree of the district court and the decision here were adverse to both contentions, and this case has no further concern with them or with those who made them.

certainly not intended to be decided that these breaches, with all of their consequences, were to be put out of view and the railroad company only enjoined against future breaches. Yet this, in effect, is the contention, and it is attempted to be supported by certain language in the opinion. Before quoting it we may say in general that much that is cited from it must be considered in reference to the controversies which were presented, and that the granting acts and their provisos were necessarily construed as of the time of their passage. Action under them and the breaches of them came afterwards, and a consideration of the remedies to which the government was entitled. Keeping this comment in mind we can more easily understand the language of the opinion in description of the grant and in regard to the relief that was awarded the government.

As to the grant, this was said—and it is much insisted on: "There was a complete and absolute grant to the railroad company with power to sell, limited only as¹² prescribed, and we agree with the government that the company 'might choose the actual settler; might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.'" And we added: "It might choose the time of sale or its use of the grant as a means of credit, subject ultimately to the restrictions imposed; and we say 'restrictions imposed' to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure, divested of the obligations of the provisos."

This declares the meaning of the words of the acts, taken by themselves. It points out the power of the railroad company and that it was "limited only as prescribed." It does not point out the remedy of the government if the limit prescribed was transcended. For that we must look to other parts of the opinion. We took pains to declare that the principles of the case were "not in great compass," that circumstances had given "perplexity and prolixity to discussion," but had not confused the simple words of the acts of Congress, regarded either as grants or as laws, and that they were both, and, as both, they conferred rights quite definite and imposed obligations as much so,—the first having the means of acquisition; the second, of performance. And we gave emphasis to them as laws and the necessity of obedience to them as such, the remission of their obligation to be obtained "through appeal to Congress," and not by an evasion of them or a defiance of them.

The evasions and defiance we showed, and the extent to which they transcended the policy and purpose of the government expressed in the covenants. We contrasted the requirement of the grants of a sale to an actual settler of 160 acres (maximum amount) with sales of 1,000, 2,000, 20,000, and 45,000 acres to single purchasers, and the use of the lands for homes with their use for immediate or speculative enterprises. The relief the government was entitled to, we said, was not satisfied by preserving its rights to the lands sold, and we further said that "an injunction simply against future violations of the covenants, or, to put it another way, simply mandatory of their requirements, will not afford the measure of relief to which the facts of the case entitle the government."

The reason was expressed. The government alleged, to show a disregard of the covenants, that more than 1,000 persons had applied to purchase lands from the railroad company in conformity with the covenants. The company, replying, said the applications were not made in good faith for settlement, but for speculation, the lands being valuable only for their timber, and not being fit for settlement; and further alleged that at no time had the lands fit for actual settlement exceeded 300,000 acres, in widely separated tracts, and had been sold during the construction of the road and prior to its completion to actual settlers in the prescribed quantities and at the prescribed price.

We have seen that other sales were made in quantities in excess of that prescribed by the statute, and not for settlement, at prices from \$5 to \$40 an acre, and that at the time the answer was filed there remained unsold over 2,000,000 acres, the reasonable value of which was \$30,000,000. There was no intimation that the lands did not include the timber, and it was not only recognized but asserted that the lands were more valuable for the timber than for settlement.

Our judgment took care of the situation. It preserved the remedies of the government for past violations of the granting acts and recognized that new dispositions were necessary to secure the rights that had accrued to the government. We said that, owing to the "conditions now existing, incident, it may be, to the prolonged disregard of the covenants by the railroad company, the lands" invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever or of the timber thereon, and from cutting or removing any of the timber thereon, until Congress shall have a

reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the railroads."

The design of this and its adequacy would seem to need no comment. It was intended to be a guide to the district court,—indeed, a direction of the decree of the court. The decree complied with the direction. See *Southern Oregon Co. v. United States* (circuit court of appeals, ninth circuit, decided Feb. 13, 1917).

Congress, in the execution of the policy it deemed fitting under the circumstances, as expressed in our opinion, enacted what is called the Chamberlain-Ferris Act of June 9, 1916 (39 Stat. at L. 218, chap. 137).² The validity of the act is challenged and both sides invite a determination of the challenge. The validity of the law may be said not to be involved. The appeal is from the decree, and, that being determined to be right, the appeal, it may be urged, is satisfied; the questions it presents decided. It, however, may be considered important in the execution of the decree, for we have seen that the granting acts were laws as well as grants, had the strength and operation of laws,*subject to amendment if the right of amendment existed or accrued. There was a reservation in them of the right of alteration or repeal, and if it could not be exerted to take back what had been granted and had vested, it could be exerted to accomplish the remedy which the court adjudged to the government for the violation by the railroad company of the provisions of the grants. It is no answer to the exertion of the power and remedy to say that the acts of Congress were initially complete and absolute grants. It is to be borne in mind that they carried with them covenants to be performed and necessarily an obligation to perform them, with remedies for breaches of performance. Such was our judgment, as we have seen, and the judgment was adapted to the conditions created by the breaches, and for this legislation was deemed necessary.

But the railroad company says that the legislation directed was to have its consent, and that such consent "was essential to the valid resumption or alteration of its vested rights," and that this was what this

² The provisions of the act, so far as they affect the railroad, may be summarized as follows:

It recites, among other things, that this court had ordered that the railroad company be enjoined from "making further sales of lands in violation of the law," and further

court meant when it said "that any legislation in the premises by Congress should 'secure to the defendants all the value the granting acts conferred upon the railroads.'"

We have already answered the contentions. The railroad company, by pushing into view the rights conferred by the granting acts and putting out of view the wrongs committed by it, can easily build an argument upon and invoke the inviolability of vested rights; and to say that its consent was necessary to legislation is to say that it could dictate the remedy for its wrongs, preclude or embarrass the policy of the government.

The interest that the granting acts conferred upon the railroad company was \$2.50 an acre. That secured to it, "all the value the granting acts conferred" upon it was secured. It is true it had the right of sale, selection of time, and settler. If these were rights, they were also aids* to the duty of transmitting the lands to settlers; and, the duty having been violated, they became unsuitable to the conditions resulting and obstructions to the relief which had accrued to the government. In other words, by the conduct of the railroad company the policy of the granting acts had become impracticable of performance, and the new condi-

tions—the lands inviting more to speculation than to settlement—demanded other provision than that prescribed by the granting acts. This was the declaration and direction of our judgment, and the Chamberlain-Ferris Act is the execution of it.

The Union Trust Company was one of the defendants in the suit and is one of the parties here. It was heard by its own counsel at the bar and through brief. In the main its argument is the same as that of the railroad company, varied somewhat in detail, and asserts that it has not only the rights of the railroad, but, "in addition and especially, that even if it be possible for the government now to take away rights once conveyed to the railroad, it cannot take them except subject to the lien of the mortgage."

So far as the rights of the trust company coincide with those of the railroad company we have considered them, and they cannot be greater than those of that company. The railroad company, it is true, could use the lands as a basis of credit, but only to the extent of its interest in them, subject to the performance of its obligations and the power of the government to exact their performance.

We were careful to observe this subordination. We expressed the extent of the

er enjoined from "making any sales whatever of either the lands or the timber thereon until Congress should have a reasonable opportunity to provide for the disposition of said lands," etc., and enacts that the title to so much of the lands as had not been sold by the railroad prior to July 1, 1913, be and the same is hereby revested in the United States, excepting right of way and lands in actual use by the railroad for depots, sidetracks, etc. (§ 1). The lands shall be divided into three classes: power sites, timber lands, and agricultural lands (§ 2). The timber shall be sold by the Secretary of the Interior at such times and in such manner as may seem best, and the lands from which it is removed shall thereafter be classed as agricultural lands (§ 4). The lands classed as agricultural shall be subject to entry under the homestead laws, but patents shall not issue until the lands have been cultivated for three years (§ 5). The Attorney General is authorized to institute proceedings against the railroad company and others to have determined the amount of moneys already received by the railroad company or its predecessors on account of sales, etc., of the granted lands, and which should be charged against it as part of the "full value" secured to the grantees under the granting acts as heretofore interpreted by this court. In making such determination the court shall take into consideration all moneys received from sales of lands or timber, forfeited contracts, rent, timber depredations, and interest on con-

tracts, or from any source relating to the lands, and also the value of the timber from the lands and used by the grantees or their successors. In such suits the court shall also determined the amount of taxes on the lands paid by the United States, as provided in § 9 of the act, and which should have been paid by the railroad, and the amounts thus determined shall be treated as money received by the railroad company (§ 7). The title to all moneys arising out of the granted lands and now on deposit to await the final outcome of the suit commenced by the United States in pursuance of the joint resolution of April 30, 1908, is hereby vested in the United States, and the United States is subrogated to all rights and remedies of the obligee or obligees under any contract for the purchase of timber on the grant lands (§ 8). Provision is made for the payment by the United States of accrued taxes on the lands revested by the act (§ 9). The proceeds of the timber and the lands shall be deposited in the Treasury of the United States, and be paid to the railroad or the lien holders as the fund accumulates, and at the end of ten years an appropriation shall be made from the general funds of the Treasury of the United States to pay any balance which may be due to the railroad (§ 10). The profits derived from the transaction shall be paid one quarter to the state of Oregon and one quarter to the counties where the lands are situated, while one half shall be retained by the government (§ 10).

interest that the railroad company received and that "it might choose the time for selling or its use of the grant as a means of credit," but, we also said, "subject ultimately to the restrictions imposed." And, further, we said "restrictions imposed" to reject the contention that an implication of the power to mortgage the lands carried a right to sell on foreclosure, divested of the obligations of the provisos."

*The case was responded to as it was presented, and no phase of it was omitted in presentation or response that could influence its judgment. Of what was in the minds of counsel, determining and urging their contentions, of what was in the mind of the court in response to the contentions, the opinion leaves no doubt, and that after the fullest consideration of all that was involved of rights and remedies, the judgment was pronounced.

A distinction is now attempted to be made between a sale of the lands and the use of the lands, including in the use of them the right to cut the timber upon them and extract minerals (coal and iron) from them. Such use, it is asserted, is a necessary incident of ownership, and that such use was not intended to be taken away nor could it have been taken away by our judgment.

To answer the contentions would be mere repetition of what we have said. The distinction now made between the lands and their use is but the contention urged on the first appeal and rejected,—that the provisos only applied to lands susceptible of actual settlement, and not to timber lands. The distinction then was between the lands; now, between their constituting elements, and for the same reason: to give to the railroad company and the trust company what the granting acts did not give; or, rather, gave for the purpose of transmission to actual settlers. This transmission becoming impracticable, other disposition of the lands, including all that is signified by the word, was adjudged.

The Trust Company also attacks the Chamberlain-Ferris Act and is assisted in the attack by a "friend of the court." The attacks have the same basis as that which we have noticed,—that is, the rights of the railroad company are asserted to be vested and inviolable. The contention gets a semblance of strength from the ability of counsel. To yield to it would be in effect to declare that covenants violated are the same as covenants performed,* wrongs done the same as rights exercised,—and, by confounding these essential distinctions, give to the transgression of the law what its observance is alone entitled to.

The decree of the district court taxed

costs against the railroad company, and this is assigned as error. The amount is stated to be \$6,249.02. So far as this sum includes costs on the former appeal we think there was error. The railroad company was compelled to appeal from the decree against it. The decree was reversed and no costs were awarded for or against it, and could not have been under rule 24 of this court. The rule gives costs to the prevailing party in certain cases. The provision, however, does not "apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States." Our mandate was in accordance with the rule, and the decree should not have awarded costs to the United States. To that extent it is erroneous and should be modified by deducting the costs which were incurred in this court; and, so modified, it is affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

(243 U. S. 521)

H. SNOWDEN MARSHALL, Appt.,

v.

ROBERT B. GORDON, Sergeant at Arms of the House of Representatives of the United States.

UNITED STATES ~~vs.~~ 21—CONGRESS — CONTEMPT—GENERAL POWER TO PUNISH.

1. The distinction between legislative, executive, and judicial powers, recognized by the Federal Constitution, and the express limitations in such Constitution, negative any implication of the possession by Congress of the commingled legislative-judicial authority as to contempts which is exerted in the English House of Commons. [Ed. Note.—For other cases, see United States, Cent. Dig. § 13.]

UNITED STATES ~~vs.~~ 21—CONGRESS — CONTEMPT—POWER TO PUNISH—IMPLICATION FROM NECESSITY.

2. Power to deal directly by way of contempt without criminal prosecution may be implied from the constitutional grant of legislative power to Congress in so far, and so far only, as such authority is necessary to preserve and to carry out the legislative power granted.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 13.]

UNITED STATES ~~vs.~~ 21—CONGRESS — CONTEMPT—PUNISHMENT.

3. Punishment for contempt as punishment for the offense was not embraced in the authority to deal directly by way of contempt without criminal prosecution, implied from the constitutional grant of legislative power to Congress, since such power rests only upon the right of self-preservation, i. e., the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty, or the refusal to do something

which there is an inherent legislative power to compel, in order that legislative functions may be performed.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 13.]

UNITED STATES 21—CONGRESS — CONTEMPT—EXTENT OF PUNISHMENT.

4. Imprisonment only, and for a term not exceeding the session of the body in which the contempt occurred, is the limit of the authority to deal directly by way of contempt without criminal prosecution, implied from the constitutional grant of legislative power to Congress in so far as such authority is necessary to preserve and to carry out the legislative power granted.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 13.]

UNITED STATES 21—CONGRESS — CONTEMPT—POWER TO PUNISH—PAST CONDUCT.

5. Congressional authority to deal directly by way of contempt without criminal prosecution with acts which interfere with the preservation of its legislative authority does not cease to exist merely because the act complained of may have been committed before the authority is exerted.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 13.]

UNITED STATES 21—CONGRESS — CONTEMPT—POWER TO PUNISH—PUBLICATION OF DEFAMATORY LETTER.

6. The implied power of the House of Representatives to deal directly by way of contempt, without criminal prosecution, with acts, the prevention of which is necessary to preserve and to carry out its legislative authority, does not embrace the punishment, as for a contempt, of the action of a Federal district attorney in writing and publishing a letter addressed to the chairman of a subcommittee of the House, containing matter defamatory to the House or the committee, even conceding that the House was considering, and its committee contemplating, impeachment proceedings against that official.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 13.]

[No. 606.]

Argued December 11 and 12, 1916. Decided April 23, 1917.

APPEAL from the District Court of the United States for the Southern District of New York to review an order refusing relief by habeas corpus to a person under arrest for an alleged contempt of the House of Representatives. Reversed, with directions to discharge the relator from custody.

See same case below, 235 Fed. 422.

The facts are stated in the opinion.

Messrs. Charles P. Spooner, Jesse C. Adkins, and John C. Spooner for appellant.

Messrs. D-Cady Herrick, Martin W. Littleton, and Henry M. Goldfogle for appellee.

*Mr. Chief Justice White delivered the opinion of the court:

These are the facts: A member of the House of Representatives on the floor charged the appellant, who was the district attorney of the southern district of New York, with many acts of misfeasance and nonfeasance. When this was done the grand jury in the southern district of New York was engaged in investigating alleged illegal conduct of the member in relation to the Sherman Anti-trust Law July 2, 1890, c. 647, 26 Stat. 209 and asserted illegal activities of an organization known as Labor's National Peace Council to which the member belonged. The investigation as to the latter subject not having been yet reported upon by the grand jury, that body found an indictment against the member for a violation of the Sherman Law. Subsequently calling attention to his previous charges and stating others, the member requested that the judiciary committee be directed to inquire and report concerning the charges against the appellant in so far as they constituted impeachable offenses. After the adoption of this resolution a subcommittee was appointed which proceeded to New York to take testimony. Friction there arose between the subcommittee and the office of the district attorney, based upon the assertion that the subcommittee was seeking to unlawfully penetrate the proceedings of the grand jury relating to the indictment and the investigations in question. In a daily newspaper an article appeared charging that the writer was informed that the subcommittee was endeavoring rather to investigate and frustrate the action of the grand jury than to investigate the conduct of the district attorney. When called upon by the subcommittee to disclose the name of his informant, the writer declined to do so and proceedings for contempt of the House were threatened. The district attorney thereupon addressed a letter to the chairman of the subcommittee, avowing that he was the informant referred to in the article, averring that the charges were true, and repeating them in amplified form in language which was certainly unparliamentary and manifestly ill-tempered, and which was well calculated to arouse the indignation not only of the members of the subcommittee, but of those of the House generally. This letter was given to the press so that it might be published contemporaneously with its receipt by the chairman of the subcommittee. The judiciary committee reported the matter to the House and a select committee was appointed

to consider the subject. The district attorney was called before that committee and reasserted the charges made in the letter, averring that they were justified by the circumstances, and stating that they would, under the same conditions, be made again. Thereupon the select committee made a report and stated its conclusions and recommendations to the House as follows:

"We conclude and find that the aforesaid letter written and published by said H. Snowden Marshall to Hon. C. C. Carlin, chairman of the subcommittee of the judiciary committee of the House of Representatives, on March 4, 1916, . . . is as a whole and in several of the separate sentences defamatory and insulting and tends to bring the House into public contempt and ridicule, and that the said H. Snowden Marshall, by writing and publishing the same, is guilty of contempt of the House of Representatives of the United States because of the violation of its privileges, its honor, and its dignity."

Upon the adoption of this report, under the authority of the House a formal warrant for arrest was issued and its execution by the Sergeant at Arms in New York was followed by an application for discharge on habeas corpus; and the correctness of the judgment of the court below, refusing the same, is the matter before us on this direct appeal.

Whether the House had power under the Constitution to deal with the conduct of the district attorney in writing the letter as a contempt of its authority, and to inflict punishment upon the writer for such contempt as a matter of legislative power, that is, without subjecting him to the statutory modes of trial provided for criminal offenses, protected by the limitations and safeguards which the Constitution imposes as to such subject, is the question which is before us. There is unity between the parties only in one respect; that is, that the existence of constitutional power is the sole matter to be decided. As to all else there is entire discord, every premise of law or authority relied upon by the one side being challenged in some respects by the other. We consider, therefore, that the shortest way to meet and dispose of the issue is to treat the subject as one of first impression, and we proceed to do so.

Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions. Certain is it that authority was possessed by the House of Commons in England to punish for contempt directly, that is, without the intervention of courts, and that such power included a variety of acts and many forms of punishment, includ-

ing the right to fix a prolonged term of imprisonment. Indubitable also is it, however, that this power rested upon an assumed blending of legislative and judicial authority possessed by the Parliament when the Lords and Commons were one, and continued to operate after the division of the Parliament into two houses, either because the interblended power was thought to continue to reside in the Commons, or by the force of routine the mere reminiscence of the commingled powers led to a continued exercise of the wide authority as to contempt formerly existing long after the foundation of judicial-legislative power upon which it rested had ceased to exist. That this exercise of the right of legislative-judicial power to exert the authority stated prevailed in England at the time of the adoption of the Constitution and for some time after has been so often recognized by the decided cases relied upon and by decisions of this court, some of which are in the margin,¹ as to make it too certain for anything but statement.

Clear also is it, however, that in the state governments prior to the formation of the Constitution the incompatibility of the intermixture of the legislative and judicial power was recognized and the duty of separating the two was felt, as was manifested by provisions contained in some of the state Constitutions enacted prior to the adoption of the Constitution of the United States, as illustrated by the following articles in the Constitutions of Maryland and Massachusetts:

"That the house of delegates may punish, by imprisonment, any person who shall be guilty of a contempt in their view, by any disorderly or riotous behaviour, or by threats to, or abuse of their members, or by any obstruction to their proceedings. They may also punish, by imprisonment, any person who shall be guilty of a breach of privilege, by arresting on civil process, or by assaulting any of their members, during their sitting, or on their way to, or return from the house of delegates, or by any assault of, or obstruction to their officers, in the execution of any order or process, or by assaulting or obstructing any witness, or any other person, attending on, or on their

¹ Crosby's Case, 3 Wils. 188, 95 Eng. Reprint, 1005, 2 W. Bl. 754; Burdett v. Abbot, 14 East, 1, 104 Eng. Reprint, 501, 5 Dow. P. C. 165, 3 Eng. Reprint, 1289, 4 Taunt. 401, 128 Eng. Reprint, 384, 12 Revised Rep. 450; Stockdale v. Hansard, 9 Ad. & El. 1, 112 Eng. Reprint, 1112, 2 Perry & D. 1, 8 L. J. Q. B. N. S. 294, 3 Jur. 905; Anderson v. Dunn, 6 Wheat, 204, 5 L. ed. 242; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

way to or from the house, or by rescuing any person committed by the house: and the senate may exercise the same power, in similar cases." Md. Const. 1776, art. 12.

* 1233
 "They [the house of representatives] shall have authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in its presence; or who, in the town where the general court is sitting, and during the time of its sitting, shall threaten harm to the body or estate of any of its members, for anything said or done in the house; or who shall assault any of them therefor; or who shall assault or arrest any witness, or other person, ordered to attend the house, in his way in going or returning; or who shall rescue any person arrested by the order of the house.

"And no member of the house of representatives shall be arrested, or held to bail on mean process, during his going unto, returning from, or his attending the general assembly.

"The senate shall have the same powers in the like cases; and the governor and council shall have the same authority to punish in like cases: Provided, That no imprisonment, on the warrant or order of the governor, council, senate, or house of representatives, for either of the above-described offenses, be for a term exceeding thirty days." Const. Mass. 1780, pt. 2, chap. 1, § 3, arts. 10 and 11.

* 1233
 The similarity of the provisions points to the identity of the evil which they were intended to reach. Clearly they operate to destroy the admixture of judicial and legislative power as prevailing in the House of Commons, since the provisions in both the state Constitutions and the limitations accompanying them are wholly incompatible with judicial authority. Moreover, as under state Constitutions all governmental power not denied is possessed, the provisions were clearly not intended to give legislative power as such, for full legislative power to deal with the enumerated acts as criminal offenses and provide for their punishment accordingly already obtained. The object, therefore, of the provisions, could only have been to recognize the right of the legislative power to deal with the particular acts without reference to their violation of the criminal law and their susceptibility of being punished under that law because of the necessity of such a legislative authority to prevent or punish the acts independently,*because of the destruction of legislative power which would arise from such acts if such authority was not possessed.

How dominant these views were can be

measured by the fact that in various other states almost contemporaneously with the adoption of the Constitution similar provisions were written into their Constitutions and continued to be adopted until it is true to say that they became, if not universal, certainly largely predominant in the states.²

No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own members. Article 1, § 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the states, it follows that no other express authority to deal with contempt can be conceived of. It comes, then, to this: was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive, and judicial authority which is interwoven in the very fabric of the Constitution, and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution. This conclusion has long since been authoritatively settled and is not open to be disputed. *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377. Whether the right to deal with contempt in the limited way provided in the state Constitutions may be implied in Congress as the result of the legislative power granted must depend upon how far such limited power is ancillary or incidental to the power granted to Congress,—a subject which we shall hereafter approach.

The rule of constitutional interpretation announced in *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it. And as there is

² 1790, South Carolina, art. 1, § 13; 1792, New Hampshire, pt. 2, §§ 22 and 23; 1796, Tennessee, art. 1, § 11; 1798, Georgia, art. 1, § 13; 1802, Ohio, art. 1, § 14; 1816, Indiana, art. 3, § 14; 1817, Mississippi, art. 3, § 20; 1818, Illinois, art. 2, § 13; 1820, Maine, art. 4, pt. 3, § 6; 1820, Missouri, art. 3, § 19.

nothing in the inherent nature of the power to deal with contempt which causes it to be an exception to such rule, there can be no reason for refusing to apply it to that subject.

Thus, in *Anderson v. Dunn*, supra, which was an action for false imprisonment against the Sergeant-at-Arms of the House for having executed a warrant for arrest issued by that body in a contempt proceeding, after holding, as we have already said, that the power possessed by the House of Commons was incompatible with the Constitution and could not be exerted by the House, it was yet explicitly decided that from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself; that is, to deal by way of contempt with direct obstructions to its legislative duties. In *Kilbourn v. Thompson*, supra, which was also a case of false imprisonment for arrest under a warrant issued by order of the House in a contempt proceeding, although the want of right of the House of Representatives to exert the judicial-legislative power possessed by the House of Commons was expressly reiterated, the question was reserved as to the right to imply an authority in the House of Representatives to deal with contempt as to a subject-matter within its jurisdiction, the particular case having been decided on the ground that the subject with which the contempt proceedings were concerned was totally beyond the jurisdiction of the House to investigate. But in *Re Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677, the principle of the existence of an implied legislative authority under certain conditions to deal with contempt was again considered and upheld. The case was this: Chapman had refused to testify in a Senate proceeding, and was indicted under § 102 of the Revised Statutes (Comp. Stat. 1913, § 157) making such refusal criminal. He sued out a habeas corpus on the ground that the subject of the refusal was exclusively cognizable by the Senate, and that therefore the statute was unconstitutional as a wrongful delegation by the Senate of its authority, and because to subject him to prosecution under the statute might submit him to double jeopardy; that is, leave him after punishment under the statute to be dealt with by the Senate as for contempt. After demonstrating the want of merit in the argument as to delegation of authority, the proposition was held to be unsound and the contention as to double jeopardy was also adversely disposed of on the ground of the distinction between the implied right to punish for contempt and the authority to provide by statute for pun-

ishment for wrongful acts and to prosecute under the same for a failure to testify, the court saying that "the two being *diverso intuito* and capable of standing together," they were susceptible of being separately exercised.

And light is thrown upon the right to imply legislative power to deal directly by way of contempt without criminal prosecution with acts the prevention of which is necessary to preserve legislative authority, by the decision of the Privy Council in *Kielley v. Carson*, 4 Moore, P. C. C. 63, 13 Eng. Reprint, 225, which was fully stated in *Kilbourn v. Thompson*, supra, but which we again state. The case was this: Kielley was adjudged by the House of Assembly of Newfoundland "guilty of contempt for having reproached a member "in coarse and threatening language" for words spoken in debate in the House. A warrant was issued and Kielley was arrested. When brought before the House he refused to apologize and indulged in further violent language toward the member and was committed. Having been discharged on habeas corpus proceedings, he brought an action for false imprisonment against the Speaker and other members of the House. As a justification the defendants pleaded that they had acted under the authority of the House. A demurrer to the plea was overruled and there was a judgment for the defendants. The appeal was twice heard by the Privy Council, the court on the second argument having been composed of the Lord Chancellor (Lyndhurst), Lords Brougham, Denman, Abinger, Cottenham, and Campbell, the Vice Chancellor (Shadwell), the Lord Chief Justice of the Common Pleas (Tindal), Mr. Justice Erskine, Lushington, and Baron Parke.

The opinion on reversal was written by Parke, B., who said:

"The main question raised by the pleadings, . . . was whether the House of Assembly had the power to arrest and bring before them, with a view to punishment, a person charged by one of its members with having used insolent language to him out of the doors of the House, in reference to his conduct as a member of the Assembly, —in other words, whether the House had the power, such as is possessed by both Houses of Parliament in England, to adjudicate upon a complaint of contempt or breach of privilege."

After pointing out that the power was not expressly granted to the local legislature by the Crown, it was said the question was "whether by law, the power of committing for a contempt, not in the presence of the Assembly, is incident to every local legislature."

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"The statute law on this subject being silent, the common law is to govern it; and what is the common law depends upon principle and precedent.

"Their Lordships see no reason to think that in the principle of the common law any other powers are given them than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment,—an act which, on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents." And after quoting the aphorism of the Roman law to the effect that the conferring of a given power carried with it by implication the right to do those things which were necessary to the carrying out of the power given, the opinion proceeded: "In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their legislative functions, they are justified in acting by the principle of the common law. But the power of punishing anyone for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions."

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There can be no doubt that the ruling in the case just stated upheld the existence of the implied power to punish for contempt as distinct from legislative authority and yet flowing from it. It thus becomes apparent that from a doctrinal point of view the English rule concerning legislative bodies generally came to be in exact accord with that which was recognized in *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242, as belonging to Congress; that is, that in virtue of the grant of legislative authority there would be a power implied to deal with contempt in so far as that authority was necessary to preserve and carry out the legislative authority given. While the doctrine of *Kielley v. Carson* was thus in substantive principle the same as that announced in *Anderson v. Dunn*, we must not be understood as accepting the application which

was made of the rule to the particular case there in question, since, as we shall hereafter have occasion to show, we think that the application was not consistent with the rule which the case announced, and would, if applied, unwarrantedly limit the implied power of Congress to deal with contempt.

What does this implied power embrace? is thus the question. In answering, it must be borne in mind that the power rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end, and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted.

These principles are plainly the result of what was decided in *Anderson v. Dunn*, supra, since in that case, in answering the question what was the rule by which the extent of the implied power of legislative assemblies to deal with contempt was controlled, it was declared to be "*the least possible power adequate to the end proposed*" (6 Wheat. 231, 5 L. ed. 248), which was but a form of stating that as it resulted from implication, and not from legislative will, the legislative will was powerless to extend it further than implication would justify. The concrete application of the definition and the principle upon which it rests were aptly illustrated in *Re Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677, where, because of the distinction existing between the two which was drawn, the implied power was decided not to come under the operation of a constitutional limitation applicable to a case resting upon the exercise of substantive legislative power.

Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation; that is, the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. And the essential nature of the power also makes clear the cogency and application of the two limitations which were expressly pointed out in *Anderson v. Dunn*, supra; that is, that the power, even when applied to subjects which justified its exercise, is limited to imprisonment, and such imprisonment may not be

extended beyond the session of the body in which the contempt occurred. Not only the adjudged cases, but congressional action in enacting legislation as well as in exerting the implied power, conclusively sustain the views just stated. Take, for instance, the statute referred to in *Re Chapman*, where, not at all interfering with the implied congressional power to deal with the refusal to give testimony in a matter where there was a right to exact it, the substantive power had been exerted to make such refusal a crime, the two being distinct the one from the other. So, also, when the difference between the judicial and legislative powers is considered and the divergent elements which, in the nature of things, enter into the determination of what is self-preservation in the two cases, the same result is established by the statutory provisions dealing with the judicial authority to summarily punish for contempt; that is, without resorting to the modes of trial required by constitutional limitations or otherwise for substantive offenses under the criminal law. Act of March 2, 1831 (4 Stat. at L. 487, chap. 99, Comp. Stat. 1913, § 1245). The legislative history of the exertion of the implied power to deal with contempt by the Senate or House of Representatives when viewed comprehensively from the beginning points to the distinction upon which the power rests, and sustains the limitations inhering in it which we have stated. The principal instances are mentioned in the margin,³ and they all, except two or three, deal with either physical obstruction of the legislative body in the discharge of its duties, or physical assault upon its members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel.

³ 1795, attempt to bribe members of the House; 1800, publication of criticism of the Senate; 1809, assault on a member of the House; 1818, attempt to bribe a member of the House; 1828, assault on the Secretary to the President in the Capitol; 1832, assault on a member of the House; 1835, assault on a member of the House; 1842, contumacious witness; 1857, contumacious witness; 1858, contumacious witness; 1859 contumacious witness; 1865, assault on a member of the House; 1866, assault on a clerk of a committee of the House; 1870, assault on a member of the House; 1871, contumacious witness; 1874, contumacious witness; 1876, contumacious witness; 1894, contumacious witness; 1913, assault on a member of the House.

In the two or three instances not embraced in the classes we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt, to be punished according to the orderly process of law, and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten; that is to say, the legislative right to exercise discretion was confounded with the want of judicial power to interfere with the legislative discretion when lawfully exerted. But these considerations are accidental and do not change the concrete result manifested by considering the subject from the beginning. Thus we have been able to discover no single instance where, in the exertion of the power to compel testimony, restraint was ever made to extend beyond the time when the witness should signify his willingness to testify, the penalty or punishment for the refusal remaining controlled by the general criminal law. So, again, we have been able to discover no instance, except the two or three above referred to, where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration. And this latter statement causes us to say, referring to *Kielley v. Carson*, 4 Moore, P. C. C. 63, 13 Eng. Reprint, 225, 7 Jur. 137, that where a particular act, because of its interference with the right of self-preservation, comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions, and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it. On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this

power the right to determine, in the use of legitimate and fair discretion, how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence; that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference.

It remains only to consider whether the acts which were dealt with in the case in hand were of such a character as to bring them within the implied power to deal with contempt; that is, the accessory power possessed to prevent the right to exert the powers given from being obstructed and virtually destroyed. That they were not would seem to be demonstrated by the fact that the contentions relied upon in the elaborate arguments at bar to sustain the authority were principally rested not upon such assumption, but upon the application and controlling force of the rule governing in the House of Commons. But aside from this, coming to test the question by a consideration of the conclusion upon which the contempt proceedings were based as expressed in the report of the select committee which we have previously quoted, and the action of the House of Representatives, based on it, there is room only for the conclusion that the contempt was deemed to result from the writing of the letter, not because of any obstruction to the performance of legislative duty resulting from the letter, or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind, or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the committee and of the House generally. But to state this situation is to demonstrate that the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties, and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject. But these considerations plainly serve to mark the broad boundary line which separates the limited implied power to deal with classes of acts as contempts for self-

preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts.

The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the government, express or implied, as contemplated by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers, manifested in state Constitutions even before the adoption of the Constitution of the United States, by which they substituted for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion, and yet, at the same time, not substantially interfere with the great guaranties and limitations concerning the exertion of the power to criminally punish,—a beneficent result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted.

It is suggested in argument that whatever be the general rule, it is here not applicable because the House was considering and its committee contemplating impeachment proceedings. The argument is irrelevant because we are of opinion that the premise upon which it rests is unfounded. But indulging in the assumption to the contrary, we think it is wholly without merit, as we see no reason for holding that if the situation suggested be assumed, it authorized a disregard of the plain purposes and objects of the Constitution as we have stated them. Besides, it must be apparent that the suggestion could not be accepted without the conclusion that, under the hypothesis stated, the implied power to deal with contempt as ancillary to the legislative power had been transformed into judicial authority and become subject to all the restrictions and limitations imposed by the Constitution upon that authority,—a conclusion which would frustrate and destroy the very purpose which the proposition is advanced to accomplish and would create a worse evil than that which the wisdom of the fathers corrected before the Constitution of the United States was adopted. How can this be escaped, since it is manifest that if the argument were to be sustained those things which, as pointed out in *Re Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677, were distinct and did not therefore the one frustrate the other,—the implied

legislative authority to compel the giving of testimony and the right criminally to punish for failure to do so,—would become one and the same and the exercise of one would therefore be the exertion of, and the exhausting of the right to resort to, the other. Again, accepting the proposition, by what process of reasoning could the conclusion be escaped that the right to exert implied authority by way of contempt proceedings in so far as essential to preserve legislative power would become itself an exertion of legislative power and thus at once be subject to the limitations as to modes of trial exacted by the guaranty of the Constitution on that subject? We repeat, out of abundance of precaution, we are called upon to consider not the legislative power of Congress to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends.

It follows from what we have said that the court below erred in refusing to grant the writ of habeas corpus, and its action must be and it is, therefore, reversed, and the case remanded with directions to discharge the relator from custody.

And it is so ordered.

(243 U. S. 617)

LOUISVILLE & NASHVILLE RAILROAD COMPANY and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, et al., Pliffs. in Err.,

v.

O. Y. LAYTON.

MASTER AND SERVANT—§11(1)—SAFETY APPLIANCES—AUTOMATIC COUPLERS—EMPLOYÉ NOT COUPLING OR UNCOUPLING CARS.

An interstate railway carrier is liable in damages to an employee injured in the discharge of his duty, regardless of the position such employee may have been in or the work which he may have been doing at the moment when he was injured, where the carrier's failure to obey the automatic coupler requirements of the Federal Safety Appliance Acts is the proximate cause of his injury. These statutes are not intended simply for the protection of employees going between the cars to couple or uncouple them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215, 255.]

[No. 840.]

Argued April 11, 1917. Decided April 30, 1917.

IN ERROR to the Supreme Court of the State of Georgia to review a judgment which affirmed a judgment of the Superior Court of Fulton County, in that state, in favor of plaintiff in a personal-injury action. Affirmed.

See same case below, 145 Ga. 886, 90 S. E. 53.

The facts are stated in the opinion.

Messrs. Sanders McDaniel, E. R. Black, P. H. Brewster, and H. C. Peebles for plaintiffs in error.

Mr. Marion Smith for defendant in error.

* Mr. Justice Clarke delivered the opinion of the court: *618

The plaintiff below was a switchman in the employ of the defendants when he suffered the injury for which he recovered the judgment which was affirmed by the supreme court of Georgia, and which is here for review on writ of error.

The facts essential to an understanding of the question presented for decision are as follows:

A train of many cars standing on a switch was separated by about two car lengths from five cars on the same track loaded with coal. An engine, pushing a stock car ahead of it, came into the switch, and failed in an attempt to couple to the five cars, but struck them with such force that, although the engine with the car attached stopped within half a car length, the five loaded cars were driven over the two intervening car lengths and struck so violently against the standing train that the plaintiff, who was on one of the five cars for the purpose of releasing the brakes, was thrown to the track, with the result that his right arm was crushed by the wheels and was amputated below the elbow.

The recovery in the case was on the first count of the petition, which alleges that the defendants were carriers of interstate commerce, and that they were negligent, among other things, in permitting the use of the car attached to the engine and of the car to which the attempt was made to couple it, without such cars being equipped with automatic couplers, which would couple by impact, as required by law, the claim being that if the cars had coupled when they came together, the five cars of coal would not have run down against the others, causing the shock which threw the plaintiff under the wheels.

The purpose of this allegation with respect to automatic couplers was to make applicable to the case the Georgia Employers' Lia-

bility Act, which provides that an injured employee shall not be held guilty of either contributory negligence or of having assumed the risk when the violation of any statute enacted for his safety contributed to his injury.

The defendants admit that they were interstate carriers of commerce, and that the plaintiff was in the performance of his duty when he was thrown from the car, as he claims, or fell, as the defendants claim, but they deny all allegations of negligence.

On this state of pleading and of fact the court charged the jury that before the plaintiff could recover on his allegation that the cars were not properly equipped with automatic couplers, "he must have shown to your satisfaction, by a preponderance of the evidence," either that the cars had never been equipped with proper couplers, or that, if they had been so equipped, they were in such condition that they would not couple automatically by impact, and that such failure to so equip them contributed to cause the injury.

Upon this charge of the court the verdict was against the defendant, and on it is based the only claim of error of sufficient substance to be noticed.

It is admitted by the defendants that the reference in the Georgia Employers' Liability Act to "any statute enacted for the safety of employees" is to the Federal Safety Appliance Act, and that the charge is a proper one if that act, as amended, is applicable to a switchman engaged as the plaintiff was when he was injured; but the claim is that it is not so applicable because it is intended only for the benefit of employees injured when between cars for the purpose of coupling or uncoupling them. This claim is based wholly upon the expression, "without the necessity of men going between the ends of cars," following the automatic coupler requirement of § 2 of the Act of 1893 [27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8606], and it is urged in argument that this case is ruled by *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, 59 L. ed. 1290, 35 Sup. Ct. Rep. 785. In that case, however, it was not claimed that the collision resulting in the injury complained of was proximately attributable to a violation of the Safety Appliance Acts, and therefore the claim made for it cannot be allowed.

The declared purpose of the Safety Appliance Act of 1893 (27 Stat. at L. chap. 196, p. 531, Comp. Stat. 1913, § 8605), and of the amendatory Acts of 1903 [32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613] and of 1910 [36 Stat. at L. 298,

chap. 160, Comp. Stat. 1913, § 8617], is "to promote the safety of employees . . . upon railroads, by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers . . . and for other purposes," and at the time the plaintiff was injured these acts made it unlawful for any carrier engaged in interstate commerce to use on its railroad any car not so equipped. *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; *Southern R. Co. v. Railroad Commission*, 236 U. S. 439, 59 L. ed. 661, 35 Sup. Ct. Rep. 304. By this legislation the qualified duty of the common law is expanded into an absolute duty with respect to car couplers, and if the defendant railroad companies used cars which did not comply with the standard thus prescribed, they violated the plain prohibition of the law, and there arose from that violation a liability to make compensation to any employee who was injured because of it. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 295, 52 L. ed. 1061, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. ed. 874, 36 Sup. Ct. Rep. 482; *Illinois C. R. Co. v. Williams*, 242 U. S. 462, 61 L. ed. 437, 37 Sup. Ct. Rep. 128.

• While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in, or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury to them when engaged in the discharge of duty. The jury found that the plaintiff's case came within this interpretation of the statute, and the judgment of the Supreme Court of Georgia must be affirmed.

(243 U. S. 607)

UNITED STATES, Plff. in Err.,

v.

JESSE T. MOREHEAD.

PERJURY ⚡7—OATH AUTHORIZED BY LAW—AFFIDAVIT—REGULATION OF LAND DEPARTMENT.

1. A charge of perjury may be based upon a valid regulation of the General Land Office requiring an affidavit, where the oath is taken before a competent tribunal, officer, or person.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 18-25.]

PUBLIC LANDS ⚡98 — DEPARTMENTAL REGULATION — AFFIDAVIT TO SOLDIERS' HOMESTEAD DECLARATORY STATEMENT.

2. A regulation requiring an affidavit to accompany a soldier's homestead declaratory statement which, when filed by himself or his agent, gives him a preferential right to acquire under the Homestead Law (U. S. Rev. Stat. §§ 2304-2309, Comp. Stat. 1913, §§ 4592-4594, 4602, 4603, 4605) the particular land selected, could validly be adopted by the Land Department in the exercise of its duty under U. S. Rev. Stat. §§ 161, 441, 453, 2478, Comp. Stat. §§ 235, 681, 699, 5120, to enforce the public land laws by appropriate regulations, notwithstanding the reference to "pre-emption cases" in § 2309 (Comp. Stat. 1913, § 4605), which provides that a soldier may as well by an agent as in person enter upon the homestead by filing a declaratory statement as in pre-emption cases, and the absence of any requirement, either by statute or by regulation, of an affidavit in proceedings under the pre-emption laws.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 290.]

PUBLIC LANDS ⚡98 — DEPARTMENTAL REGULATION—AFFIDAVIT—WHO MAY ADMINISTER OATH.

3. A departmental regulation that a soldiers' homestead declaratory statement, when filed by an agent, may be executed before any officer having a seal and authorized to administer oaths generally, is both appropriate and not inconsistent with the various congressional enactments which provide for the administering of oaths by registers and receivers, or by the clerks of courts or United States commissioners in the district in which the land is situated, or with the provision of U. S. Rev. Stat. § 2293, Comp. Stat. 1913, § 4545, relating to affidavits before the commanding officers of soldiers actually engaged in service.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 290.]

PERJURY ⚡9(2) — OATH AUTHORIZED BY LAW—AFFIDAVIT BEFORE STATE OFFICER.

4. An oath administered by a notary public or clerk of a state court in pursuance of a valid regulation of one of the departments of the Federal government, although without express authority from Congress, subjects the affiant to the penalty of the Federal statute against false swearing.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 29-35.]

[No. 685.]

Argued March 14, 1917. Decided April 30, 1917.

IN ERROR to the District Court of the United States for the District of Montana to review a judgment sustaining a demurrer to an indictment for conspiring against the United States by suborning perjury. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. Francis J. Kearful and S. W. Williams for plaintiff in error.

Mr. W. B. Sands for defendant in error.

* Mr. Justice Brandeis delivered the opinion of the court: *608

Morehead was indicted under § 37 of the Criminal Code [35 Stat. at L. 1096, chap. 321, Comp. Stat. 1913, § 10,201] for conspiring with others to commit an offense against the United States. The offense contemplated by the conspirators is subornation of perjury (Criminal Code, § 126) in connection with soldiers' declaratory statements, to be filed by defendant as agent, covering public lands under the Homestead Law. The perjury set forth in the indictment consists in false swearing before notaries public and clerks of state courts to declaratory statements. The parts of the statement alleged to be false are those which declare:

(1) That the claim is made for his [the applicant's] exclusive use and benefit, for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person. *609

(2) That the agent has no right or interest, direct or indirect, in the filing of such declaratory statement.

The district court sustained a demurrer on the ground that the indictment did not charge a crime, holding that there was no law which required affidavits to soldiers' declaratory statements; that the Land Department was not authorized to exact them; that consequently no law "authorizes an oath to be administered" to such affidavits; and, as perjury is possible only when an oath is authorized to be administered, the procuring of these false oaths could not be subornation of perjury, nor an agreement to secure them a conspiracy to suborn perjury. The case comes here on writ of error under the Criminal Appeals Act (March 2, 1907, chap 2564, 34 Stat. at L. 1246, Comp. Stat. 1913, § 1704).

The Homestead Law (Rev. Stat. §§ 2304-2309, Comp. Stat. 1913, §§ 4592-4594, 4602, 4603, 4605, embodying Act of June 8, 1872, chap. 338, 17 Stat. at L. 333) does not prescribe whether or not an affidavit shall accompany a soldier's declaratory statement. The affidavit is prescribed by a regulation

of the Commissioner of the General Land Office, promulgated with the approval of the Secretary of the Interior.¹ It is clear that a charge of perjury* may be based upon a valid regulation of the General Land Office requiring an affidavit if the oath be taken "before a competent tribunal, officer, or person." *United States v. Smull*, 236 U. S. 405, 59 L. ed. 641, 35 Sup. Ct. Rep. 349. The question obviously arising here is whether the law authorized the oath to be administered. Another question—whether it was administered by a competent tribunal, officer, or person—was treated by both parties as requiring decision. Assuming without specially determining the occasion for passing upon the second question, we proceed to consider both.

1. Whether an affidavit may be required to a soldier's homestead declaratory statement.

The Homestead Law² gives to every soldier who served* in the Army of the United States during the War of the Rebellion for ninety days, was honorably discharged and remained loyal to the government, the right, upon certain conditions, to enter upon 160 acres of the public land as a homestead and receive a patent therefor. To

comply with these conditions the applicant must make actual entry,³ settlement, and improvement; and he must, on applying to enter the land, make and file the affidavit, as provided in Rev. Stat. § 2290, Comp. Stat. 1913, § 4531, that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person. Furthermore, in order to obtain a certificate or patent, he must, under Rev. Stat. § 2291, Comp. Stat. 1913, § 4532, make proof of his residence for the full period, and an affidavit "that no part of such land has been alienated." The filing of a declaratory statement is not a necessary step in acquiring title to land. It relates to a privilege, akin to pre-emption, by which he may secure, prior to the entry under § 2290, Comp. Stat. 1913, § 4531, a preferential right to acquire, under the homestead law, the particular tract located on. The privilege is exercised by filing the declaratory statement with the register; and if exercised, lapses unless, within six months thereafter, the soldier makes entry and actually commences settlement and improvement. See *Re Hotaling*, 3 Land Dec. 17, 20; *Stephens v. Ray*, 5 Land Dec. 133,

¹ The material part of the Regulation of October 11, 1910 (39 Land Dec. 291, 294, 295), is as follows:

"The soldier's declaratory statement, if filed in person, must be accompanied by the prescribed evidence of military service and the oath of the person filing the same, stating his residence and postoffice address, and setting forth that the claim is made for his exclusive use and benefit for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person; . . .

"In case of filing a soldier's declaratory statement by agent, the oath must further declare the name and authority of the agent and the date of the power of attorney, or other instrument creating the agency, adding that the name of the agent was inserted therein before its execution. It should also state in terms that the agent has no right or interest, direct or indirect, in the filing of such declaratory statement.

"The agent must file (in addition to his power of attorney) his own oath to the effect that he has no interest, either present or prospective, direct or indirect, in the claim; that the same is filed for the sole benefit of the soldier, and that no arrangement has been made whereby said agent has been empowered at any future time to sell or relinquish such claim, either as agent or by filing an original relinquishment of the claimant.

"Where a soldier's declaratory statement is filed in person, the affidavit of the soldier or sailor must be sworn to before either the register or the receiver, or before a United States commissioner, or a United States

court commissioner, or judge, or clerk of a court of record in the county or land district in which the land sought is situated. Where a declaratory statement is filed by an agent, the agent's affidavit must be executed before one of the officers above mentioned, but the soldier's affidavit may be executed before any officer having a seal and authorized to administer oaths generally, and not necessarily within the land district in which the land is situated."

² Rev. Stat. § 2304, Comp. Stat. 1913, § 4592.

"Every private soldier . . . who has served in the Army of the United States during the recent rebellion . . . shall . . . be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres . . . subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead, and filing his declaratory statement, . . . to make his entry and commence his settlement and improvement."

³ The term "entry" is used in the statutes, regulations, and decisions in several senses; sometimes to designate the initiatory proceeding whereby an inchoate right or privilege is acquired; sometimes as referring to final entries or proof; sometimes as referring to the proceeding as a whole. *Dealy v. United States*, 152 U. S. 539, 545, 38 L. ed. 545, 547, 14 Sup. Ct. Rep. 680, 9 Am. Crim. Rep. 161; *Stearns v. United States*, 82 C. C. A. 48, 162 Fed. 900, 907; *United States v. Northern P. R. Co.* 204 Fed. 485.

134. To render this privilege readily available to soldiers living at a distance, authority is given (Rev. Stat. § 2309, Comp. Stat. 1913, § 4605)⁴ to "enter upon *the homestead by filing a declaratory statement," "as well by an agent as in person." Thus the soldier can be assured of the selection of an advantageous homestead before perfecting his plan for removing to his new home.

It is a matter of common knowledge that this special privilege, granted to facilitate the acquisition by soldiers of homesteads in grateful recognition of patriotic service, was soon perverted into an instrument of fraud. Soldiers' declaratory statements, acquired by so-called agents in large numbers, became the subject of extensive speculation. They were used as a means of pre-empting choice lands for a period of six

months with a view merely to selling relinquishments of locations to persons desiring to acquire public lands under the pre-emption or general homestead laws. (See *Re Gardner*, 1 Land Dec. 79.) To stay this abuse the General Land Office issued, on December 15, 1882, the circular concerning "Soldiers' Homestead Declaratory Statements" (1 Land Dec. 648),⁵ prescribing requirements* which have since remained in force and are embodied in substance in the regulation of October 11, 1910.

Defendant contends that this regulation, which has been enforced continuously for nearly thirty-five years, is invalid. Since the Land Department is expressly charged with the duty of enforcing the public land laws by appropriate regulations,⁶ and the regulation in question was* duly promulgated, the assertion of its invalidity must

⁴ Rev. Stat. § 2309:

"Every soldier, sailor, marine, officer, or other person coming within the provisions of section twenty-three hundred and four, may, as well by an agent as in person, enter upon such homestead by filing a declaratory statement, as in pre-emption cases; but such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfil all the requirements of law."

⁵ "Soldiers' Homestead Declaratory Statements.

"Circular.

"Commissioner McFarland to registers and receivers, December 15, 1882:

"In view of extensive frauds in the matter of declaratory statements of homestead applicants under §§ 2304 and 2309 of the Revised Statutes (Comp. Stat. 1913, §§ 4592, 4605), the privilege conferred by the filing of such claims having been made the occasion of barter and sale, without attempt on the part of the soldier to comply with the statute by making formal entry at the district office, and commencement of settlement upon the land within the prescribed period of six months, the following regulations are prescribed for the admission of such filings:

"1. Proof of qualification as an honorably discharged soldier must be furnished in accordance with existing regulations in case of entry by soldiers who make direct homestead application without availing themselves of the preliminary filing. Oath of the soldier, setting forth his residence and postoffice address, must accompany the filing, to the effect that the claim is made for his exclusive use and benefit, for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and it must also be shown by such oath that he has not theretofore either made a homestead entry or filed a declaratory statement under the homestead law.

"2. Where the declaratory statement is offered for filing by an agent under § 2309 (Comp. Stat. 1913, § 4605), the oath must further declare the name and authority of such agent, giving the date of the power of attorney or other instrument creating the agency, and also aver that the name was inserted therein before execution. It will be observed that with the filing of the declaratory statement the power of the agent, under the law, is at an end. He has thereafter no right or control with respect to the matter nor over the land selected, and has no authority to relinquish the claim or do any other act in the premises. The further declaration of the statute is express, that 'such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter to fulfil all the requirements of law.' Nevertheless, the oath of the soldier and the power of attorney should show that such is the understanding of the matter, and he should swear in terms that such agent has no right or interest direct or indirect in the filing of such declaratory statement."

⁶ Rev. Stat. § 441, Comp. Stat. 1913, § 681.

"The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: . . . The public lands, . . ."

Rev. Stat. § 453, Comp. Stat. 1913, § 699.

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, . . ."

Rev. Stat. § 161, Comp. Stat. 1913, § 235.

"The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and pres-

be predicated either upon its being inconsistent with the statutes or upon its being in itself unreasonable or inappropriate. That the requirement of the soldier's affidavit to the facts essential to the existence of any right of the applicant under the law is both reasonable and appropriate can scarcely be doubted. *United States v. Smull*, 236 U. S. 405, 411, 59 L. ed. 641, 643, 35 Sup. Ct. Rep. 349; *United States v. Bailey*, 9 Pet. 238, 255, 9 L. ed. 113, 120. But defendant urges that the regulation is inconsistent with the statute, in that it adds to the requirements of the statute still another condition to be performed before the soldier can acquire his homestead; and hence is legislation, not regulation. But the regulation does not add a new requirement in exacting the affidavit, as in *Williamson v. United States*, 207 U. S. 425, 458-462, 52 L. ed. 278, 294-297, 28 Sup. Ct. Rep. 163. It merely demands appropriate evidence that the proceeding is initiated—as the statute requires it must be throughout conducted—in good faith, for the single purpose of acquiring a homestead.

Great stress is laid upon the reference to "pre-emption cases" in Rev. Stat. § 2309, Comp. Stat. 1913, § 4605, which provides that the soldier "may as well by an agent as in person enter upon such homestead by filing a declaratory statement as in pre-emption cases." In proceedings under the pre-emption laws (Rev. Stat. §§ 2275, 2276, 2286, 2288, Comp. Stat. 1913, §§ 4860, 4861, 4869, 4535, repealed by Act* of March 3, 1891, chap. 561, 26 Stat. at L. 1095, Comp. Stat. 1913, § 5116), an affidavit was not required either by the statute or by regulation (see 10 Land Dec. 687); and it is said that it cannot, therefore, be required under the provisions for soldiers in the Homestead Law. But the reference in the latter statute carries no such implication. It was inserted for a different purpose. The general homestead law does not give the privilege of securing, in advance of formal entry, a preferential right to a particular location. That is, it gives no right to prior selection; and none accrues from prior occupation save such as is given by § 3 of the Act of May 14, 1880, chap. 89, 21 Stat. at L. 140, Comp. Stat. 1913, § 4538. Nor does the pre-emption

law give a privilege to acquire, *merely* by selection, a preferential right to a particular parcel of land. But under it, the person who actually "settles and improves" land may, in advance of entry under Rev. Stat. § 2262, acquire a preferential right over others, to the particular parcel, by filing with the register within thirty days thereafter (Rev. Stat. § 2264) "a written statement describing the land settled upon." To that "written statement" the "declaratory statement" provided for by the provision for soldiers in the Homestead Law may be likened; but the conditions under which it is filed are very dissimilar. The pre-emptor must personally, before "filing," have actually entered upon the land, must have commenced settlement and improvement,—acts which, in themselves, furnish evidence that the proceeding has been initiated in good faith. The soldier homesteader, on the other hand, need do nothing whatever to obtain a six months' preferential right save file the declaratory statement, and that may be done by an agent,—a situation calling for extrinsic evidence by affidavit of the applicant's good faith. Good reasons thus exist for a difference in requirements in the two classes of cases; but the power of the Land Department to require an affidavit to the declaratory statement even in pre-emption cases,⁷ as it did to declaratory* statements under* the Coal Land Law, seems not to have been questioned. (Rev. Stat. §§ 2348, 2349, Comp. Stat. 1913, §§ 4660, 4661; 1 Land Dec. 687, ¶¶ 28, 33.) The regulation calling for an affidavit to a soldier's declaratory statement under the Homestead Law, unlike that considered in *United States v. George*, 228 U. S. 14, 57 L. ed. 712, 33 Sup. Ct. Rep. 412, is thus a regulation entirely consistent with the statutory provisions; and being also appropriate, is valid.

2. Whether state officers are authorized to administer the oath.

The purpose of Congress in allowing filings to be made by an agent was to facilitate the acquisition of homesteads by soldiers living at a distance from the land to be settled on. To their declaratory statements the several statutes⁷ which provide for the administering of oaths by registers and receivers, or by the clerks of courts or

ervation of the records, papers, and property appertaining to it."

Rev. Stat. § 2478, Comp. Stat. 1913, § 5120.

"The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title [title 32—The Public Lands] not otherwise specially provided for."

⁷ Rev. Stat. §§ 2246, 2290, 2294, Comp. Stat. 1913, §§ 4494, 4531, 4546; Act of June 9, 1880, chap. 164, 21 Stat. at L. 169; Act of May 26, 1890, chap. 355, 26 Stat. at L. 121, Comp. Stat. 1913, § 4546; Act of March 11, 1902, chap. 182, 32 Stat. at L. 63, Comp. Stat. 1913, § 4546; Act of March 4, 1904, chap. 394, 33 Stat. at L. 59, Comp. Stat. 1913, § 4546.

United States commissioners in the district wherein the land is situated, are obviously not exclusively applicable, if applicable at all. And plainly the provision of Rev. Stat. § 2293, Comp. Stat. 1913, § 4545, relating to affidavits before the commanding officers of soldiers actually engaged in service, is inapplicable. The requirement of an affidavit to the declaratory statement, to be made by soldiers living elsewhere than in the land district, can be complied with only if an oath before some officer other than those specifically named in those statutes is recognized as being within the authority of law. It follows that, to carry out the duties imposed by law, the Land Department was called upon to make appropriate provision for the administering of oaths in such cases; and the provision that soldiers' declaratory statements, when filed by agent, "may be executed before any officer having a seal and authorized to administer oaths generally," is both appropriate and "not inconsistent with law." Ever since the decision in *United States v. Bailey*, 9 Pet. 233, 255, 9 L. ed. 113, 120, it has been held that an oath administered by a state magistrate, in pursuance of a valid regulation of one of the departments of the Federal government, though without express authority from Congress, subjects the affiant to the penalties of the Federal statute against false swearing. See *Caha v. United States*, 152 U. S. 211, 218, 38 L. ed. 415, 417, 14 Sup. Ct. Rep. 513.

The indictment charges a crime under the laws of the United States. Judgment of the District Court is reversed and the case is remanded for further proceedings in conformity with this opinion.

It is so ordered.

(243 U. S. 592)

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Plff. in Err.,

v.

C. A. STARBIRD, Administrator of the Estate of Adam Miller, Deceased. (No. 275.)

C. A. STARBIRD, Administrator of the Estate of Adam Miller, Deceased, Plff. in Err.,

v.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY. (No. 796.)

COURTS ⇨ 394(15)—ERROR TO STATE COURT—FEDERAL QUESTION—HOW RAISED AND DECIDED.

1. A right, the creation of a Federal statute, was especially set up or claimed, and decided against, within the meaning of the Judicial Code, § 237,¹ governing writs of error from the Federal Supreme Court

to state courts, where the action was one against the initial carrier of an interstate shipment to recover upon a through bill of lading for the negligence of the connecting carriers, as well as of itself, and was brought since the passage of the Carmack Amendment of June 29, 1906 (34 Stat. at L. 595, chap. 3591, § 7, pars. 11 and 12, Comp. Stat. 1913, § 8592), to the Act of February 4, 1887 (24 Stat. at L. 386, chap. 104), § 20, by which Congress took entire possession of the subject of the rights and liabilities growing out of contracts for interstate shipments, and the defendant carrier, though not specifically mentioning the Federal statute in its answer, did specifically plead a breach of the obligation under the bill of lading to report claims for damages to the terminal carrier in writing within thirty-six hours after the consignee had been notified of the arrival of the freight at the place of delivery, insisting that such obligation had not been complied with, and the state court, in deciding the case against the carrier, stated that a through bill of lading had been issued and would be controlling in the absence of special facts which it found as to the effect of verbal notice given to certain agents of the terminal carrier.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1064.]

CARRIERS ⇨ 159(2)—LIMITING LIABILITY—NOTICE OF CLAIM.

2. A stipulation in a through bill of lading for an interstate shipment of peaches that the carrier issuing the bill of lading shall not be held liable for damages unless a claim for damages is reported by the consignee in writing to the terminal carrier within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery is valid and not unreasonable.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 711-713.]

CARRIERS ⇨ 159(1)—LIMITING LIABILITY—NOTICE OF CLAIM.

3. Written notice within the time stipulated of an intention to make a claim for damages, without specifying the amount of the damages claimed, is a sufficient compliance with a stipulation in the through bill of lading for an interstate shipment of peaches that the carrier issuing the bill shall not be held liable for damages unless a claim for damages is reported by the consignee in writing to the terminal carrier within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 668-671, 700, 711.]

CARRIERS ⇨ 159(1)—LIMITING LIABILITY—NOTICE OF CLAIM—ACTUAL NOTICE.

4. The failure to comply with the requirement of a stipulation in a through bill of lading for an interstate shipment of fruit, conditioning the liability of the carrier issuing the bill of lading upon the report by the consignee of claims for damages to the terminal carrier in writing within thirty-six hours after such consignee

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

¹ Act March 3, 1911, c. 231, 35 Stat. 1156 (Comp. Stat. 1913, § 1214).

had been notified of the arrival of the freight at the place of delivery, was not excused, where the terminal carrier had a freight agent at the place of delivery in charge of the docks upon which the shipment was delivered, by virtue of the giving of verbal notice of the bad condition of the shipment to the terminal carrier's dock master, or because of the knowledge of such condition by longshoremen working on the docks.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 668-671, 700, 711.]

COURTS 394(15)—**ERROR TO STATE COURT**—**FEDERAL QUESTION**—**RIGHT UNDER FEDERAL STATUTE.**

5. A judgment of the highest court of a state, which, upon the ground of the validity of the stipulation in an interstate through bill of lading respecting the giving of notice of claims for damages, reversed in part a judgment in favor of the consignee in an action against the initial carrier to recover on such bill of lading for the negligence of connecting carriers as well as of itself, may be reviewed in the Federal Supreme Court on cross writ of error, where the consignee asserts that the provisions of the Act of June 29, 1906 (34 Stat. at L. 595, chap. 3591, § 7, pars. 11 and 12, Comp. Stat. 1913, § 8592), amendatory of the Act of February 4, 1887 (24 Stat. at L. 386, chap. 104), § 20, are violated by such stipulation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1064.]

[Nos. 275 and 796.]

Argued December 5 and 6, 1916. Decided April 30, 1917.

ON WRIT AND CROSS WRIT OF ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed in part and reversed in part a judgment of the Circuit Court of Crawford County, in that state, in favor of plaintiff in an action against a carrier to recover for the damage to a perishable shipment. Judgment reversed on writ of error sued out by the carrier, and affirmed on cross writ of error.

See same case below, 118 Ark. 485, 177 S. W. 912.

The facts are stated in the opinion.

Messrs. Thomas B. Pryor and Edward J. White for the St. Louis, Iron Mountain, & Southern Railway Company.

Messrs. Robert A. Rowe and Charles D. Folsom for C. A. Starbird.

*Mr. Justice Day delivered the opinion of the court:

A motion is made to dismiss the writ of error upon the ground that no Federal question was properly raised in the state court. The disposition of this motion requires a consideration of § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat.

1913, § 1214], which section*is in effect but a re-enactment of § 25 of the Judiciary Act of September 24, 1789 [1 Stat. at L. 85, chap. 20], and § 709 of the Revised Statutes of the United States.

This suit was brought by Miller, and revived by his administrator, to recover against the initial carrier, the St. Louis, Iron Mountain, & Southern Railway Company, for its negligence and that of connecting carriers in failing to properly refrigerate certain carloads of peaches, shipped from a point in Arkansas to the city of New York, over the lines of the initial and connecting carriers, and in the last-named city delivered upon the dock of the Pennsylvania Company, and found to be in a bad condition. Each shipment was interstate and upon a through bill of lading, the bill containing, among other things, a stipulation that the carrier should not be liable for damages unless claims for damages were reported to the delivering line within thirty-six hours after the consignee had been notified of the arrival of the freight at the place of delivery. In the answer filed in the case, making one of the issues upon which the case was tried and decided, the defendant set up this clause in the bill of lading and the failure of the plaintiff to comply with it.

Without now reciting other provisions of § 237, it is enough to say that a case is reviewable in this court where any title, right, privilege, or immunity is claimed under a statute of the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed by either party under such statute.

We have, therefore, to determine three propositions: (1) Was there a right involved which is the creation of a Federal statute? (2) Was it sufficiently set up and called to the attention of the state court so as to be "especially set up or claimed," within the meaning of the act? (3) Was the decision against the right set up or claimed under the Federal statute? If these requisites are complied with, the case is reviewable here.

*1. On June 29, 1906, Congress passed the so-called Hepburn Act (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8592), by § 7 of which it undertook to provide for the liability of carriers in interstate commerce, and to subject them, as to interstate shipments, to certain obligations which should supersede the varying requirements of the states through which interstate transportation might be conducted. The construction of this act came before this court in *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148, and upon full considera-

tion it was held that the effect of the Carmack Amendment was to supersede all legislation in the particular states, and to embrace the liability of the carrier in interstate transportation. It was there said that almost every detail of the subject had been completely covered, and that there could be no rational doubt that Congress intended to take possession of the subject and lay down rules and regulations upon which the parties might rely and have their rights determined by a uniform rule of obligation. Among other things, the act required that the initial carrier should issue a receipt or bill of lading whenever it received property for transportation from a point in one state to a point in another state, and the initial carrier was made liable, not only for the results of its own negligence, but also for loss, damage, or injury to the property occasioned by any common carrier, railroad, or transportation company to which the property should be delivered and over whose line or lines the property might pass; and it was provided that no contract, receipt, rule, or regulation should exempt such initial carrier from the liability imposed by the act.

As the shipment in this case was interstate, there can be no question that, since the decision in the Croninger Case, supra, the parties are held to the responsibilities imposed by the Federal law, to the exclusion of all other rules of obligation. Since the Carmack Amendment, the carrier in this case is liable only under the terms of that act of Congress, and the action against it to recover on a through bill of lading for the negligence of connecting carriers as well as of itself was founded on that Amendment. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 196, 55 L. ed. 167, 178, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164.

This principle has been so frequently recognized in the recent decisions of this court that it is only necessary to refer to some of them. In *Southern R. Co. v. Prescott*, 240 U. S. 632, 636, 639, 60 L. ed. 836, 838, 839, 36 Sup. Ct. Rep. 469, this court said:

"As the shipment was interstate, and the bill of lading was issued pursuant to the Federal act, the question whether the contract thus set forth had been discharged was necessarily a Federal question. . . . Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a Federal question. As it has often been said, the statutory provisions manifest the intention of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the

diverse requirements of state legislation and decisions."

In *Southern Exp. Co. v. Byers*, 240 U. S. 612, 614, 60 L. ed. 825, 827, L.R.A.1917A, 197, 36 Sup. Ct. Rep. 410, this court said:

"Manifestly, the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading, and common-law principles accepted and enforced by the Federal courts."

To the same effect, *Northern P. R. Co. v. Wall*, 241 U. S. 87, 91, 92, 60 L. ed. 905, 907, 908, 36 Sup. Ct. Rep. 493; *Georgia, F. & A. R. Co. v. Blish Mill Co.* 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. 1022, L.R.A.1917A, 265, 36 Sup. Ct. Rep. 555.

2. As to the part of § 237 which deals with rights of this character, it requires that the right, privilege, etc., must be especially set up or claimed in order to make a decision* of the state court a proper subject of examination by writ of error from this court.

It would be superfluous to review the many decisions in which this court has had occasion to consider the effect of this provision, which has been in the law ever since the passage of the Judiciary Act of 1789 in practically the terms in which it is now embodied in § 237.

It is manifest that the object of the provision is to require that the alleged right of a Federal character must in some way be drawn to the attention of the state court so that it may know, or, from the nature of the pleadings, be held to have known, that a Federal right was before it for adjudication.

The Carmack Amendment is a Federal statute regulating interstate commerce. It was passed under the power conferred by the Constitution upon Congress to regulate such commerce, and is applicable throughout the United States, and at once became the rule of law governing such shipments in all the courts of the country. *Claffin v. Houseman*, 93 U. S. 130, 136, 23 L. ed. 833, 838; *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 169.

Since the passage of the Carmack Amendment, the state court must be held to have known that interstate shipments were covered by a uniform Federal rule which required the issuance of a bill of lading, and that that bill of lading contained the entire contract upon which the responsibilities of the parties rested. This is the result not

only of our own holdings, but is universally held in the state courts.¹

* The Federal right is not required to be pleaded in any special or particular form. It is enough that it be relied upon and in a proper manner called to the attention of the court. Section 237 of the Judicial Code does not require that the statute creating the Federal right shall be especially set up. The courts take judicial notice of the statute. It is the right, privilege, or immunity of Federal origin which must be brought to the attention of the state court.

This question has been frequently dealt with in the decisions of this court; under the Judiciary Act of 1789 a case arose which required a consideration of § 25 and the requirements to be observed in order to bring a case within its provisions,—*Crowell v. Randell*, 10 Pet. 368, 9 L. ed. 458. In that case the requirements of the Judiciary Act and the former decisions of this court were reviewed by Mr. Justice Story. Dealing with this feature of the law, he said:

"That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis*; but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment."

* It is to be noticed, as to the manner of pleading a Federal right, that Mr. Justice Story observed that all that is essential is that it must appear by clear and necessary intendment to have been raised. When the answer in this case set up the requirement of the bill of lading upon which the suit was brought, and the failure to comply with it, that was all that was necessary to fairly challenge the attention of the state court to rights existing by virtue of a Federal statute as to carriers in interstate commerce.

In speaking of the necessity of especially setting up Federal rights under § 709 of

the Revised Statutes, now § 237 of the Judicial Code, this court said, in *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 67, 43 L. ed. 364, 368, 19 Sup. Ct. Rep. 97:

"But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court.

". . . In *Roby v. Colehour*, 146 U. S. 153, 159, 36 L. ed. 922, 924, 13 Sup. Ct. Rep. 47, it was said that 'our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right so set up and claimed was expressly denied, or that such was the necessary effect in law of the judgment.' 'If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient.' *Powell v. Brunswick County*, 150 U. S. 433, 440, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581."

In *Ferris v. Frohman*, 223 U. S. 424, 56 L. ed. 492, 32 Sup. Ct. Rep. 263, it appears that the complainant asserted a copyright in a certain play under the common law and defendant set up the copyright for the play, the performance of which was sought to be enjoined, which copyright was issued under the laws of the United States. The state court enjoined the defendant from using that copyright, and it was held that was sufficient to show that a Federal right had been set up and denied, as the copy-

¹ *St. Louis, I. M. & S. R. Co. v. Faulkner*, 111 Ark. 430, 164 S. W. 763; *Gamble-Robinson Commission Co. v. Union P. R. Co.* 262 Ill. 400, 104 N. E. 666, Ann. Cas. 1915B, 89; *Johnson Grain Co. v. Chicago, B. & Q. R. Co.* 177 Mo. App. 194, 164 S. W. 182; *Clingan v. Cleveland, C. C. & St. L. R. Co.* 184 Ill. App. 202; *Kansas City & M. R. Co. v. Oakley*, 115 Ark. 20, 170 S. W. 565; *Mitchell v. Atlantic Coast Line R. Co.* 15 Ga. App. 797, 84 S. E. 227; *Bailey v. Missouri P. R. Co.* 184 Mo. App. 457, 171 S. W. 44; *Spada v. Pennsylvania R. Co.* 86 N. J. L. 187, 92 Atl. 379; *St. Louis & S. F. R. Co. v. Bilby*, 35 Okla. 589, 130 Pac. 1089; *Missouri, K. & T. R. Co. v. Hailey*, — Tex. Civ. App. —, 156 S. W. 1119; *American Silver Mfg. Co.* 37 S. C.—30.

v. Wabash R. Co. 174 Mo. App. 184, 156 S. W. 830; *Wabash R. Co. v. Priddy*, 179 Ind. 483, 101 N. E. 724; *Atlantic Coast Line R. Co. v. Thomasville Live Stock Co.* 13 Ga. App. 102, 78 S. E. 1019; *Ford v. Chicago, R. I. & P. R. Co.* 123 Minn. 87, 143 N. W. 249; *Joseph v. Chicago, B. & Q. R. Co.* 175 Mo. App. 18, 157 S. W. 837; *Barstow v. New York, N. H. & H. R. Co.* 158 App. Div. 665, 143 N. Y. Supp. 983; *Missouri, K. & T. R. Co. v. Walston*, 37 Okla. 517, 133 Pac. 42; *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717; *Texas & P. R. Co. v. Langbehn*, — Tex. Civ. App. —, 158 S. W. 244; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 153 Ky. 730, 45 L.R.A. (N.S.) 529, 156 S. W. 400.

right of the defendant was derived under the Federal law. That the controversy raised a Federal question was held by this court and the contrary contention disposed of in the following language:

"The defendants in error contest the jurisdiction of this court upon the ground that the bill was based entirely upon a common-law right of property, and insist that the upholding of this right by the state court raises no Federal question. But the complainants sued, not simply to maintain their common-law right in the original play, but, by virtue of it, to prevent the defendant from producing the adapted play which he had copyrighted under the laws of the United States. They challenged a right which the copyright, if sustainable, secured. Rev. Stat. § 4952. It was necessary for them to make the challenge, for they could not succeed unless this right were denied. Ferris stood upon the copyright. That it had been obtained was alleged in the bill, was averred in the answer, and was found by the court. The fact that the court reached its conclusion in favor of the complainants by a consideration, on common-law principles, of their property in the original play, does not alter the effect of the decision. By the decree Ferris was permanently enjoined 'from in any manner using, . . . selling, producing, or performing . . . the said defendant's copyrighted play hereinbefore referred to for any purpose.' The decision thus denied to him a Federal right specially set up and claimed within the meaning of § 709 of the Revised Statutes of the United States. This court, therefore, has jurisdiction. *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. *561, 580, 581, 50 L. ed. 596, 604, 605, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *McGuire v. Massachusetts*, 3 Wall. 382, 385, 18 L. ed. 164, 165; *Anderson v. Carkins*, 135 U. S. 483, 486, 34 L. ed. 272, 274, 10 Sup. Ct. Rep. 905; *Shively v. Bowlby*, 152 U. S. 1, 9, 38 L. ed. 331, 335, 14 Sup. Ct. Rep. 548; *Northern P. R. Co. v. Colburn*, 164 U. S. 383, 385, 386, 41 L. ed. 479, 480, 17 Sup. Ct. Rep. 98; *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 67, 68, 43 L. ed. 364, 368, 369, 19 Sup. Ct. Rep. 97."

In *Creswill v. Grand Lodge*, K. P. 225 U. S. 246, 258, 56 L. ed. 1074, 1078, 32 Sup. Ct. Rep. 822, the defendants were enjoined from using their corporate name, and it was held that, as this right or privilege was derived under a statute of the United States, authorizing the incorporation, the case was reviewable here under § 237 of the Judicial Code.

In *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858, where a suit was brought

to recover for a death occurring while plaintiff's intestate was engaged in interstate commerce, it was held that the question of the amount of evidence necessary to establish a liability was inherently of a Federal character, and that this court might review the decision of the state court for that reason.

3. The other requisite essential to bring the case within § 237 of the Judicial Code is that the alleged Federal right must be denied. It has never been required that a Federal right must be denied in terms, but it has been uniformly held that it is sufficient if the state court necessarily denied it in the judgment rendered. If the plaintiff, in bringing this suit to recover against the initial carrier, not only for its own negligence, but for that of the intervening carriers in the failure to care for and deliver the several cars of peaches, had said in terms that the suit was thus brought upon a through bill of lading because of the Federal statute giving the right to thus prosecute the action, no one would doubt that the Federal question was brought to the attention of the state court; when the plaintiff set forth facts which necessarily showed that a suit could only be maintained because of rights given under the Carmack Amendment, upon a bill of lading required by that act, it was unnecessary to further label the cause of action by specific reference to the Federal statute. *Jones Nat. Bank v. Yates*, 240 U. S. 541, 550, 551, 60 L. ed. 788, 796, 797, 36 Sup. Ct. Rep. 429. So, when the defendant set up the breach of the through bill of lading, and insisted that it had not been complied with, he would have made his case no stronger for the purposes of review here had specific reference been made to the Federal statute which made this bill of lading the sole rule of obligation between the parties.

This record presented a suit which showed that it was necessarily brought under rights conferred by a Federal act; the defendant specifically pleaded the failure to keep the obligation of the contract whose force was binding by virtue of such act; and the state court, in stating in its decision that this bill of lading had been issued, and would be controlling in the absence of special facts which it found as to the effect of verbal notice given to certain agents of the Pennsylvania Company in New York, necessarily denied the contention of Federal right made by the defendant that the provision of the bill of lading was conclusive of the rights of the parties in this case, and required written notice within thirty-six hours after notice to the consignee of the delivery of the goods.

For these reasons the case is properly reviewable here.

The stipulation reads:

"Claims for damages must be reported by consignee, in writing, to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice is not there given, neither this company nor any of the connecting or intermediate carriers shall be liable."

*602 Five of the cars arrived at Jersey City and were lightered over to Pier 29 in the evening, where they were opened and unloaded by the longshoremen of the Pennsylvania Company. The record shows that the course of business at the dock where these peaches were delivered is: At *midnight a bulletin is put up showing the car numbers and consignees. At 1 o'clock in the morning the dock is opened to the dealers, usually present in large numbers, who then go upon it and find their shipments. Miller testified that he had to get trucks to take the peaches to his store, and then had to get extra men to sort and repack them so that they could be sold the following day, and that he could not tell within two or three days and until his bookkeeper had figured up what was going to be lost on each car, what the amount of the damage was, and in some cases it would be three or four or five days after the car arrived before he knew.

Miller further testified that, by reason of a warning from the Health Department that it would destroy ensuing shipments of fruit if they arrived in as bad condition as those in preceding cars, he had the railroad company, upon the arrival of the other five cars in Jersey City, unload them and take the peaches to the Merchants Refrigerating Company's plant, where he had them sorted and repacked and then loaded on cars and taken over to Pier 29 for sale. He testified that he was notified of the cars' arrival and went over to the Refrigerating Company; that he put a lot of men at work sorting and repacking the peaches; that it would take from two to four days to do this and another day to put them on board the cars and get them over to Pier 29 and sold, and it would be another day before the reports of sale could be made up.

The state court held that the stipulation, in view of the perishable character of these shipments, was a reasonable one, but as there was proof in the case to show the knowledge of the superintendent of the dock of the Pennsylvania Company, where delivery was made, as to five cars of peaches, that as to such cars the necessity of notice was dispensed with, notwithstanding the requirement of the bill of lading. As to

the other cars involved in the cross writ of error, Case No. 796, the court held that the only *knowledge of the condition of the peaches was that of longshoremen working on the dock, and not under duty to inspect the fruit, and that as to such cars the action must fail.

Stipulations of this character have not infrequently been inserted in bills of lading, and, where reasonable in their terms, have been sustained by this court. *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556; *The Queen of the Pacific*, 180 U. S. 49, 45 L. ed. 419, 21 Sup. Ct. Rep. 278. Whether such stipulations are reasonable or not depends on the circumstances of each case. *Pennsylvania Co. v. Shearer*, 75 Ohio St. 249, 116 Am. St. Rep. 730, 79 N. E. 431, 9 Ann. Cas. 15. We agree with the supreme court of Arkansas that, in view of the highly perishable nature of this shipment and the necessity of giving notice promptly in order that the carrier might have an opportunity to examine the same and determine the nature and extent of the injury thereto before the fruit was sold or destroyed, the stipulation requiring notice of such intention within the time named in the bill was not unreasonable. What constitutes reasonable time in which notice may be required must depend on the nature of the freight; and, if such notice is to be of service in cases like the present, it must be given promptly. In *Northern P. R. Co. v. Wall*, 241 U. S. 87, 91, 92, 60 L. ed. 905, 907, 908, 36 Sup. Ct. Rep. 493, this court dealt with the requirement of a bill of lading that the shipper must, as a condition precedent to his right of recovery for injury to cattle in transit, give notice in writing to some officer or agent of the initial carrier before the cattle were removed from the place of destination, and held that such requirement must be complied with by giving notice to the agent of the delivering carrier, as the Carmack Amendment makes such carrier for this purpose the agent of the initial carrier. And see *Chesapeake & O. R. Co. v. McLaughlin*, 242 U. S. 142, 61 L. ed. 207, 37 Sup. Ct. Rep. 40. The Carmack Amendment requires the receiving carrier to issue a through bill of lading, and makes that bill of lading the contract of shipment, and the initial carrier is made liable for injuries in *the course of transit over connecting lines. The requirement that notice in writing of a claim for damages shall be given in such cases to the delivering carrier, who is the agent of the initial carrier for the purpose of completing the shipment, is but reasonable. In *Georgia, F. & A. R. Co. v. Blish Mill*, Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541, it was held that a stipulation of this kind was com- *604

plied with when the notice in writing was given by telegram within the time named in the bill of lading.

It is not difficult for the consignee to comply with a requirement of this kind, and give notice in writing to the agent of the delivering carrier. Such notice puts in permanent form the evidence of an intention to claim damages, and will serve to call the attention of the carrier to the condition of the freight, and enable it to make such investigation as the facts of the case require while there is opportunity so to do.

In this case no attempt was made to give such notice in writing to the agent of the delivering carrier. The record shows the delivering carrier had a freight agent at the place of delivery in charge of the docks upon which the peaches were delivered, and he testifies without contradiction that no such notice was given to him; that he was acquainted with Adam Miller, the consignee, a commission merchant in New York city; and that he never heard of any claim for damages until after the beginning of the present suit. The fact that the peaches were greatly depreciated was known to the consignee very shortly after arrival and within sufficient time to have enabled him to give notice in writing within the time fixed of his intention to claim damages.

It is true that the record contains testimony tending to show that it would take more than thirty-six hours to separate the good peaches from the bad, and to re-crate and sell the good ones. But the bill of lading in this case only requires that "claims for damages must be reported by the consignee, in writing, to the delivering line" within the time named. This bill of lading contained no stipulation requiring a specific claim to be filed within thirty-six hours, fixing the amount of damages to be claimed. It was entirely consistent with this requirement, on discovery of the bad condition of the peaches, to have given notice within the time stipulated of the intention to make a claim for damages, although the exact amount of the claim might not have been ascertained. This would have given an opportunity for the delivering carrier to make the examination which it was the principal purpose of the stipulation to afford. *Northern P. R. Co. v. Wall*, supra; *St. Louis, & S. F. R. Co. v. Keller*, 90 Ark. 308, 313, 119 S. W. 254, 21 Am. Neg. Rep. 522. As was said in the *Keller* Case: "The contract of shipment in this case specifically provided that, before a recovery could be had, a notice in writing must be given of loss or damage within thirty hours after the arrival of the peaches at destination and their delivery; that is to say, a notice of the intention to claim damages must be so

given. And in this case such notice was not given." Compliance with the requirement of the bill of lading in this respect would leave a right of recovery within the period named by the Statute of Limitations if the shipper has a good cause of action. *Pennsylvania Co. v. Shearer*, 75 Ohio St. 254, 116 Am. St. Rep. 730, 79 N. E. 431, 9 Ann. Cas. 15, supra.

We find nothing unreasonable in the stipulation concerning notice, and there was no attempt made to comply with it. We therefore think the supreme court of Arkansas erred in holding that verbal notice to the dockmaster of the condition of the peaches was a compliance with the terms of the contract.

We may note that this case arose before the passage of the Act of March 4, 1915 (38 Stat. at L. 1196, chap. 176), regulating, among other things, this feature of a bill of lading issued under the Carmack Amendment.

On cross writ of error, No. 796, a reversal is sought of the judgment of the Supreme Court of Arkansas as to the five cars where the damaged condition of the peaches was shown to be known to the longshoremen. This cross writ involves the liability of the carrier under the bill of lading, and it is assigned for error that the stipulation in question violates the act of Congress known as the Hepburn Act and the Carmack Amendment, and there are other reasons assigned for the alleged invalidity of the stipulation in the bill of lading. This court has jurisdiction upon the cross writ. As to these cars, we think the conclusion reached by the Supreme Court of Arkansas was a correct one, and upon the cross writ of error the judgment is affirmed. As to No. 275, the writ sued out by the railroad company, the judgment of the Supreme Court of Arkansas is reversed, and the cause remanded to that court for further proceedings not inconsistent with the opinion of this court.

(243 U. S. 574)

PENNSYLVANIA RAILROAD COMPANY,
Plff. in Err.,
v.
OLIVIT BROTHERS.

COURTS ⇐394(15)—ERROR TO STATE COURT
—FRIVOLOUS FEDERAL QUESTION.

1. The contention that the owner of the shipment, or someone shown to be duly authorized to act for him in a way that would render any judgment recovered in the action against the carrier *res judicata* in any other action, is what was meant by the words "lawful holder" in the provisions of the Carmack Amendment of June 29, 1906 (34 Stat. at L. 595, chap. 3591, § 7, pars. 11

and 12, Comp. Stat. 1913, § 8592), to the Act of February 4, 1887 (24 Stat. at L. 386, chap. 104), § 20, that any common carrier receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, is not so frivolous as not to serve as the basis of a writ of error from the Federal Supreme Court to a state court to review a judgment rejecting such contention.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1064.]

CARRIERS ⚡76—**LIABILITY FOR DAMAGE—**
CARMACK AMENDMENT—"LAWFUL HOLD-
ER."

2. The words "lawful holder," as used in the provision of the Carmack Amendment of June 29, 1906 (34 Stat. at L. 595, chap. 3591, § 7, pars. 11 and 12, Comp. Stat. 1913, § 8592), to the Act of February 4, 1887 (24 Stat. at L. 386, chap. 104), § 20, that any common carrier receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, cannot be said to mean only the owner of the shipment or someone shown to be duly authorized to act for him in such a way as to render any judgment recovered in the action against the carrier res judicata in any other action, although by § 8 of the earlier act a carrier is made liable "to the person or persons injured" in consequence of any violation of the act, since to adopt this view would permit the general purpose of the latter section to control the purpose of the amendment, which is special and definitely expresses the lawful holder of the bill of lading to be the person to whom the carrier shall be liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 256-271, 363.

For other definitions, see Words and Phrases, Lawful Holder.]

TRIAL ⚡296(7)—**ERROR IN INSTRUCTION**
CURED BY OTHER INSTRUCTION.

3. Error, if any, in the ruling of the trial court in an action against a carrier for damages caused by delay in transporting an interstate shipment of perishable freight, that merely proving an accumulation of freight or a strike did not shift the burden of proof, but that, to complete its defense under strike and accumulation of freight clauses in the bill of lading, the carrier must show that such strike or accumulation of freight caused the delay, is not prejudicial where the jury were otherwise carefully instructed that the carrier had proved a cause beyond its control, i. e., a strike, and that if no negligence on its part was shown it was not liable, and that the burden of proving such negligence was upon the plaintiff, and a like instruction was given as to any cause beyond the carrier's control, including an accumulation of freight.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 710.]

CARRIERS ⚡32(1) — **DELAY IN DELIVERY**
—RECOVERY OF FREIGHT PAID—REBATES.

4. The recovery, as a part of the damages caused by a delay in transporting an

interstate shipment of perishable freight, of the freight paid upon delivery at destination, is properly allowed, notwithstanding the prohibitions of the Interstate Commerce Act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), against deviations from the filed tariffs and schedules, and against rebates and undue preferences and discriminations, —especially where the bills of lading require damages to be computed upon the basis of the value of the property at the place and time of shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 83.]

[No. 577.]

Argued April 9 and 10, 1917. Decided April 30, 1917.

IN ERROR to the Supreme Court of the State of New Jersey to review a judgment affirmed by the Court of Errors and Appeals, of that state, in favor of plaintiff in an action against a carrier to recover damages for injury to interstate shipments of perishable freight. Affirmed.

See same case below, 88 N. J. L. 376, 96 Atl. 589.

The facts are stated in the opinion.

Messrs. Frederic D. McKenney, John Spalding Flannery, Albert C. Wall, and John A. Hartpence for plaintiff in error.

Messrs. Edward P. Stout and George S. Hobart for defendant in error.

*Mr. Justice McKenna delivered the opinion of the court:

This is a consolidation of actions, each action expressed in a number of counts, and each count praying for the recovery of the sum of \$500 for a carload of watermelons received, as it is alleged, and accepted by the railroad company to be transported and delivered within a reasonable time to plaintiff at Jersey City, New Jersey, and alleging that by reason of the failure so to transport and deliver, a large number of the melons were wholly lost and the remainder delivered in a bad and damaged condition.

The car numbers are given, the places of receipt, all of which were in North Carolina, and the dates, all between July 26 and August 2, 1912, both dates inclusive.

The answers of defendant denied the allegations of the complaint and set up, besides, the following defenses: If the property came into the hands of defendant for the purpose of transportation, it did so as to each and every count of the complaint under the terms and conditions of a certain bill of lading issued to plaintiff by the initial carrier of the property, pursuant to the provisions of the Interstate Commerce Act, constituting an express agreement whereby the defendant was to be relieved from any

and all liability for damage to the property resulting from delay in transportation and delivery if the delay was caused by (a) a strike or strikes among defendant's employees; (b) an accumulation of freight at any point; (c) or by any other cause or causes over which defendant had no control.

It is alleged that a strike did take place among defendant's employees and continued from July 9, 1912, to the 21st of that month, which strike was the cause of the alleged delay; also that an accumulation of freight did occur at Jersey City, which continued from July 9 to August 15 and beyond.

It is further alleged as a defense that no claim for the loss or damage to the property was made in writing, as required by the respective bills of lading of defendant at the point of delivery of the property within ten days after its delivery, or after due time for its delivery to plaintiff,* though it was agreed between plaintiff and defendant that such claim should be made at the time, place, and in the manner mentioned.

Nor was there any claim for such loss or damage made in writing to defendant at the point of delivery or point of origin within four months after the delivery of the property, or after a reasonable time for delivery, though it was expressly agreed that such claim should be made at the time, place, and in the manner mentioned, and, if not so made, defendant should not be liable.

It will be observed, therefore, that the basis of the action is that certain carloads of watermelons were received for shipment by defendant at certain places in North Carolina for transportation to and delivery at Jersey City, New Jersey, and that defendant failed to transport and deliver the same within a reasonable time, in consequence of which a large number of the melons were lost and the others delivered in a bad condition.

In point of fact the melons were not delivered to defendant in North Carolina, but in such state to a carrier with which defendant had connections, and were delivered to defendant at Edgemoor, Delaware, to be transported from there to Jersey City, and were so transported.

The melons were transported on through bills of lading issued by the initial carrier, which contained the stipulations upon which the defenses are based, to wit: (1) That the delay in transportation and delivery was caused by a strike, accompanied by demonstrations of violence over which defendant had no control and against which it could not contend; (2) that there was a congestion of freight, due to causes beyond its control; and (3) that claims for damages were not made within the time required by

the bills of lading,—that is, within ten days in some cases, thirty days in others, and four months in others.

The ultimate basis of these defenses is the Carmack* Amendment to the Interstate Commerce Act. What this amendment requires of shipper and carrier becomes the question in the case.

The case involves, as we have said, a number of actions tried together and submitted to one jury. Plaintiff was plaintiff in all of them and obtained judgment which was affirmed by the court of errors and appeals on the authority of another case of like kind.

There was a stipulation which concentrated the issues and removed from controversy the amounts involved. For instance, as to the latter it was stipulated that the value of the melons at the time and place of shipment was \$13,465, and that they were sold at the place of delivery for \$8,895, being the best price which could be obtained for them, owing to their damaged condition. And it was further stipulated that the freight charges paid by plaintiff amounted to the sum of \$5,484.59.

As to the other elements, it was stipulated that the melons were received and accepted by defendant at Edgemoor, Delaware, for transportation to Jersey City, New Jersey, in accordance with the bills of lading; that the usual and customary time for transportation was about seven hours, under the most favorable circumstances; that plaintiff was, at the time of bringing the actions, and is now, the lawful holder of the bills of lading; that the melons were received at Edgemoor by defendant in apparently good order, but were in a damaged condition when delivered to plaintiff at defendant's delivery yard at Jersey City, and that claims for damages were duly made in writing, as required by the bills of lading.

The cases are designated as the "64-count case," the "13-count case," and the "11-count case." All of the bills of lading in the "64-count case," one in the "13-count case," and four in the "11-count case," contain a provision exempting the carrier from liability for loss or damage resulting 'from riots or strikes.' Twelve of the* bills of lading in the "13-count case" and seven in the "11-count case" provide that the carriers should "not be liable for any injury to or decay of fruits or vegetables, or other perishable freight due to detention or delay occasioned by an accumulation of freight at any point . . . or to any other causes over which the carriers have no control." And there is difference in times of demands.

A motion is made to dismiss on the ground that no Federal question appears in the record, or alternatively, if one ap-

pears, it is without merit. In support of the contentions it is said the questions in the case are (1) whether, it being stipulated that plaintiff was the holder of the bills of lading, it was the owner of the melons at the time the shipments were made; (2) whether there was any evidence of negligence of defendant which should have been submitted to the jury; and (3) whether plaintiff was entitled to recover the freight paid by it.

The first question involves the Carmack Amendment; and, considering it, the court of errors and appeals decided that "any lawful holder of a bill of lading issued by the initial carrier pursuant to the Carmack Amendment . . . upon receiving property for interstate transportation, may maintain an action for any loss, damage, or injury to such property caused by any connecting carrier to whom the goods are delivered." [88 N. J. L. 235, 96 Atl. 588.] Citing *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148.

We are not prepared to say that a contest of this view is frivolous, and the motion to dismiss is denied. Besides, it is contended that the shipments having been in interstate commerce, they are subject to and governed by the Interstate Commerce Act.

Coming to the merits of the question, however, we concur with the court of errors and appeals in its construction of the Carmack Amendment. It provides: "That any common carrier . . . receiving property ²² for transportation from a point in one state ²³ to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the *lawful holder* [italics ours] thereof for any loss, damage, or injury to such property caused by it. . . ." [34 Stat. at L. 595, chap. 3951, Comp. Stat. 1913, § 8592.]

The crucial words are "lawful holder." Defendant contends that they mean "the owner or someone shown to be duly authorized to act for him in a way that would render any judgment recovered in such an action against the carrier res adjudicata in any other action." And § 8 of the Interstate Commerce Act is referred to as fortifying such view. It provides that "such common carrier shall be liable to the person or persons injured" in consequence of any violations of the act.¹

To accept this view would make § 8 contradict the Carmack Amendment (§ 20), it having only a general purpose, whereas the purpose of the amendment is special and definitely expresses the lawful holder of the bill of lading to be the person to whom the carrier shall be liable "for any loss, damage, or injury" to property caused by it. *Adams Exp. Co. v. Croninger*, supra.

The next contention of defendant is that there was error in applying the burden of proof upon the motion to direct a verdict for defendant.

The grounds of the contention urged at the trial and now repeated are that, by certain of the bills of lading, the carrier is relieved from liability in case of a strike, by certain others in case of delays occasioned by causes beyond its control, and by others in case of an accumulation of freight proved to be a matter beyond the control of the carrier. And these causes having been proved, it is contended the carriers were brought within the protection of the stipulation, and it became incumbent upon plaintiff to show that defendant, in one way or another, failed "to handle the situation at that time in a way which was free from negligence." It was and is contended that the whole issue was shifted "from the general allegation of negligence to the allegation that the injury was caused because the defendant failed to perform the duty which it was obliged to perform under the law." Counsel concede that the whole question was whether, when the proof was that "there was the excepting cause," defendant did what it "should have done to meet the situation;" and the burden was upon the plaintiff to show that the carrier did not do what it "ought to have done."

The court rejected the contention. It replied that merely proving an accumulation of freight or a strike did not shift the burden of proof, but that to complete its defense the carrier must show that the strike or the accumulation of freight caused the delay in executing its contract to deliver the property.

If we should grant that the ruling was technically erroneous, its effect in the case can hardly be estimated, in view of the instructions of the court to the jury, entirely considered. They are too long to quote, but we may say of them that they were very

¹ "Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of

damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." 24 Stat. at L. 382, chap. 104, Comp. Stat. 1913, § 8572.

carefully expressed to give the jury the elements of decision.

The court told the jury that defendant had proved a cause beyond its control; that is, a strike; and, at the request of defendant, further instructed that if no negligence on the defendant's part was shown, defendant was not liable, and that the burden of proving such negligence was upon the plaintiff. A like instruction was given as to any cause beyond defendant's control, including an "accumulation of freight, if reasonable care was exercised by defendant to relieve the situation, that negligence was not to be presumed, but must be affirmatively proved; and that the burden of proving it was upon plaintiff. "The question is," the court said, "whether or not, in the light of what occurred over there, the defendant in this case has been shown by the greater weight of the evidence to have been negligent in the forwarding and the delivery of this freight. If it has been, why these plaintiffs are entitled to recover and to have you assess their damages, unless some of these other defenses have been made out by the greater weight of the evidence. If the defendant has not been shown to have been negligent in the particular indicated, why, then, manifestly, the defendant is not responsible, and the verdict in all the cases where these rules apply would have to be for the defendant."

Defendant, however, contended that there was not sufficient evidence of negligence to justify the submission of the case to the jury. Counsel, in attempted support of the contention, select certain elements in the case, ignoring others and their probative value. That is, counsel ignore the fact, of which there was evidence, that the melons were received for shipment after the strike was over, and the fact, of which there was evidence, that the delay in delivery was caused by the use by defendant of tracks where melons were usually delivered for the delivery of peaches, usually delivered elsewhere, to the exclusion of melons, which were placed in storage tracks at the "meadows."

The fourth contention is that plaintiff should not recover as part of its damages the freight paid upon delivery at destination.

The contention is rested upon the prohibition of the Interstate Commerce Act against deviation from the filed tariffs and schedules and against rebates and undue preferences and discriminations. It is not asserted in the present case that there was an evasion of the statute or an attempt to evade, but that the possibility of such result makes the recovery of freight illegal. It is urged, besides, that the melons were carried to

destination and were there sold by plaintiff or on its account, and that freight thereby accrued and was properly paid. For which 2 Hutchinson on Carriers, 3d ed. § 802, is cited. But the cited authority shows that to be the rule when the loss or damage results from no fault or negligence of the carrier. And, besides, to the contentions the plaintiff opposes the terms of the bills of lading, they providing that the amount of loss or damage for which a carrier is liable "shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if paid) at the place and time of shipment. . . ."

Some of the bills of lading do not contain this provision, but it was agreed at the trial that the proper measure of damages was to be computed upon the basis of the value of the property at the place and time of shipment and that such measure should be read into all of the bills of lading. As plaintiff further says, to recover the damages sustained by it, based upon this value, plaintiff must receive from defendant the difference between this value and the proceeds of the sale, and the freight paid. In this we concur, and therefore there was no error in including in the recovery such freight. *Shea v. Minneapolis, St. P. & S. Ste. M. R. Co.* 63 Minn. 228, 65 N. W. 458; *Davis v. New York, O. & W. R. Co.* 70 Minn. 37, 44, 72 N. W. 823; *Horne v. Missouri P. R. Co.* 70 Mo. App. 285, 294; *Tibbits v. Rock Island & P. R. Co.* 49 Ill. App. 567, 572. The plaintiff was no more than made whole.

Affirmed.

(243 U. S. 587)

PENNSYLVANIA RAILROAD COMPANY,
Plff. in Err.,
v.

ISAAC W. CARR and Fannie G. Estes,
Partners, Doing Business as Isaac W.
Carr & Company.

This case is governed by the decision in *Pennsylvania R. Co. v. Olivit Brothers*, ante, 468.

[No. 578.]

Argued April 9 and 10, 1917. Decided April 30, 1917.

IN ERROR to the Supreme Court of the State of New Jersey to review a judgment affirmed by the Court of Errors and Appeals, of that state, in favor of plaintiff in an action against a carrier to recover damages for injury to interstate shipments of perishable freight. Affirmed.

See same case below, 88 N. J. L. 235, 96 Atl. 588.

The facts are stated in the opinion.

Messrs. Frederic D. McKenney, John Spalding Flannery, Albert C. Wall, and John A. Hartpence for plaintiff in error.

Messrs. Edward P. Stout and George S. Hobart for defendants in error.

Mr. Justice McKenna delivered the opinion of the court:

Action in seven counts praying for damages caused by delay in the delivery of certain watermelons received for shipment and accepted by an initial carrier at certain places in the state of Georgia, to be transported to Jersey City, New Jersey, and transferred in good condition to defendant's line at Edgemoor, Delaware, a point on the route.

A violation of the contract of carriage is charged in that the melons were not transported within a reasonable time, by reason of which a large part of them was lost and the rest delivered in a damaged condition.

* The defenses were denials of the allegations of the complaint, and an averment that the delay in delivery was caused by a strike on the road, for which cause, under the bills of lading issued by the initial carrier pursuant to the Interstate Commerce Act, defendant was exempt from liability for damages. This was one of the defenses in No. 577 [243 U. S. 574, 61 L. ed. 908, 37 Sup. Ct. Rep. 468], with which this case was submitted.

Judgment was entered for plaintiff by consent, and that plaintiff's damages be assessed at \$1,841.13, "reserving to defendant the right to reduce said judgment in accordance with its exceptions and objections pertaining to the measure of damages, and without prejudice to defendant to appeal from said judgment, pursuant to law."

The judgment was affirmed by the Court of Errors and Appeals. 88 N. J. Law, 235, 96 Atl. 588. Indeed, it was upon the opinion in the latter case that the Court of Errors and Appeals decided No. 577.

On the authority of No. 577 the motion to dismiss which is made is overruled and the judgment is

Affirmed.

(243 U. S. 588)

G. WASHINGTON LOTT, Appt.,

v.

DAVID W. PITTMAN, Sheriff of Ware County, Georgia.

CONSTITUTIONAL LAW 271 — DUE PROCESS OF LAW—CRIMINAL PROCEEDINGS—AFFIRMANCE OF SENTENCE BY DIVIDED COURT — PARTICIPATION BY NEWLY APPOINTED JUDGE IN AFFIRMANCE.

The affirmance by an equally divided

court, conformably to Ga. Code, 1910, § 6116, of a sentence to life imprisonment upon a conviction for murder, did not deprive the prisoner of his liberty without due process of law, contrary to U. S. Const. 14th Amend., although but one half of the judges of the appellate court who participated in its opinion heard the argument, and although one of the judges who voted to affirm was not even a member of the court when the case was argued, where, after his appointment, notice was given to parties and counsel in all cases then pending in which argument had been heard prior to his appointment, and which were to be passed upon by him, setting the time for the reargument of such cases.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 760.]

[No. 894.]

Submitted April 13, 1917. Decided April 30, 1917.

APPEAL from the District Court of the United States for the Southern District of Georgia to review an order refusing relief by habeas corpus to a person in custody under a criminal sentence. Affirmed.

The facts are stated in the opinion.

Messrs. John Randolph Cooper and T. A. Wallace for appellant.

Mr. Clifford Walker, Attorney General of Georgia, for appellee.

* Mr. Justice McKenna delivered the opinion of the court:

Petition in habeas corpus, in which appellant was petitioner, which presents the following facts, stated narratively:

Appellant is confined in the common jail of Ware county in execution of a life sentence upon conviction for murder, the sentence having been affirmed by the supreme court of that state. The court was evenly divided in opinion, and therefore the judgment was affirmed by operation of law under the provision of that part of § 6116 of the Code of Georgia of 1910 which is as follows: "In all cases decided by a full bench of six justices, the concurrence of a majority shall be essential to a judgment of reversal; and if the justices are evenly divided, the judgment of the court below shall stand affirmed."

Three of the judges did not hear the argument, but participated in the opinion of the court.

The case was argued before the supreme court on June 3, 1916, and when it was argued Justice Gilbert was not even a member of the court, but was appointed in September, 1916, to fill the place made vacant by the death of a member of the court.

Upon these facts it is averred that appellant was denied a right guaranteed by

the Constitution and laws of the United States,—the benefit of counsel and right to be heard,—which abridged his privileges and immunities as a citizen of the United States, deprived him of liberty without due process of law, and of his right to have a judicial determination of his guilt or innocence by a reviewing court.

Attached to the petition was a transcript of the record in the trial court and the supreme court.

His prayer to be discharged was denied. An appeal was allowed, the court certifying that there was probable cause.

It appears from the transcript of the record that the judgment affirming the sentence was rendered after Justice Gilbert had taken his seat as a member of the court, and that if he had not taken part the judgment would have been reversed. It also appears that after the judgment a petition for rehearing was filed which attacked the statute permitting a judgment of affirmance by a divided court upon the same grounds as those alleged in the petition for habeas corpus and now urged here, and also attacked the judgment for the participation therein of Justice Gilbert.

It was stated in the petition for rehearing as follows:

"This case having been heard before three justices by oral argument, or rather Wash Lott having appeared by attorneys, the case having been passed upon by the court as a whole, consisting of the entire six judges, and the defendant not having been heard before the said six judges, either in person or by attorneys, movant begs leave to call the court's attention to § 6115 of the Code of 1910 which is as follows:

"Whenever any justice in either division differs from the other two as to any particular case pending*before it, such case shall go to the court as a whole, or any one or more justices of the other division may be argued before one division only, it may, upon its own motion, but not otherwise, order a reargument therein."

It was suggested that the court "hear reargument in this case on its own motion" because the court had overlooked the section of the Code quoted above and the provision of the Constitution of the United States which gives assurance that no person shall be deprived of his liberty without due process of law.

The petition was filed November 24th and overruled December 19, 1916. Upon what consideration it does not appear; but it may be presumed that the court was of opinion that the statute of the state had been adequately complied with. The Attorney General asserts in his brief, and there is no denial by appellant, that after the appointment of Justice Gilbert notice was given to parties and counsel in all cases then pending in which argument had been heard prior to his appointment, and which were to be passed on by him, setting a time for reargument of such cases. The appellant, therefore, was given an opportunity to be heard. Besides, the right of appeal is not essential to due process. *Reetz v. Michigan*, 188 U. S. 505, 508, 47 L. ed. 563, 566, 23 Sup. Ct. Rep. 390. It was, therefore, competent for the state to prescribe the procedure and conditions, and the cases cited by appellant are not apposite.

Order affirmed.

FOLLOWING ARE MEMORANDA
OF
CASES DISPOSED OF AT OCTOBER TERM, 1916,

WITHOUT OPINIONS AND NOT ELSEWHERE OR OTHERWISE DISPOSED OF IN THIS EDITION.

FRANK C. STETTLER, Plaintiff in Error, **v.** **EDWIN V. O'HARA** et al., Constituting the Industrial Welfare Commission of the State of Oregon [No. 25]; and **ELMIRA SIMPSON**, Plaintiff in Error, **v.** **EDWIN V. O'HARA** et al., Constituting the Industrial Welfare Commission of the State of Oregon [No. 26].

In Error to the Supreme Court of the State of Oregon.

Messrs. Charles W. Fulton and Rome G. Brown for plaintiffs in error.

Mr. Felix Frankfurter for defendants in error.

April 9, 1917. Per Curiam: Judgments (69 Or. 519, 139 Pac. 743, Ann. Cas. 1916A. 217, and 70 Or. 261, 141 Pac. 158) affirmed with costs by an equally divided court.

VICTOR PAKAS, Petitioner, **v.** **UNITED STATES**. [No. 989.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Terence J. McManus for petitioner.

No brief filed for respondent.

April 9, 1917. Granted.

UNITED STATES, Petitioner, **v.** **BROOKLYN EASTERN DISTRICT TERMINAL**. [No. 1014.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Solicitor General Davis for petitioner.

Mr. Henry B. Closson for respondent.

April 9, 1917. Granted.

CENTRAL TRUST COMPANY OF NEW YORK, Petitioner, **v.** **TEXAS COMPANY**. [No. 959].

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Arthur H. Van Brunt for petitioner.

Mr. Amos L. Beaty for respondent.

April 9, 1917. Denied.

CENTRAL TRUST COMPANY OF NEW YORK et al., Petitioners, **v.** **TEXAS COMPANY**. [No. 999.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. George Welwood Murray and Arthur H. Van Brunt for petitioners.

Mr. Amos L. Beaty for respondent.

April 9, 1917. Denied.

MICHIGAN CENTRAL RAILROAD COMPANY, Petitioner, **v.** **EVERETT A. TRIPP**. [No. 986.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Frank E. Robson for petitioner.

Mr. Sidney T. Miller for respondent.

April 9, 1917. Denied.

BYRON F. BABBITT, Trustee, etc., Petitioner, **v.** **CAROLINE S. READ** et al. [No. 1003.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Charles A. Boston for petitioner.

Mr. Charles E. Rushmore for respondents.

April 9, 1917. Denied.

CAROLINE S. READ et al., Executors, etc., Petitioners, **v.** **BYRON F. BABBITT**, Trustee, etc. [No. 1020.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Charles E. Rushmore for petitioners.

Messrs. P. Taylor Bryan and George H. Williams for respondent.

April 9, 1917. Denied.

RIVERS & HARBORS IMPROVEMENT COMPANY,
Owner, etc., Petitioner, v. **JOHN S. LATTA**
et al. [No. 1013.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Third Circuit.

Mr. Russell T. Mount for petitioner.

No appearance for respondents.

April 9, 1917. Denied.

MATTHEW HOWARD REED, Petitioner, v.
CROPP CONCRETE MACHINERY COMPANY et
al. [No. 1018.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Seventh Circuit.

Mr. Otto Raymond Barnett for petitioner.

Messrs. William Nevarre Cromwell and
Lewis T. Greist for respondents.

April 9, 1917. Denied.

**WASHINGTON RAILWAY & ELECTRIC COM-
PANY,** Petitioner, v. **MINA L. CLARK,** Ad-
ministratrix, etc. [No. 1024.]

Petition for a Writ of Certiorari to the
Court of Appeals of the District of Colum-
bia.

Messrs. John S. Barbour and George P.
Hoover for petitioner.

Messrs. Wilton J. Lambert and Rudolph
H. Geatman for respondent.

April 9, 1917. Denied.

ALEXANDER DOYLE, Petitioner, v. **HAMILTON
FISH CORPORATION.** [No. 1026]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

Mr. Max J. Kohler for petitioner.

Mr. Henry W. Taft for respondent.

April 9, 1917. Denied.

UNITED STATES, Appellant, v. **ILLINOIS CEN-
TRAL RAILROAD COMPANY** et al. [No.
1012.]

Appeal from the District Court of the
United States for the Northern District of
Illinois.

The Attorney General for appellant.

Messrs. Edward J. Brundage and James
H. Wilkerson for respondents.

April 9, 1917. Dismissed, on motion of
counsel for the appellant.

ALEXANDER M. EMERSON, Petitioner, v. **WAR-
REN E. SWEETSER.** [No. 791.]

On Writ of Certiorari to the United
States Circuit Court of Appeals for the
First Circuit.

Mr. Henry Wheeler for petitioner.

The Attorney General for respondent.

April 9, 1917. Dismissed with costs, on
motion of counsel for the petitioner.

ALFRED P. LOWELL, Petitioner, v. **WARREN
E. SWEETSER.** [No. 792.]

On Writ of Certiorari to the United
States Circuit Court of Appeals for the First
Circuit.

Mr. Henry Wheeler for petitioner.

The Attorney General for respondent.

April 9, 1917. Dismissed with costs, on
motion of counsel for the petitioner.

A. LEO WEIL, Plaintiff in Error, v. **HENRY
K. BLACK,** Judge, etc. [No. 297.]

In Error to the Supreme Court of Ap-
peals of the State of West Virginia.

Messrs. P. C. Knox, Louis Marshall,
George E. Price, B. M. Ambler, F. DeC.
Faust, and Charles F. Wilson for plaintiff
in error.

Messrs. T. C. Townsend and S. B. Avis
for defendant in error.

April 9, 1917. Dismissed with costs and
mandate granted on motion of counsel for
the plaintiff in error.

NORFOLK & WESTERN RAILWAY COMPANY,
Plaintiff in Error, v. **CORNELIUS H. MEL-
VIN.** [No. 620.]

In Error to the Court of Appeals for the
Fourth Judicial District, State of Ohio.

Mr. Theodore W. Reath for plaintiff in
error.

No counsel appeared for defendant in er-
ror.

April 9, 1917. Dismissed with costs, on
motion of counsel for the plaintiff in error.

ROSA C. GOODE et al., Plaintiffs in Error, v.
UNITED STATES. [No. 348.]

In Error to the Court of Appeals of the
District of Columbia.

Messrs. Charles T. Cates, Jr., William G.
Johnson, and Henry P. Blair for plaintiffs
in error.

The Attorney General for defendant in
error.

April 10, 1917. Dismissed with costs, on
motion of counsel for the plaintiffs in error.

HARRIET H. GOULD and Frederick A. Waldron, Appellants, v. HYDE PARK WATER COMPANY, First National Bank of Boston, and City of Boston. [No. 85.]

Appeal from the District Court of the United States for the District of Massachusetts.

Messrs. Frederick S. Deitrick and Roscoe Walsworth for appellants.

Messrs. Robert M. Morse, William M. Richardson, and Edward E. Blodgett for appellees.

April 16, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of *Deming v. Carlisle Packing Co.* 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; *Consolidated Turnp. Co. v. Norfolk & O. V. R. Co.* 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; *Stewart v. Kansas City*, 239 U. S. 14, 60 L. ed. 120, 36 Sup. Ct. Rep. 15.

ST. LOUIS, SAN FRANCISCO, & TEXAS RAILWAY COMPANY, Plaintiff in Error, v. MAUD SMITH, Administratrix of the Estate of M. T. Seale, Deceased. [No. 392.]

In Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas.

Messrs. W. F. Evans and Frank Andrews for plaintiff in error.

Messrs. Judson H. Wood and James P. Haven for defendant in error.

April 16, 1917. Per Curiam: Judgment affirmed with costs upon the authority of *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; *Seaboard Air Line R. Co. v. Koennecke*, 239 U. S. 354, 60 L. ed. 326, 36 Sup. Ct. Rep. 126, 11 N. C. C. A. 165; *Seaboard Air Line R. Co. v. Renn*, 241 U. S. 293, 60 L. ed. 1008, 36 Sup. Ct. Rep. 567; See *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156.

HATHAWAY HARPER, Plaintiff in Error, v. BOARD OF COUNTY COMMISSIONERS OF OKLAHOMA COUNTY, State of Oklahoma, et al. [No. 422.]

In Error to the Supreme Court of the State of Oklahoma.

Mr. Arthur G. Moseley for plaintiff in error.

Mr. Charles J. Kappler for defendants in error.

April 16, 1917. Per Curiam: Dismissed

for want of jurisdiction upon the authority of *Deming v. Carlisle Packing Co.* 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; *Consolidated Turnp. Co. v. Norfolk R. Co.* 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; *Stewart v. Kansas City*, 239 U. S. 14, 60 L. ed. 120, 36 Sup. Ct. Rep. 15.

DON LACY, as Liquidating Agent of the Oklahoma City National Bank, Plaintiff in Error, v. MOLLIE EZZARD. [No. 619.]
In Error to the Supreme Court of the State of Oklahoma.

Messrs. W. F. Wilson and Enoch A. Chase for plaintiff in error.

Messrs. Harvey R. Winn, Henry E. Asp, and Henry G. Snyder for defendant in error.

April 16, 1917. Per Curiam: Judgment affirmed with costs upon the authority of: (1) *Chemical Nat. Bank v. Hartford Deposit Co.* 161 U. S. 1, 40 L. ed. 595, 16 Sup. Ct. Rep. 439; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; *Union Nat. Bank v. McBoyle*, 243 U. S. 26, 61 L. ed. 570, 37 Sup. Ct. Rep. 370; (2) *Kansas City Southern R. Co. v. H. Albers Commission Co.* 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; *Creswill v. Grand Lodge, K. P.* 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822; *Norfolk & W. R. Co. v. Conley*, 236 U. S. 605, 609, 610, 59 L. ed. 745, 747, 748, P.U.R.1915C, 293, 35 Sup. Ct. Rep. 437; (3) *Southern P. C. v. Schuyler*, 227 U. S. 601, 611, 612, 57 L. ed. 662, 669, 43 L.R.A. (N.S.) 901, 33 Sup. Ct. Rep. 277.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error, v. CYNTHIA WILLIAMS, Administratrix of the Estate of W. E. Williams, Deceased. [No. 732.]

In Error to the Supreme Court of the State of South Carolina.

Mr. J. B. S. Lyles for plaintiff in error.

Mr. W. Boyd Evans for defendant in error.

April 16, 1917. Per Curiam: Judgment affirmed with costs upon the authority of *Chicago Junction R. Co. v. King*, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; *Seaboard Air Line R. Co. v. Padgett*, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; *Baltimore & O. R. Co. v. Whitacre*, 242 U. S. 169, 61 L. ed. 228, 37 Sup. Ct. Rep. 33.

UNITED STATES FIDELITY & GUARANTY COMPANY, Appellant, v. TRAVELERS INSURANCE MACHINE COMPANY. [No. 945.]

Appeal from the District Court of the United States for the District of Arizona.

Mr. William Marshall Bullitt for appellant.

Messrs. David R. Castleman and Walter Bennett for appellee.

April 16, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of *Bache v. Hunt*, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *Railroad Commission v. Louisville & N. R. Co.* 225 U. S. 272, 279, 56 L. ed. 1087, 1090, 32 Sup. Ct. Rep. 756.

A. S. COHN, Petitioner, v. R. A. MALONE, Trustee of A. S. Cohn, Bankrupt. [No. 852.]

Messrs. George S. Jones and James H. McIntosh for petitioner.

Messrs. Alexander Akerman, Charles Akerman, and John D. Pope for respondent.

April 16, 1917. Order entered herein on March 6, 1917, vacated and set aside, and petition for Writ of Certiorari granted.

SAMUEL C. COHEN, as Trustee in Bankruptcy of Elias W. Samuels, Bankrupt, Petitioner, v. ELIAS W. SAMUELS. [No. 855.]

Mr. Lawrence B. Cohen for petitioner.

Messrs. Irving L. Ernst and Samuel Sturtz for respondent.

April 16, 1917. Order entered herein on March 6, 1917, vacated and set aside, and petition for Writ of Certiorari granted.

SOUTHERN PACIFIC COMPANY, Petitioner, v. CALIFORNIA ADJUSTMENT COMPANY. [No. 995.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. C. W. Durbrow and W. F. Herrin for petitioner.

Mr. Leon E. Morris for respondent.

April 16, 1917. Granted.

CHARLES D. SMITH et al., Petitioners, v. COPIAH COUNTY et al. [No. 998.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Caruthers Ewing for petitioners.

Messrs. J. S. Sexton and H. J. Wilson for respondents.

April 16, 1917. Denied.

CHARLES A. NONES, Petitioner, v. STATE OF NEW JERSEY. [No. 1006.]

Petition for a Writ of Certiorari to the Court of Errors and Appeals of the State of New Jersey.

Messrs. Barry Mohun and Henry E. Davis for petitioner.

Mr. James Henry Harrison for respondent.

April 16, 1917. Denied.

DAVID W. SIDEX, Petitioner, v. CITY OF MARCELINE, in the County of Linn, State of Missouri. [No. 1016.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. John T. Wayland for petitioner.

No appearance for respondent.

April 16, 1917. Denied.

CHARLES HATHAWAY et al., etc., Petitioners, v. JOSEPH B. MARTINDALE et al., Receivers, etc. [No. 1019.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Alfred B. Cruikshank for petitioners.

Mr. Charles E. Rushmore for respondents.

April 16, 1917. Denied.

SAALFIELD PUBLISHING COMPANY et al., Petitioners, v. G. & C. MERRIAM COMPANY. [No. 1022.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Wade H. Ellis and Challen B. Ellis for petitioners.

Mr. William B. Hale for respondent.

April 16, 1917. Denied.

ILLINOIS SURETY COMPANY, Petitioner, v. STANDARD UNDERGROUND CABLE COMPANY. [No. 1025.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Albert J. Hopkins for petitioner.

Mr. George B. Gordon for respondent.

April 16, 1917. Denied.

UNION SAND & MATERIAL COMPANY, Petitioner, v. STATE OF ARKANSAS. [No. 1039.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Arkansas.

Mr. Caruthers Ewing for petitioner.

No appearance for respondent.

April 16, 1917. Denied.

FRANCIS SEMIDEY et al., Petitioners, v. **CENTRAL AGUIRRE COMPANY, etc., et al.** [No. 1047.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Perry Allen and Elijah N. Zoline for petitioners.

Messrs. Charles Hartzell and Malcolm Donald for respondents.

April 16, 1917. Denied.

FENTRESS COAL & COKE COMPANY, Petitioner, v. **BEECHER ELMORE.** [No. 1049.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. White B. Miller for petitioner.

No counsel appeared for respondent.

April 16, 1917. Denied.

CHARLES W. RANTOUL, JR., Petitioner, v. **NORTH GERMAN LLOYD.** [No. 1057.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. J. Parker Kirlin, Charles R. Hickox, and Edward E. Blodgett for petitioner.

Messrs. Joseph Larocque and Walter C. Noyes for respondent.

April 16, 1917. Denied.

MAURICE HANSSENS, Petitioner, v. **NORTH GERMAN LLOYD.** [No. 1058.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. J. Parker Kirlin, Charles R. Hickox, and Edward E. Blodgett for petitioner.

Messrs. Joseph Larocque and Walter C. Noyes for respondent.

April 16, 1917. Denied.

UNITED STATES, Plaintiff in Error, v. **GROVER C. ARRINGTON.** [No. 293.]

In Error to the District Court of the United States for the Western District of Virginia.

The Attorney General for plaintiff in error.

No appearance for defendant in error.

April 16, 1917. Dismissed, on motion of counsel for the plaintiff in error.

WALTER BRANDT, Appellant, v. **THOMAS W. MORGAN,** Warden, etc. [No. 468.]

Appeal from the District Court of the United States for the District of Kansas.

Mr. Frans E. Lindquist for appellant.

No appearance for appellee.

April 16, 1917. Dismissed with costs, on motion of counsel for the appellant.

INTERNATIONAL LUMBER COMPANY, Plaintiff in Error, v. **UNITED STATES.** [No. 519.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Harris Richardson for plaintiff in error.

The Attorney General for defendant in error.

April 17, 1917. Dismissed, pursuant to the Sixteenth Rule, on motion of counsel for the defendant in error.

ADOLFO GARCIA GRANADA, Plaintiff in Error and Appellant, v. **JOSÉ STA. MARIA et al.** [No. 198.]

In Error to the Supreme Court of the Philippine Islands.

Mr. Clement L. Bouvé for plaintiff in error.

No appearance for defendants in error.

April 20, 1917. Dismissed with costs, pursuant to the Tenth Rule.

McGOLDRICK LUMBER COMPANY, Appellant, v. **CHARLES J. KINSOLVING et al.** [No. 185.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. John P. Gray, William E. Cullen, and F. M. Dudley for appellant.

Messrs. James H. Forney and Frank L. Moore for appellees.

April 23, 1917. Per Curiam: Judgment affirmed with costs, upon the authority of *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *De Cambra v. Rogers*, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519; *Greenmeyer v. Coate*, 212 U. S. 434, 53 L. ed. 587, 29 Sup. Ct. Rep. 345.

UNITED STATES, Petitioner, v. **WILLIAM B. POLAND et al.** [No. 1015.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

The Attorney General and Mr. Solicitor General Davis for petitioner.

No counsel appeared for respondents.

April 23, 1917. Granted.

THOMAS GILCREASE, Petitioner, v. G. R. McCULLOUGH et al. [No. 1056.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma. Mr. A. J. Biddison for petitioner.

Messrs. Frederick De Courey Faust and Charles Frederick Wilson for respondents.

April 23, 1917. Granted.

NORTHERN PACIFIC RAILWAY COMPANY et al., Petitioners, v. E. W. McCOMAS. [No. 1065.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon.

Messrs. Charles H. Carey, James B. Kerr, and Charles A. Hart for petitioners.

No counsel appeared for respondent.

April 23, 1917. Granted.

UNION PACIFIC RAILROAD COMPANY, Petitioner, v. EVA E. COOK, Administratrix, etc. [No. 1002.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Iowa.

Messrs. N. H. Loomis and Alfred G. Ellick for petitioner.

Mr. William R. Green for respondent.

April 23, 1917. Denied.

UNITED STATES EX REL. NG. SAM et al., Petitioners, v. JOSEPH H. WALLIS, Assistant Commissioner of Immigration, etc. [No. 1031.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Robert M. Moore for petitioners.

Mr. Solicitor General Davis for respondent.

April 23, 1917. Denied.

HUGH CHAMBERS, Trustee, etc., Petitioner, v. CONTINENTAL TRUST COMPANY. [No. 1040.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Rudolph S. Wimberly for petitioner.

Messrs. George S. Jones and Orville A. Park for respondent.

April 23, 1917. Denied.

UNION PACIFIC RAILROAD COMPANY, Petitioner, v. MAUDE M. HENDERSON, Administratrix, etc. [No. 1043.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Nebraska.

Messrs. N. H. Loomis and Alfred G. Ellick for petitioner.

Messrs. T. J. Mahoney and J. A. C. Kennedy for respondent.

April 23, 1917. Denied.

JOSEPH HERTZBERG et al., Petitioners, v. UNITED STATES. [No. 1044.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Walter Jeffreys Carlin for petitioners.

The Attorney General for respondent.

April 23, 1917. Denied.

SIDNEY J. BROOKS, Receiver, etc., Petitioner, v. EMPIRE TRUST COMPANY et al. [No. 1050.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Walter P. Napier, E. C. Brandenburg, Weldon Bailey, and Chester H. Terrell, for petitioner.

Messrs. Thomas H. Franklin, Stephen H. Olin, and Henry C. Coke for respondents.

April 23, 1917. Denied.

MOUNT VERNON & MARSHALL HALL STEAMBOAT COMPANY, LTD., Petitioner, v. JOHN L. MCKENNEY. [No. 1072.]

Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia.

Messrs. Daniel Thew Wright, Henry F. Woodard, and T. Morris Wampler for petitioner.

No appearance for respondent.

April 23, 1917. Denied.

PRESBYTERIAN HOME HOSPITAL et al., Petitioners, v. MARY DOCKERY GOOCH, by Her Next Friend, William D. Gooch. [No. 1073.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. John L. Stout and John W. Farley for petitioners.

No appearance for respondent.

April 23, 1917. Denied.

KEYSTONE WOOD COMPANY, Petitioner, v. SUSQUEHANNA BOOM COMPANY. [No. 1074.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Mortimer C. Rhone for petitioner.

Messrs. Max L. Mitchell and N. M. Edwards for respondent.

April 23, 1917. Denied.

FRANCISCO ARIAS and Rosario Arias, the Latter Being Represented by Her Guardian ad Litem, Francisco Arias, Appellants, v. MARIANO VELOSO, Damiana Veloso, and Melchor Veloso. [No. 1089.]
Appeal from the Supreme Court of the Philippine Islands.

No counsel appeared for appellants.

Messrs. Alexander Britton and Evans Browne for appellees.

April 23, 1917. Docketed and dismissed with costs, on motion of counsel for the appellees.

PARK SQUARE AUTOMOBILE STATION, Plaintiff in Error, v. AMERICAN LOCOMOTIVE COMPANY. [No. 140.]

In Error to the District Court of the United States for the Northern District of New York.

Messrs. Fred N. Wier and Edward C. Stone for plaintiff in error.

Messrs. Robert G. Dodge, Moorfield Storey, and Reginald H. Johnson for defendant in error.

April 30, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Bender v. Pennsylvania Co.* 148 U. S. 502, 37 L. ed. 537, 13 Sup. Ct. Rep. 640; *McDonnell v. Jordan*, 169 U. S. 734, 42 L. ed. 1215, 18 Sup. Ct. Rep. 944; *Heike v. United States*, 217 U. S. 423, 54 L. ed. 821, 30 Sup. Ct. Rep. 539.

WILLIAM W. WITHNELL, M. Cecile Withnell, His Wife; Maul E. Hager et al., Plaintiffs in Error, v. WILLIAM R. BUSH CONSTRUCTION COMPANY. [No. 195.]

In Error to the St. Louis Court of Appeals, State of Missouri.

Messrs. Clifford B. Allen and Edmund T. Allen for plaintiffs in error.

Mr. Edward C. Kehr for defendant in error.

April 30, 1917. Per Curiam: Judgment reversed with costs, upon the authority of *Gast Realty & Invest. Co. v. Schneider Granite Co.* 240 U. S. 55, 60 L. ed. 523, 36 Sup. Ct. Rep. 254.

37 S. C.—31.

PENNSYLVANIA TUNNEL & TERMINAL RAILROAD COMPANY, Plaintiff in Error, v. CHARLES E. HENDRICKSON et al., State Board of Assessors, and Edward I. Edwards, Comptroller. [No. 217.]

In Error to the Supreme Court of the State of New Jersey.

Mr. Albert C. Wall for plaintiff in error.

Messrs. John R. Hardin, John W. Westcott, and William D. Edwards for defendants in error.

April 30, 1917. Per Curiam: Judgment affirmed with costs upon the authority of *Florida C. & P. R. Co. v. Reynolds*, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176.

D. M. HILLER and Max Miller et al., Sureties, Plaintiffs in Error, v. THOMAS B. CRENSHAW, Clerk, W. E. Woolen, Revenue Agent, and John C. McLemore, Clerk. [No. 646.]

In Error to the Supreme Court of the State of Tennessee.

Mr. H. D. Minor for plaintiffs in error.

Mr. R. L. Bartels for defendants in error.

April 30, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of *Eustis v. Bolles*, 150 U. S. 381, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Leathe v. Thomas*, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *Mellon Co. v. McCafferty*, 239 U. S. 134, 60 L. ed. 181, 36 Sup. Ct. Rep. 94.

INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA, Petitioner, v. SOUTHERN PACIFIC COMPANY. [Nos. 1000 and 1001.]

Petitions for Writs of Certiorari to the Supreme Court of the State of California.

Mr. Christopher M. Bradley for petitioner.

Messrs. Henley C. Booth and W. F. Herin for respondent.

April 30, 1917. Denied.

JOHN B. GLEASON, Petitioner, v. MARY C. THAW. [No. 1051.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. John B. Gleason and Gist Blair for petitioner.

Messrs. Abram J. Rose and Alfred C. Petté for respondent.

April 30, 1917. Denied.

CITY OF CENTRALIA, Petitioner, v. A. R. TITLOW, as Receiver, etc., et al. [No. 1075.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Samuel H. Piles, James B. Howe, Dallas V. Halverstadt, and Blackburn Esterline for petitioner.

No appearance for respondents.

April 30, 1917. Denied.

NICK A. MAYERS, Petitioner, v. UNION RAILROAD COMPANY. [No. 1085.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

Messrs. John M. Freeman and Frank C. McGirr for petitioner.

Mr. Samuel McClay for respondent.

April 30, 1917. Denied.

WILLIAM TERREY, Plaintiff in Error, v. STATE OF KANSAS. [No. 806.]

In Error to the Supreme Court of the State of Kansas.

Messrs. Malcolm D. Nicholson, William J. Pirtle, and Frans E. Lindquist for plaintiff in error.

Mr. J. P. Coleman for defendant in error.

April 30, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error.

(244 U. S. 329)

IDA A. VAN DYKE et al., Appts.,
v.W. PAUL GEARY et al., Members of the
Corporation Commission of the State of
Arizona, et al.

COURTS ⇨399(1)—FEDERAL COURTS—JURISDICTION—ENTIRE CONTROVERSY.

1. The entire case may be considered by the Federal Supreme Court on an appeal from a district court to review an order denying an application before three judges for an interlocutory injunction to restrain the enforcement of an order of a state public service commission on the ground of its repugnancy to the Federal Constitution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1089.]

CONSTITUTIONAL LAW ⇨20—LEGISLATIVE CONSTRUCTION OF STATE CONSTITUTION—POWERS OF CORPORATION COMMISSION—MEANING OF "CORPORATIONS" AND "PUBLIC SERVICE CORPORATIONS"—INDIVIDUAL OWNER OF PUBLIC UTILITY.

2. The legislative construction given by the Arizona Public Service Corporation Act (Ariz. Rev. Stat. 1913, tit. 9, chap. 11), enacted at the first session of the Arizona legislature, to the words "corporations" and "public service corporations" in Ariz. Const. art. 15, creating a Corporation Commission with broad powers of regulation, as embracing a water system owned by an individual, will be followed by the Federal Supreme Court, in the absence of an authoritative decision of the Arizona supreme court to the contrary, notwithstanding the provision of art. 14 of such Constitution, defining "corporation" as used in such article as including all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or copartnerships,—especially since the legislature was empowered by Ariz. Const. art. 15, § 6, to enlarge the powers and extend the duties of the Corporation Commission.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 14, 15.

For other definitions, see Words and Phrases, First and Second Series, Corporation; Second Series, Public Service Corporation.]

STATUTES ⇨113(2)—EXPRESSION OF SUBJECT IN TITLE.

3. The incorporation in a statute whose subject, as expressed in the title, is the regulation of public service corporations, of a provision that "public service corporations" shall include persons owning a water system, is not in violation of the requirement of Ariz. Const. art. 4, pt. 2, § 13, that every law shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 142.]

WATERS AND WATER COURSES ⇨203(6)—PUBLIC UTILITY—RATE REGULATION.

4. A water system operated for the purpose of supplying water to the residents and inhabitants of a part of a town site is a public utility so as to be subject to rate regulation by a state public service commission, although the plant is owned by an individual who pumps the water on her own

land, stores it in tanks on her own land, and thence conducts it through pipes, all upon her own land, and delivers it to consumers at the boundary line between her and their properties, they having purchased their lots with the oral understanding that water could be secured from such system.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 292.]

WATERS AND WATER COURSES ⇨203(6)—WATER RATES—REVIEW OF FINDINGS.

5. The enforcement of an order of a public service commission fixing water rates upon the basis of a net return of 10 per cent on the value of the property employed after deducting an annual depreciation charge of 3½ per cent should not be enjoined by the courts as confiscatory upon contradictory affidavits dealing with the items of value which go to make up the water system, where it cannot be said that it was impossible for a fair-minded board to come to the result which was reached.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 292.]

[No. 52.]

Argued March 23, 1917. Decided May 7, 1917.

APPEAL from the District Court of the United States for the District of Arizona to review an order which, while enjoining the enforcement of the fines and penalties prescribed by a state statute for failure to obey an order of the Corporation Commission regulating water rates, refused to interfere with the enforcement of such order. Affirmed.

See same case below, 218 Fed. 111.

The facts are stated in the opinion.

Messrs. William C. Prentiss and F. C. Jacobs for appellants.

Messrs. Samuel Herrick, George W. Harben, R. William Kramer, and Mr. Wiley E. Jones, Attorney General of Arizona, for appellees.

* Mr. Justice Brandeis delivered the opinion of the court:

In 1909 Ida A. Van Dyke and her husband organized a corporation under the name of the Miami Town-site Company, to acquire a tract in Gila county, Arizona, and establish a town thereon. A large part of Miami is now located on that land. In order to supply residents and others thereon with water for domestic, commercial, and fire purposes, the Van Dykes introduced a water system which developed rapidly. In October, 1913, the Arizona Corporation Commission, a public service*commission with the usual powers of regulation, instituted before itself a proceeding to have the rates charged by the water system declared excessive, and to have reasonable rates established. The Van Dykes, who were duly served, filed a "plea in bar;" alleged that the plant was the indi-

vidual property of Ida A. Van Dyke; that the business was operated by her with her husband as manager, and not by a corporation; and denied not only the validity of the order, but also the jurisdiction of the Commission over them. The objection to the jurisdiction was overruled; and the Commission proceeded to a hearing on the merits, at which the Van Dykes offered no evidence. On May 1, 1914, after an elaborate report, an order was entered greatly reducing the water rates. The Van Dykes promptly filed a motion for a rehearing, which was denied. Thereupon they applied to the Commission to stay the operation of the order pending proceedings for review in the state court. This application also was denied. Then they filed, in the district court of the United States for the district of Arizona, this suit against the members of the Commission, the attorney general of the state, and the county attorney, to enjoin the enforcement of the order and the prosecution for penalties for failure to observe the same, and to have the order itself canceled.

Both plaintiffs and defendants are citizens and residents of Arizona. Jurisdiction of the Federal court was invoked solely on the ground that the order of the Commission, if enforced, would deprive plaintiffs of their property, in violation of the 14th Amendment; and that the penalties prescribed by the Arizona statute for failure to obey the order are so severe as to prevent resort to the remedies therein provided for testing in the state courts the validity of the orders. An interlocutory injunction was applied for; and the case was heard before three judges, under § 266 of the Judicial Code [36 Stat. at L. 1162, chap. 231, Comp. Stat. 1913, § 1243]. The jurisdiction of the court was sustained under the rule declared* in *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; but the court refused relief against the order reducing water rates, saying:

"The evidence submitted by the complainants does not afford this court a satisfactory basis on which to adjudicate the question of the value of the property used as a water plant, and therefore the court cannot say that the rates prescribed by the Corporation Commission are confiscatory, and there is no basis on which an order could be made declaring them illegal. If hereafter it shall appear that, under actual operation of the plant under these rates, the return allowed by such Corporation Commission operates as a confiscation of the property of complainant Ida A. Van Dyke, she may, at the expiration of one year, again present

her evidence to the court and obtain appropriate relief on the facts then presented.

"The court will retain jurisdiction of the case, with permission to complainant Ida A. Van Dyke, if so advised, after the expiration of one year, to renew her application for an injunction against the rates established by the Corporation Commission as confiscatory. In the meantime the rates established will remain in force."

From an order entered in accordance with this opinion the Van Dykes appealed; and this court has jurisdiction to review the whole case. *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48.

The errors alleged are, in substance, as follows:

First. That the Arizona Constitution and Public Service Corporation Act were construed and applied to subject property owned and operated by a natural person to regulation as a public service corporation.

Second. That a water system established for the purpose of furnishing water only to purchasers of lots from the Miami Town-site Company was treated as a public water system.

Third. That the rates fixed are confiscatory.

These alleged errors will be considered in their order.

* 1. Whether the Arizona Corporation Commission had jurisdiction to regulate a water system owned by an individual.

Arizona was admitted as a state February 14, 1912; and on that date its Constitution, which had been adopted December 9, 1910, took effect. By article 15 it created (§ 1) a Corporation Commission with full power to establish reasonable rates in the public services; and declared (§ 2) that corporations engaged in furnishing water "shall be deemed public service corporations." The Arizona Public Service Corporation Act (Ariz. Rev. Stat. 1913, title 9, chap. 11) provides that the term "public service corporation" shall include "water corporation," § 2278 (z); that "water corporation" shall include "every corporation or person . . . owning, controlling, operating, or managing any water system for compensation within the state," § 2278 (x); that the term "person" includes an individual, § 2278 (d); and that the term "water system" shall include all property used in the supply or distribution of water "for municipal, domestic, or other beneficial uses," § 2278 (w). It is clear that the legislature intended that the powers of the Corporation Commission should extend to plants owned and operated by individuals, and that the language used by it was adequate to express that intent. But it is in-

sisted that provisions of the Arizona Constitution forbid the grant of such a power by the legislature; and the question resolves itself into this: Are the terms "corporation" and "public service corporation" in article 15 of the Constitution, used in the limited sense of incorporated companies, or do they include all public utilities, both incorporated and unincorporated, and whether they be firms or individuals?

*44 Article 15, entitled, "The Corporation Commission," consists of nineteen sections,¹ and confers broad powers of regulation. The character of the service, that is, whether it is public or private, and not the character of the ownership, determines ordinarily the scope of the power of regulation. The need of such regulation and the manner of exercising it are the same whether a public utility is incorporated or not; and the purpose of a public service commission could easily be frustrated if concerns owned by individuals were excluded from its operation. The district court accordingly declined *45 to give a technical meaning to the term "public service corporation," and interpreted it in the broad popular sense as embracing all public utilities. That construction is in line with numerous decisions holding that statutes imposing certain liabilities on "railroad corporations" embrace all railroads, whether individually or corporately owned.²

It is contended that article 14, entitled, "Corporations Other Than Municipal," renders this liberal construction of article 15 inadmissible. Section 1, of article 14, de-

finer "corporation," as used in this article . . . to include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or copartnerships;" and § 16 provides that the records of "all public service corporations" shall at all times be subject to the inquisitorial powers of the state. It is argued that the term "public service corporation," thus excluding individually-owned utilities, could hardly have a different meaning in the very next article of the Constitution. But the answer is that article 14 deals only with the organization, incorporation, management, and powers of technical corporations, and the definition therein of "corporation" is, for that reason, expressly limited by the phrase "*as used in this article.*" This is significant and is entirely in harmony with the view that the term as used in some other article, having a wholly different purpose, should bear a different and broader construction.

Furthermore, the powers of the Arizona Corporation Commission are not limited to those expressly granted by the Constitution. Section 6 of article 15 authorizes the legislature to "enlarge the powers and extend the duties of the Corporation Commission;" and the legislature, by defining "water *46 corporation" to include "persons" owning a water utility, clearly extends the powers of the Commission to individually-owned concerns. So that, even if the Commission was not originally vested by the Constitution with power over utilities owned by indi-

¹Included are the following:

"Section 1. A Corporation Commission is hereby created to be composed of three persons, who shall be elected at the general election to be held under the provisions of the enabling act approved June 20, 1910, and whose term of office shall be coterminous with that of the governor of the state elected at the same time, and who shall maintain their chief office, and reside, at the state capital. . . .

"Sec. 2. All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers shall be deemed public service corporations.

"Sec. 3. The Corporation Commission shall have full power to and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reason-

able rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations: Provided, That incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein, including the regulation of rates and charges to be made and collected by such corporations: Provided further, That classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said Corporation Commission may from time to time be amended or repealed by such Commission."

²Union P. R. Co. v. De Busk, 12 Colo. 294, 304, 3 L.R.A. 350, 13 Am. St. Rep. 221, 20 Pac. 752; Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse, 168 Ind. 438, 78 N. E. 1033, 1042; Schus v. Powers-Simpson Co. 85 Minn. 447, 450, 451, 69 L.R.A. 887, 89 N. W. 68; Lewis v. Northern P. R. Co. 36 Mont. 207, 218, 92 Pac. 469.

viduals, it now has that power directly by legislative enactment. In other words, the Constitution prescribed a certain minimum of power with which the Commission was intrusted; it authorized the legislature to enlarge from time to time the scope of the Commission's duties; and the legislature extended them to water concerns owned by individuals.

This construction of the Arizona Constitution by the district court is in harmony with the contemporaneous construction evidenced by the Public Service Corporation Act (supra) enacted at the first session of its legislature. In the absence of an authoritative decision of the Arizona supreme court to the contrary, this legislative construction, reasonable in itself and designed to accomplish the obvious purpose of the constitutional provision, ought not to be set aside by this court. *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 305, 58 L. ed. 229, 239, 34 Sup. Ct. Rep. 48.

Appellants contend also that even if the legislature had power to extend the jurisdiction of the Corporation Commission to water systems owned and operated by individuals, the Public Service Corporation Act was, in this respect, invalid under article 4, pt. 2, § 13, of the Arizona Constitution, because this purpose was not expressed in the title of that act.³ Constitutional provisions requiring the subject of legislative acts to be embraced in the title are not to be given a strained and narrow construction for the purpose of nullifying legislation. The "subject," as expressed in the title, is the regulation of "public service corporations;" and the provision in the act that "public service corporations" shall include "persons" owning a public utility is a matter obviously connected therewith.

2. Whether the Van Dyke water system is a private business.

The Van Dyke system appears to be the only water supply of the inhabitants of the original town of Miami (not including the "additions"). The number of water tak-

ers is not shown. But it appears that the large consumers who used meters numbered, at the time of the Commission's investigation, 675, yielding a revenue of \$11,378.10; and that the number of small takers must have been much larger, since the revenue derived from the flat rates was \$14,517.35. "Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large" (*Munn v. Illinois*, 94 U. S. 113, 126, 24 L. ed. 77, 84). The property here in question was devoted by its owners to supplying a large community with a prime necessity of life. That Mrs. Van Dyke pumps the water on her own land, stores it in tanks on her own land, and thence conducts it through pipes all upon her own land (the strips reserved in the streets for conduits being owned by her), and delivers it to purchasers at the boundary line between her and their properties; and that lot purchasers bought with the understanding that they might purchase water from Mrs. Van Dyke's water system at rates fixed by her, —are* all facts of no significance; for the character and extent of the use make it public; and since the service is a public one, the rates are subject to regulation.

Counsel contend that the use is not public, because water is furnished only to particular individuals, in fulfilment of private contracts made with the purchasers of town-site lots. But there is nothing in the record to indicate that such is the fact. Purchasers seem to have bought merely with the oral understanding that water could be secured from the Van Dyke system. Affidavits filed by appellants state expressly that their water system is operated "for the purpose of supplying the residents and inhabitants of said Miami town site with water, and not for the purpose of supplying persons outside of said town site, or the public generally, with water." The offer thus is to supply all the "inhabitants" within the given area; and that, of course, includes sub-tendees, tenants, and others with whom the Van Dykes had no contract relations. The fact that the service is limited to a part of the town of Miami does not prevent the water system from being a public utility. See *Del Mar Water, Light, & P. Co. v. Eshleman*, 167 Cal. 666, 681, 683, L.R.A. —, —, 140 Pac. 591, 948.

3. Whether the rates fixed are confiscatory.

The Commission decided that the net return to the owner upon the value of the property employed should be at the rate of at least 10 per cent, after allowing an annual depreciation charge of 3½ per cent. Water rates prescribed on this basis obviously cannot be held confiscatory unless

³ The Arizona Constitution (art. 4, pt. 2, § 13) provides that:

"Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title."

The act is entitled:

"An Act Relating to Public Service Corporations, Providing for the Regulation of the Same, Fixing Penalties for the Violation Thereof, and Repealing Certain Acts; with an Emergency Clause." [Laws 1912, chap. 90.]

either the valuation placed upon the property used was grossly inadequate or the cost of operation greatly underestimated. These elements are largely matters of fact and opinion, as to which both the Commission and the district court, after careful examination, found against the appellants. The case is presented to us on contradictory affidavits dealing with the items of value which go to make up the water system. We cannot say "that it was impossible for a fair-minded board to come to the result which was reached." *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 442, 47 L. ed. 892, 894, 23 Sup. Ct. Rep. 571; *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 18, 53 L. ed. 371, 382, 29 Sup. Ct. Rep. 148. And the provision in the order of the district court by which it retained jurisdiction of the case, with permission to Mrs. Van Dyke to renew her application for an injunction after one year, if the rates fixed appear to be confiscatory, afforded her appropriate protection.

The decree of the District Court is affirmed.

Mr. Justice McReynolds dissents.

(244 U. S. 31)

GULF, COLORADO, & SANTA FE RAILWAY COMPANY, Plff. in Err.,

v.

TEXAS PACKING COMPANY and Wabash Railroad Company.

COURTS ⇐394(15) — FEDERAL SUPREME COURT — ERROR TO STATE COURT—FEDERAL QUESTION.

1. A case which involves rights set up and denied that arose upon through interstate bills of lading issued under the Carmack Amendment of June 29, 1906 (34 Stat. at L. 593, chap. 3591, Comp. Stat. 1913, § 8592), to the Act of February 4, 1887 (24 Stat. at L. 349, chap. 104), § 20, is reviewable in the Federal Supreme Court on writ of error to a state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1064.]

CARRIERS ⇐135 — DAMAGED FREIGHT — VALUE AT DIVERTED DESTINATION.

2. The difference between the invoice price of an interstate shipment at the place of shipment in Texas and the value of the same in its damaged condition at the time of its delivery at Chicago, the new destination to which it was diverted upon the shipper's request without issuing new bills of lading, is the proper measure of damages for a loss caused by the carrier's failure to re-ice, where it is fairly inferable from the evidence that the original bills of lading, which provided that the loss should be computed "on the basis of the value of the

property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment," were continued in force by the action of the parties, simply changing the place of destination from St. Louis to Chicago, and remained binding contracts when the carriers accepted the diversion of the shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 557-559, 593-602, 603½-604½.]

DAMAGES ⇐62(3)—CARRIER'S LIABILITY—PREVENTING ANY UNNECESSARY LOSS.

3. The consignee of perishable goods arriving at destination in bad condition discharged its whole duty to the carrier to save it from resulting loss where it sold the damaged goods for the best price which they would bring.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 124-127.]

[No. 334.]

Argued and submitted December 6, 1916.

Decided May 7, 1917.

IN ERROR to the Court of Civil Appeals for the Third Supreme Judicial District, State of Texas, to review a judgment which affirmed a judgment of the District Court of Bell County, in that state, in favor of plaintiffs in a suit to recover damages from a carrier growing out of its failure to re-ice a perishable shipment. Affirmed.

See same case below, — Tex. Civ. App. —, 172 S. W. 195.

The facts are stated in the opinion.

Messrs. Alexander Britton, Gardiner Lathrop, J. W. Terry, Evans Browne, and A. H. Culwell for plaintiff in error.

Messrs. W. O. Cox and Frederick S. Tyler for defendants in error.

*Mr. Justice Day delivered the opinion of the court:

Defendant in error, Texas Packing Company, brought its action in the district court of Bell county, Texas, against the Gulf, Colorado, & Santa Fe Railway Company, plaintiff in error, to recover damages growing out of a series of shipments of dressed poultry from Temple, Texas, to St. Louis, Missouri, but which were re-routed over the line of the Wabash Railroad Company from St. Louis to Chicago. The shipments were on bills of lading, among the terms of which was the following: "Iced to full capacity at Temple with crushed ice adding 12 per cent salt. Re-ice at all regular icing stations with crushed ice using 12 per cent salt." The Packing Company in its petition, after averring the necessity of proper icing and the contract to that effect between it and the carrier, alleged negligence on the part of the carriers in failing to re-ice the poultry properly and

regularly, as a result of which plaintiff claimed damages in the sum of \$12,202.87.

The Santa Fe Company answered, denying the allegations of the petition, and alleging the absence of a contract of carriage from Temple to Chicago, and averred by way of cross petition that, under the terms of the bills of lading, its obligation was to carry the shipments and deliver them within a reasonable length of time to its connecting line, en route to destination, and that it did within a reasonable time carry and safely deliver the shipments in good and proper condition, or in such condition as they were received by it, to its connecting line, the Wabash Railroad Company; that under the terms of the bills of lading, the liability of each carrier was distinctly limited to all such loss and injury as occurred while the shipments were in its possession, and that there was no loss or injury to the shipments while the same were in its possession; that any loss or injury thereto was the result of the negligence of the plaintiff or the Wabash Railroad Company, and that it is not responsible herein for any of the losses or injuries complained of in plaintiff's petition; that the Santa Fe Company, being the initial carrier, was made responsible under the act of Congress for all loss or injury occurring en route, but that, under said act, it is entitled to vouch in the Wabash Railroad Company and recover over and against it for any loss or injury occasioned to the shipments in question through its negligence, and that if there was any negligence of any carrier which resulted in loss to plaintiffs, the same was the negligence of the Wabash Railroad Company.

Accordingly, the Wabash Railroad Company was made a defendant and filed an answer, asserting that it was not a proper party to the suit, and denying that it was guilty of the negligence complained of. It further averred that the shipments were delivered at Chicago in the same condition as when it (the Wabash Company) had received them, and that it received and transported the shipments by virtue of a contract with the plaintiff to which the Gulf, Colorado, & Santa Fe Railway Company was not a party or in any way interested, and prayed a dismissal with its costs.

It appears from the record that the shipments were separately billed from Temple, Texas, to St. Louis, Missouri, at dates varying from December 24th to December 30th, 1910; that upon January 4th, 1911, the shipper requested the carrier's agent, at Temple, by telephone, to divert the five cars from St. Louis to Chicago; that the agent said he would, asked where the bills of lading were, and upon being told that they

were in St. Louis, said that the carrier's representative in St. Louis would perhaps see that the notations of the diversion were made upon the bills; that no new bills were issued, and that thereupon the shipments were continued to Chicago.

* Concerning the stipulation as to icing in transit at "all regular icing stations," there is testimony tending to show the cars were in fact re-iced en route to St. Louis at all but one regular station,—Shawnee, Oklahoma; but the failure to re-ice at this point resulted in a lapse of from twenty-eight to fifty-four hours without ice and salt.

Upon the issues made the jury found for the Packing Company against the Santa Fe Railway Company, and upon the issue between the Santa Fe and Wabash Companies the verdict was in favor of the Wabash Company. The district court rendered judgment accordingly, and the case was taken to the court of civil appeals, where the judgment of the district court was affirmed. 172 S. W. 195.

As the case involves rights set up and denied which arose upon through bills of lading issued under the Carmack Amendment, it is properly reviewable here. *St. Louis, I. M. & S. R. Co. v. Starbird*, decided April 30, 1917 [243 U. S. 592, 61 L. ed. 917, 37 Sup. Ct. Rep. 462]. Indeed, both parties admit that the Federal statute controls, and the case must be decided under its provisions.

As required by the Texas statute (Rev. Stat. [Tex.] 1911, art. 1639), the court of civil appeals made findings of fact, in which it said:

"The verdict of the jury is amply supported by testimony, and we therefore make findings of fact to the effect that appellant breached its contract of shipment, as alleged in appellee's petition, and that, as a result of that breach, the property which was shipped was injured and damaged to the extent found by the jury; and that the proof failed to show that any of the damage referred to was caused by the Wabash Railroad Company."

The plaintiff in error, in urging certain grounds for the reversal of the judgment of the court of civil appeals, contends that the district court erred in charging the jury as to the measure of damages. On that subject the district court charged the jury as follows:

* "(4) If you find for the plaintiff you will assess the damages at the difference between the invoice price of said poultry, to wit, the sum of Twenty-Two Thousand Two Hundred Thirty-Eight and 56/100 (\$22,238.56) Dollars, and the value of said property at the time the same was delivered to plain-

tiff or its agents, the Western Cold Storage Company in Chicago, by the carrier, with 6 per cent interest per annum from January 15th, 1911."

This interstate shipment was governed by the terms of the Carmack Amendment [34 Stat. at L. 593, chap. 3591, § 7, Comp. Stat. 1913, § 8592], requiring the initial carrier to issue a receipt or bill of lading, and as this court frequently has held, with the effect of making such contract the measure of liability between the parties. It is insisted that, inasmuch as the bill of lading made St. Louis the point of destination, it is immaterial what the value of the property was in Chicago, to which point the goods were shipped, having been sold in transit to a company in that city. On this point the record shows that the bills of lading covered the shipment of five cars of dressed poultry from Temple, Texas, to St. Louis, where they were consigned to the "order of the Texas Packing Company, notify St. Louis Refrigerating & Cold Storage Company." There is testimony to show that the poultry while in transit was sold in Chicago, and that while the cars were in St. Louis on the sidetrack of the St. Louis Refrigerating & Cold Storage Company the shipper called upon the agent of the Santa Fe Company at Temple, to divert the cars to Chicago. The testimony also shows that the agent promised to do so; said that he would wire a representative of the railway company in St. Louis to divert the cars; that no new bills of lading were issued; that the agent asked for the original bills of lading and was told that they were in St. Louis, and said that the representative of the carrier there would perhaps call at the bank and make the proper notations thereon.

It is fairly inferable from the evidence that the bills of lading originally issued were continued in force by the action of the parties, simply changing the place of destination, and remained binding contracts when the Santa Fe Company accepted the diversion of the shipment from St. Louis to Chicago.

The bills of lading contained this stipulation:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper, or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be

the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

The testimony showed that the invoice price of the poultry at Temple to the Packing Company was \$22,238.56, and that the poultry was worth at least that sum at Temple at the time of shipment. We think that, in taking this sum as the basis of computing damages, the trial court did but enforce the stipulation in the bills of lading. That sum was the bona fide invoice price to the consignee, which the bills provided was to be the basis of recovery in case of loss or damage. We think the court properly charged the jury to take the difference between this invoice price and the value of the poultry at the time the same was delivered in Chicago in arriving at the amount of damages. No question is raised in this case as to the right of the plaintiff to recover also the freight paid. See *Pennsylvania R. Co. v. Olivit Bros.* decided April 30, 1917 [243 U. S. 574, 61 L. ed. 908, 37 Sup. Ct. Rep. 468].

The testimony shows that the poultry reached St. Louis in poor condition, and that the cars were there re-iced and forwarded to Chicago, where the poultry was delivered, still in bad condition, and really unfit for market. It was nevertheless sold for the best price which could be obtained. When the poultry reached Chicago in that condition, the consignee discharged its duty to the railway company when it sold the damaged goods for what could be obtained for them.

The testimony shows that the poultry was taken to a storage company at Chicago, where it was kept until it could be sold, and ultimately realized the sum of \$10,035.69. The jury returned a verdict, under the instruction of the court to deduct the value of the property at Chicago from the invoice price, in the sum of \$9,000 and interest. Evidently, in this state of the record, no harm was done to the rights of the plaintiff in error in assessing the sum which the jury awarded against it.

We cannot agree with the contention of the plaintiff in error that the value of the deteriorated poultry at Temple or St. Louis should have been taken as the sum to be deducted from the invoice basis of value.

Apart from the stipulation of these bills of lading, the ordinary measure of damages in cases of this sort is the difference between the market value of the property in the condition in which it should have arrived at the place of destination and its market value in the condition in which, by reason of the fault of the carrier, it did arrive. *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 616, 37 L. ed. 292,

304, 13 Sup. Ct. Rep. 444. The stipulations of these bills of lading changed this rule in the requirement that the invoice price at the place of shipment should be the basis for assessing the damages.

The poultry in fact had no market price at Temple or elsewhere. It was badly deteriorated, and when the shipper sold it at the point of destination for the best price it would bring he did all that could be fairly required of him to save the carrier from resulting loss.

The trial court charged that the Santa Fe Company was entitled to a recovery against the Wabash Railroad Company if the jury found that the Santa Fe Company and Wabash Railroad Company were both guilty of negligence in the handling of the poultry, in which event the jury were told that the Santa Fe Company would be entitled to a verdict against the Wabash Railroad Company for that part of the sum to which the Wabash Company had contributed by its negligence to plaintiff's injury. It is urged by the plaintiff in error that the Santa Fe Company, as the initial carrier, regardless of its own negligence, was entitled to recover against the Wabash Company in proportion as the negligence of that company contributed to the loss; and it is contended that the testimony tends to show that the Wabash Railroad Company did not properly re-ice and otherwise care for the poultry in transit. The record shows no proper exception reserved upon which to base this criticism; and the question becomes immaterial in view of the verdict of the jury in favor of the Wabash Railroad Company, and the express finding of the Court of Civil Appeals that the proof failed to show that any of the damages had been caused by the Wabash Railroad Company.

We find no error in the judgment of the court below, and it is affirmed.

(244 U. S. 12)

NORTH GERMAN LLOYD, Claimant of the Steamship Kronprinzessin Cecilie, Petitioner,

v.

GUARANTY TRUST COMPANY of New York and National City Bank of New York.

SHIPPING —115—FAILURE TO DELIVER—ANTICIPATION OF WAR.

The action of the master of a German steamship in turning back and seeking an American port when distant from Plymouth, England, but 1,070 miles, did not create an actionable breach of the steamship company's obligation to transport shipments of gold from New York to Plymouth and to Cherbourg, France, under bills of lading excepting, in this connection, only "arrest

and restraint of princes, rulers, or people," where, at the moment of turning back, the master knew that war had been declared by Austria against Serbia; that Germany had declined a proposal for a conference of Ambassadors in London; that orders had been issued for the German fleet to concentrate in home waters; that British battle squadrons were ready for service; that Germany had sent an ultimatum to Russia; and that business was practically suspended on the London Stock Exchange; and he had just received a wireless message from the directors of the steamship company at her home port, stating, "War has broken out with England, France, and Russia; return to New York," and he had then proceeded about as far as he could with coal enough to return if that should prove needful, although war between Germany and the countries named had not, in fact, been declared, and if nothing unforeseen had happened, he might in fact have delivered the gold and escaped capture by the margin of a few hours.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 433.]

[No. 922.]

Argued April 16 and 17, 1917. Decided May 7, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the First Circuit to review decrees which reversed decrees of the District Court for the District of Massachusetts, dismissing libels against a German steamship. Reversed.

See same case below, 238 Fed. 668.

The facts are stated in the opinion.

Messrs. Joseph Larocque, Walter C. Noyes, and Joseph D. Bedle for petitioner.

Messrs. J. Parker Kirlin and Charles R. Hickox for the Guaranty Trust Company.

Messrs. James M. Beck, Carl A. Mead, and Edward E. Blodgett for the National City Bank.

Mr. Justice Holmes delivered the opinion of the court:

This writ was granted to review two decrees that reversed decrees of the district court, dismissing libels against the steamship Kronprinzessin Cecilie. 238 Fed. 668; 228 Fed. 946, 965. The libels alleged breaches of contract by the steamship in turning back from her voyage from New York and failing to transport kegs of gold to their destinations, Plymouth and Cherbourg, on the eve of the outbreak of the present war. The question is whether the turning back was justified by the facts that we shall state.

The Kronprinzessin Cecilie was a German steamship owned by the claimant, a German corporation. On July 27, 1914, she received the gold in New York for the above desti-

nations, giving bills of lading in American form, referring to the Harter Act, and we assume, governed by our law in respect of the justification set up. Early on July 28 she sailed for Bremerhaven, Germany, via the mentioned ports, having on board 1,892 persons, of whom 667 were Germans, passengers and crew; 406, Austrians; 151, Russians; 8, Bulgars; 7, Serbs; 1, Roumanian; 14, English; 7, French; 304, Americans; and 2 or 3 from Italy, Belgium, Holland, etc. She continued on her voyage until about 11.05 P. M., Greenwich time, July 31, when she turned back; being then in 46° 46' N. latitude and 30° 21' W. longitude from Greenwich, and distant from Plymouth about 1,070 nautical miles. At that moment the master knew that war had been declared by Austria against Serbia (July 28), that Germany had declined a proposal by Sir Edward Grey for a conference of Ambassadors in London; that orders had been issued for the German fleet to concentrate in home waters; that British battle squadrons were ready for service; that Germany had sent an ultimatum to Russia; and that business was practically suspended on the London Stock Exchange. He had proceeded about as far as he could with coal enough to return if that should prove needful, and was of opinion that the proper course was to turn back. He reached Bar Harbor, Maine, on August 4, avoiding New York on account of supposed danger from British cruisers, and returned the gold to the parties entitled to the same.

On July 31 the German Emperor declared a state of war, and the directors of the company at Bremen, knowing that that had been or forthwith would be declared, sent a wireless to the master: "War has broken out with England, France, and Russia, Return to New York." Thereupon he turned back. The probability was that the steamship, if not interfered with or prevented by accident or unfavorable weather, would have reached Plymouth between 11 P. M. August 2, and 1 A. M. August 3, and would have delivered the gold destined for England, to be forwarded to London by 6 A. M., August 3. On August 1st, at 9:40 P. M., before the earliest moment for probably reaching Plymouth, had the voyage kept on, the master received a wireless message from the German Imperial Marine Office: "Threatening danger of war. Touch at no port [of] England, France, Russia." On the same day Germany declared war on Russia. On August 2, Germany demanded of Belgium passage for German troops, and seized two English vessels with their cargoes. Explanations were offered for the seizures, but the vessels were detained. The German Army entered Luxembourg, and

there were skirmishes with French troops. On August 3, Germany was at war with France, and at 11 P. M., on August 4, with England. On August 4 some German vessels were detained by England, and early on the fifth were seized as prize, e. g., The Prinz Adalbert, L. R. [1916] P. 81, 85 L. J. Prob. N. S. 108, 114 L. T. N. S. 567, 32 Times L. R. 378, 60 Sol. Jo. 480. No general history of the times is necessary. It is enough to add that from the moment Austria declared war on Servia the great danger of a general war was known to all.

With regard to the principles upon which the obligations of the vessel are to be determined it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was "arrest and restraint of princes, rulers, or people," other exceptions necessarily are to be implied; at least, unless the phrase "restraint of princes" be stretched beyond its literal intent. The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine v. Jane*, Aleyn, 26, 82 Eng. Reprint, 897, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money), some, at least, which, if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed. *Baily v. De Crespigny*, L. R. 4 Q. B. 180, 185, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494, 15 Eng. Rul. Cas. 799. Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing. *Taylor v. Caldwell*, 3 Best & S. 826, 839, 122 Eng. Reprint, 309, 32 L. J. Q. B. N. S. 164, 8 L. T. N. S. 356, 11 Week. Rep. 726, 6 Eng. Rul. Cas. 603. It has been held that a laborer was excused by the prevalence of cholera in the place where he had undertaken to work. *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77. The same principles apply to contracts of shipment. If it had been certain that the vessel would have been seized as prize upon reaching England, there can be no doubt that it would have been warranted in turning back. See *Mitsui & Co. v. Watts, W. & Co.* [1916] 2 K. B. 826, 845, 85 L. J. K. B. N. S. 1721, 115 L. T. N. S. 248 [1916] W. N. 271, 32 Times L. R. 622; *The Styria v. Morgan*, 186 U. S. 1, 46 L. ed. 1027, 22 Sup. Ct. Rep. 731. The owner of a cargo upon a foreign ship cannot expect the foreign master to run greater risks than he would in respect to goods of his own nation. *The Teutonia*, L. R. 4 P. C. 171, 8 Moore, P. C. C. N. S. 411, 17 Eng. Reprint, 366, 41 L. J. Prob.

N. S. 57, 26 L. T. N. S. 48, 20 Week. Rep. 421; *The San Roman*, L. R. 5 P. C. 301, 307, 42 L. J. Prob. N. S. 46, 21 Week. Rep. 393, 1 Asp. Mar. L. Cas. 603. And when we add to the seizure of the vessel the possible detention of the German and some of the other passengers, the proposition is doubly clear. Cases deciding what is and what is not within the risk of an insurance policy throw little light upon the standard of conduct to be applied in a case like this. But we see no ground to doubt that Chief Justice Marshall and Chief Justice Kent would have concurred in the views that we express. *Oliver v. Maryland Ins. Co.* 7 Cranch, 487, 493, 3 L. ed. 414, 416; *Craig v. United Ins. Co.* 6 Johns. 226, 250, 253, 5 Am. Dec. 222. See also *British & F. M. Ins. Co. v. Sanday* [1916] A. C. 650, 85 L. J. K. B. N. S. 550, 21 Com. Cas. 154, 114 L. T. N. S. 521 [1916] W. N. 44, 32 Times L. R. 266, 60 Sol. Jo. 253.

What we have said so far we hardly suppose to be denied. But if it be true that the master was not bound to deliver the gold in England at the cost of capture, it must follow that he was entitled to take reasonable precautions to avoid that result, and the question narrows itself to whether the joint judgment of the master and the owners in favor of return was wrong. It was the opinion very generally acted upon by German shipowners. The order from the Imperial Marine Office, if not a binding command, at least shows that if the master had remained upon his course one day longer, and had received the message, it would have been his duty as a prudent man to turn back. But if he had waited till then, there would have been a question whether his coal would hold out. Moreover, if he would have been required to turn back before delivering, it hardly could change his liability that he prophetically and rightly had anticipated the absolute requirement by twenty-four hours. We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared, he never is at liberty to anticipate war. In this case the anticipation was correct, and the master is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man.

We agree with the counsel for the libellants that on July 27 neither party to the contract thought that it would not be performed. It was made in the usual form, and, as we gather, charged no unusual or additional sum because of an apprehension of war. It follows, in our opinion, that

the document is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier, subject to the implied exceptions which it would be extravagant to say were excluded because they were not written in. Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs. The case of *The Styria*, supra, although not strictly in point, tends in the direction of the principles that we adopt.

Decree reversed.

Mr. Justice Pitney and Mr. Justice Clarke dissent, upon grounds expressed in the opinions delivered by Circuit Judges Dodge and Bingham in the circuit court of appeals, 238 Fed. 668.

(244 U. S. 25)

CHICAGO LIFE INSURANCE COMPANY
and the Federal Life Insurance Company, Plffs. in Err.,
v.

BERTHA R. CHERRY.

CONSTITUTIONAL LAW — 315 — DUE PROCESS OF LAW — UPHOLDING JUDGMENT OF OTHER STATE.

1. The rendition of a judgment in favor of plaintiff in an action upon a judgment of a court of another state, over defendants' objection that the judgment sued upon was void for lack of valid service of process, does not take the property of defendants without due process of law, where the second judgment rests upon the view—right or wrong—that, as the issue of jurisdiction over the parties was raised and adjudicated after full hearing in the former case, it could not be reopened in the present suit. [Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 935, 937, 941, 947.]

COURTS — 399(1) — FEDERAL SUPREME COURT — SCOPE OF REVIEW — LOCAL PROCEDURE.

2. The objection that a copy of the document sued upon should have been filed with the declaration in a suit in a state court is a matter of state procedure not open to review in the Federal Supreme Court by writ of error.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1089.]

[No. 171.]

Argued April 18, 1917. Decided May 7, 1917.

IN ERROR to the Appellate Court for the First District of the State of Illinois to review a judgment which affirmed a judgment of the Superior Court of Cook County, in that state, in favor of plaintiff in an

action upon a judgment of a court of another state. Affirmed.

See same case below, 190 Ill. App. 70.

The facts are stated in the opinion.

Messrs. Charles A. Atkinson, Chilton P. Wilson, and Charles J. O'Connor for plaintiffs in error.

Messrs. Vernon R. Loucks, Charles O. Loucks, and Fred H. Atwood for defendant in error.

* Mr. Justice Holmes delivered the opinion of the court:

This is a suit in Illinois upon a judgment recovered in Tennessee against the Insurance Companies, plaintiffs in error. They pleaded and set up at the trial that there never was a valid service upon them in Tennessee and that the judgment was void. The defendant in error (the plaintiff) showed in reply, without dispute, that the defense was urged in Tennessee by pleas in abatement; that, upon demurrer to one plea and upon issue joined on the other, the decision was for the plaintiff; and that the judgment was affirmed by the higher courts. The plaintiff had judgment at the trial in Illinois, the judgment was affirmed by the appellate court, and a writ of certiorari was denied by the supreme court of that state. The Insurance Companies say that the present judgment deprives them of their property without due process of law. Other sections of the Constitution are referred to in the assignments of error, but they have no bearing upon the case.

The ground upon which the present judgment was sustained by the appellate court was that, as the issue of jurisdiction over the parties was raised and adjudicated after full hearing in the former case, it could not be reopened in this suit. The matter was thought to stand differently from a tacit assumption or mere declaration in the record that the court had jurisdiction.

A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant. But it must be taken to be established that a court cannot conclude all persons interested by its mere assertion of its own power (*Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897), even where its power depends upon a fact and it finds the fact (*Tilt v. Kelsey*, 207 U. S. 43, 51, 52 L. ed. 95, 99, 28 Sup. Ct. Rep. 1). A divorce might be held void for want of jurisdiction although the libellee had appeared in the cause. *Andrews v. Andrews*, 188 U. S. 14, 16, 17, 38, 47 L. ed. 366, 367, 372, 23 Sup. Ct. Rep. 237. There is no doubt of the general proposition that, in a suit upon a judgment, the

jurisdiction of the court rendering it over the person of the defendant may be inquired into. *National Exch. Bank v. Wiley*, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 70; *Haddock v. Haddock*, 201 U. S. 562, 573, 50 L. ed. 867, 871, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1. But when the power of the court in all other respects is established, what acts of the *defendant shall be deemed a submission to its power is a matter upon which states may differ. If a statute should provide that filing a plea in abatement, or taking the question to a higher court, should have that effect, it could not be said to deny due process of law. The defendant would be free to rely upon his defense by letting judgment go by default. *York v. Texas*, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9; *Western Life Indemnity Co. v. Rupp*, 235 U. S. 261, 272, 273, 59 L. ed. 220, 224, 225, 35 Sup. Ct. Rep. 37. If, without a statute, a court should decide as we have supposed the statute to enact, it would infringe no rights under the Constitution of the United States. That a party that has taken the question of jurisdiction to a higher court is bound by its decision was held in *Forsyth v. Hammond*, 166 U. S. 506, 517, 41 L. ed. 1095, 1099, 17 Sup. Ct. Rep. 665. It can be no otherwise when a court so decides as to proceedings in another state. It may be mistaken upon what to it is matter of fact, the law of the other state. But a mere mistake of that kind is not a denial of due process of law. *Pennsylvania F. Ins. Co. v. Gold Issue Min. & Mill. Co.* 243 U. S. 93, 96, 61 L. ed. 610, 37 Sup. Ct. Rep. 344. Whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights. The decision of the Illinois courts, right or wrong, was not such a denial. If the Tennessee judgment had been declared void in Illinois, this court might have been called upon to decide whether it had been given due faith and credit. *National Exch. Bank v. Wiley*, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 70. But a decision upholding it upon the ground taken in the present case does not require us to review the Tennessee decision or to go further than we have gone. An objection that a copy of the document sued upon should have been filed with the declaration is a matter of state procedure, and not open here.

Judgment affirmed.

(244 U. S. 1)

THOMAS EWING, Commissioner of Patents, Petitioner,
v.

UNITED STATES EX REL. THE FOWLER CAR COMPANY.

PATENTS §106(1)—INTERFERENCE—DUTY TO DECLARE — DISCRETION OF COMMISSIONER OF PATENTS.

The refusal of the Commissioner of Patents to declare an interference, where the Patent Office is informed, through the admission of an applicant, that the invention shown in his application was conceived on a date subsequent to the filing date upon an application of another person for the same invention, is justified by the provisions of U. S. Rev. Stat. § 4904, Comp. Stat. 1913, § 9449, that whenever an application is made for a patent which, "in the opinion" of the Commissioner, "would interfere with any pending application," he shall give notice thereof and shall direct the primary examiner to determine the question of priority of invention, since the duty to declare an interference imposed by this statute and by the rules of the Patent Office, adopted in the exercise of the authority under § 483 (Comp. Stat. 1913, § 745), to establish regulations not inconsistent with law, cannot be deemed imperatively to arise merely because of an asserted antagonism between the applications, but there must be the precedent and supervising judgment of the Commissioner.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 146-149.]

[No. 721.]

Argued April 17, 1917. Decided May 7, 1917.

ON WRIT of Certiorari to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, awarding mandamus to compel the Commissioner of Patents to declare an interference between two applications for a similar invention. Reversed and remanded for the discharge of the rule and dismissal of the petition.

See same case below, 45 App. D. C. 185.

Statement by Mr. Justice McKenna:

This writ is directed to a judgment of the court of appeals of the District of Columbia, which affirmed a judgment of the supreme court of the District of Columbia in mandamus commanding the Commissioner of Patents "to declare or direct to be declared an interference between the application of William E. Fowler, filed May 22, 1915, for improvements in car floor construction, and the application for a similar invention" of an unnamed applicant, "pursuant to the statute and rules in such cases made and provided."

The judgment was rendered upon motion of petitioner's attorney upon the petition, rule to show cause, and answer. It was affirmed by the court of appeals.

As the Fowler Car Company and Ewing, Commissioner of Patents, were petitioner and respondent, respectively, in the court below, we shall so designate them here.

The facts as stated by the petition are as follows:

William E. Fowler, Sr., was the first and original inventor of certain new and useful improvements in car floor construction.

On May 22, 1915, he applied for a patent in the usual form and manner and his application was accepted and became known and designated as application serial No. 29,794.

On May 19, 1915, he duly assigned his right, title, and interest in the invention to the Fowler Car Company, which company appointed Charles C. Linthicum its attorney.

On November 18, 1915, the Commissioner of Patents wrote to Linthicum stating that "there is another application pending, claiming substantially the same invention as that defined" in certain of the claims which were set out. He further stated: "In order to determine whether it is necessary to declare an interference you are requested to obtain a statement from Fowler setting forth when he conceived the invention defined in the above quoted claims, when he disclosed it to others, and when he reduced it to practice. This statement will not be made a part of the record and will be returned to you."

Fowler replied that he had conceived the subject-matter of the claim quoted in the Commissioner's letter on or about April 16, 1915, disclosed the same to others and made drawings on or about the same date, but had not reduced the same to practice by constructing any full-sized devices.

On November 26, 1915, Linthicum filed an amendment to Fowler's application in which all of the claims suggested by the Commissioner were inserted. Of these claims Linthicum said: "It is thought that these claims appear in a co-pending application, and they are inserted at this time with the request that, if such claims do appear in a co-pending application, an interference be declared."

To this communication the Commissioner replied as follows:

"Sir:—Enclosed please find the statement of William Fowler, Sr., made in response to the request in my letter of November 18, 1915.

"The dates of invention claimed by Fowler are subsequent by several months to the filing date of the application of the other

party. The other party's case will be passed to issue as soon as possible and when patented will be cited as a reference against such claims in Fowler's application as it may be found to anticipate. An interference will not be declared."

Section 483, Rev. Stat. Comp. Stat. 1913, § 745, provides: "The Commissioner of Patents, subject to the approval of the Secretary of the Interior, may, from time to time, establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office."

Pursuant to this authority regulations known as "Rules of Practice in the United States Patent Office" have been established by the Commissioner, by and with the approval of the Secretary of the Interior, and now govern* the declaration of interferences between pending conflicting applications, and have the force and effect of law, binding as well upon the Commissioner as upon the applicant for patents.

It is further alleged that it clearly appears from the correspondence recited and under the statute and rules that an interference exists between the Fowler application and that of the applicant, unknown to petitioner, which applications disclose and claim the same patentable invention, and it is the duty of the Commissioner to declare an interference and to call upon each applicant for the sworn preliminary statement required by rule 110.

That if the unknown applicant receive a patent and thereafter petitioner's (Fowler's) application is put in interference with it, and petitioner afterwards be awarded priority over the unknown applicant and receive a patent, in order to get rid of the menace of the outstanding patent to such unknown applicant petitioner will have to file a bill in equity under the provisions of § 4918, Rev. Stat. Comp. Stat. 1913, § 9463, for the cancellation of such patent, or the owner of the outstanding patent may file such bill against petitioner, all of which possibility of litigation may be prevented if the Commissioner be required to discharge his plain duty under the statute and rules and declare an interference when the rights of both parties are in the application stage, and before either party receives a patent. That conduct of the Commissioner is a matter of public concern, and for over a quarter of a century his predecessors have, without exception, regarded the interference rules as imposing upon them the legal duty of declaring an interference under the circumstances detailed. And petitioner is advised and believes that unless the Commissioner be restrained, a patent in due course will be issued to the unknown ap-

plicant, and petitioner is without remedy unless the court, by writ of mandamus, shall interpose in its behalf.

* Mandamus was prayed.

A rule to show cause was issued and the Commissioner's action stayed until the determination of the cause.

The Commissioner in his answer admitted the filing of the applications as alleged and the correspondence with Linthicum, but denied the legal conclusion drawn by petitioner therefrom. He alleged that an interference, as defined by the rules of the Patent Office, is a proceeding for the purpose of determining the question of priority of invention, and that when an applicant informs the office that the invention shown in his application was made at a date which was subsequent to the date upon which another application for the same invention was filed, the statute does not require that an interference be established between his application and the prior application. That in asking the later applicant to inform the office of the date of its invention, the Commissioner was only asking for information upon which he might form, as required by § 4904, Rev. Stat. Comp. Stat. 1913, § 9449, an opinion whether a situation existed where the statute required that the later application should be put into interference with the earlier application, and that the rules do not require or contemplate a declaration of interference where it is known that the later applicant made his invention subsequently to the filing of the earlier application; in other words, they do not contemplate the declaration of an interference except where there is a possible conflict in the dates of invention.

The answer further denied that petitioner had shown injury or threatened injury, and alleged that the only injury averred in the petition was that if the application of petitioner be put in interference with the patent granted upon the other application, and if priority should be awarded to petitioner and a patent granted to it, a bill in equity under § 4918, Rev. Stat. Comp. Stat. 1913, § 9463, would be necessary to get rid of the menace of the outstanding patent. That the date of Fowler's invention being subsequent to the filing* date of the other party, there would* be no ground of awarding priority to Fowler. That even if interference should be declared, "a litigation to be conducted between the application owned by the petitioner and the patent issued to the other party would be no longer or more expensive than a litigation to be conducted between the two applications. No suit could be brought under § 4918 of the Revised Statutes (Comp. Stat. 1913, § 9463), either by

or against this petitioner, unless it were proved that Fowler was the first inventor and a patent issued to him; but, as above stated, the date upon which Fowler states he conceived the invention is subsequent to the date upon which the other application was filed."

There was detail of the business of the Patent Office and of the inconvenience to its administration if the right insisted upon by petitioner were allowed.

A discharge of the rule was prayed.

Solicitor General Davis, Assistant Attorney General Warren, and Mr. R. F. Whitehead for petitioner.

Messrs. George L. Wilkinson and Melville Church for respondent.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The case is not in broad compass. It depends upon a few simple elements. Section 4904, Rev. Stat. Comp. Stat. 1913, § 9449, provides: "Whenever an application is made for a patent which, *in the opinion* of the Commissioner, would interfere with any pending application, or with an unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question* of priority of invention. And the Commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner, or of the board of examiners-in-chief, as the case may be, within such time, not less than twenty days, as the Commissioner shall prescribe."

The duty prescribed by this section and the other duties of the Commissioner, it was provided (Rev. Stat. § 483, Comp. Stat. 1913, § 745), might be regulated by rules established by the Commissioner, subject to the approval of the Secretary of the Interior. And rules were established. They define an interference to be a proceeding instituted for the purpose of determining the question of priority of invention between two or more parties claiming the same patentable invention (rule 93), and provide that an interference shall be declared between two or more original applications containing conflicting claims (rule 94). Before the declaration of an interference all preliminary questions must be settled by the primary examiner, the issue clearly defined, and the claims put in such condition that they will not require alteration (rule 95). Whenever the claims of the co-pending applications differ in phrase-

ology they must be brought to expression substantially in the same language, and claims may be suggested to the applicants, and, if not followed, the invention covered by them shall be considered as disclaimed. The declaration of an interference will not be delayed by the failure of a party to put his claim in condition for allowance (rule 96). Each party to the interference will be required to file a concise statement, under oath, showing (1) the date of original conception of his invention, (2) the date upon which a drawing of it was made, (3) the date of its disclosure to others, (4) the date of its reduction to practice, (5) the extent of its use, and (6) the date and number of any foreign application. If a drawing has not been made or the invention has not been reduced to practice or *dis-²closed to others or used to any extent, the statement must specifically disclose these facts (rule 110).

Priority of invention is necessarily the essential thing, and to determine it, interference proceedings are provided. But are they considered as a matter of course on the mere assertion or appearance of a conflict? Upon the answer to the question the controversy here turns. The Commissioner contends for a negative answer and supports the contention by the language of § 4904 (Comp. Stat. 1913, § 9449), reinforced by the assertion that there is no necessity for proceedings to determine what is already apparent, as in the pending case, by the admission of respondent. The mere fact of asserted antagonism does not put the proceedings in motion, is the contention. There must be the precedent and superintending judgment of the Commissioner. The law requires, it is said, his opinion to be exercised upon the effect of a conflict in applications, and such, indeed, is the language of § 4904 (Comp. Stat. 1913, § 9449). It provides that "whenever an application is made for a patent which, *in the opinion* of the Commissioner, would interfere with any pending application . . . he shall give notice thereof . . . and shall direct the primary examiner to proceed to determine the question of priority of invention."

In opposition to this view petitioner replies that the only fact upon which the Commissioner is to exercise an opinion is the fact of the conflict in the applications; and, that fact ascertained, the duty is imperative upon the Commissioner to declare an interference. "Interference, it is said, is a question of fact; it exists or it does not exist. If it exists, then priority must be determined in the way pointed out by the statute and rules." Other conditions than priority in time determine priority of

invention, it is insisted; that the rules of the Patent Office and the motions for which they provide contemplate such conditions; and that in twenty-five years of practice under them "the question of interference, in fact, the question of seniority of the parties, the patentability of the claim to one or the other, and a number of other questions became inter partes, and it often happens that the interference is dissolved because of mistake in declaring it, or the burden of proof shifted on the ground that the senior party is not entitled to his original filing date as his effective date for the reason that he did not disclose the invention in his case as originally filed, or that his application discloses an inoperative embodiment of the invention, or that he was not entitled to make the claims, or that the junior party had an earlier filed case disclosing the invention, or that the issues as formed did not apply to the structures of the two parties."

The result of the practice is declared to be that it "provides a judgment of record based solely upon an ex parte consideration by the Commissioner, and affords each of the parties an opportunity to contest the right of the other party to a judgment."

If there are such possibilities in some interferences, they are precluded in petitioner's case. Seven claims of a prior application were adduced by the Commissioner as making a conflict with the invention claimed by petitioner. The latter, through its attorney, adopted six of the claims and directed that they be inserted in its application. It did not intimate the existence of any circumstances which would overcome the priority of invention as determined by the difference in times of the conceptions of the contending applicants.

The conceptions were thus established to be identical and that that of Fowler did not come to him until some months after the filing of the other application. And it is to be observed that the priority was complete. There was not only the precedent conception, but there was its expression in claims; and that it was practical, a useful gift to the world, petitioner concedes by adopting the claims. There were, therefore, all of the elements of a completed invention,—one perfected before the filing of petitioner's application,—all that the preliminary statement required by rule 110 could disclose.

This, then, was the situation presented to the Commissioner. There was nothing shown to change it, there is nothing alleged in the petition for mandamus to change it, and there is only urged that an experience of twenty-five years has demonstrated that, in interference proceedings,
37 S. C.—32.

circumstances may be shown that determine against the date of filing or the claim of invention.

If it could be conceded that there is antagonism between § 4904 (Comp. Stat. 1913, § 9449) and the rules, the former must prevail. *United States ex rel. Steinmetz v. Allen*, 192 U. S. 543, 565, 48 L. ed. 555, 563, 24 Sup. Ct. Rep. 416. But there is no antagonism. The former provides that "whenever an application is made for a patent which, *in the opinion* of the Commissioner, would interfere with any pending application . . . he . . . shall direct the primary examiner to proceed to determine the question of priority of invention." The section, therefore, commits to the opinion (judgment) of the Commissioner the effect of an application upon a pending one,—whether it will interfere with a pending one; something more, therefore, than the fact of two applications,—something more than the mere assertion of a claim. The assertion must be, in the opinion of the Commissioner, an interference with another. And it is this other that is first in regard, not to be questioned except at the instance of the Commissioner by an exercise of judgment upon the circumstances. And there is no defeat of ultimate rights; there may be postponement of their assertion remitted to a suit in equity under § 4918 (Comp. Stat. 1913, § 9463).

But, anterior to such relief, petitioner contends that "there is a fundamental and basic right of opposition on the part of any applicant, whether junior or senior, to prevent the wrongful grant of a patent to his opponent." It is further contended that the declaration of an interference and the motions which are permitted to be made under the rules "provide a judgment of record based solely upon an ex parte consideration by the Commissioner, and affords each of the parties an opportunity to contest the right of the other party to a judgment." There indeed seems to be a less personal right claimed,—the right of opposition in the interest of the public, displacing the superintendency of the Commissioner constituted by the law. It is to be remembered that the law gives the Commissioner both initial and final power. It is he who is to cause the examination of an asserted invention or discovery and to judge of its utility and importance;¹ it is he who is to judge (be of opinion) whether an application will interfere with a pending one;² and it is he who, after

¹ Rev. Stat. § 4893, Comp. Stat. 1913, § 9437; *Butterworth v. United States*, 112 U. S. 50, 28 L. ed. 656, 5 Sup. Ct. Rep. 25.

² § 4904 (Comp. Stat. 1913, § 9449).

an interference is declared and proceedings had, is the final arbiter of its only controversy, priority of invention.³

The contentions of petitioner put these powers out of view,—put out of view the fact that the so-called “judgment of record” is, as the action of the Commissioner may be said to be, but a matter of administration. A suit in equity may follow and be instituted by either party, and even in it nothing can be determined but priority of invention. “There is but one issue of fact in an interference suit. That issue relates to the dates wherein the interfering matter was respectively invented by the interfering inventors. If the complainant’s inven-

tion is the older, the defendant’s interfering claim is void for want of novelty. And the complainant’s interfering claim is void for want of novelty if the defendant’s invention is found to antedate the other.” Walker, Patents, 3d ed. § 317.

Such suit, therefore, is the judicial remedy the law provides. Section 4904 (Comp. Stat. 1913, § 9449) concerns and regulates the administration of the Patent Office,³ and the utility of the*discretion conferred upon the Commissioner is demonstrated by his answer in this case.

Judgment reversed and case remanded with instructions to reverse the judgment of the Supreme Court of the District of Columbia, and direct it to discharge the rule and dismiss the petition.

³ § 4910 (Comp. Stat. 1913, § 9455).

(214 U. S. 276)

NORFOLK SOUTHERN RAILROAD COMPANY, Plff. in Err.,
v.

W. C. CHATMAN.

CARRIERS ⇨242—CARETAKER AS "PASSENGER FOR HIRE"—LIMITING LIABILITY FOR NEGLIGENCE.

1. A person in charge of an interstate shipment of live stock, traveling on a freight train upon a pass issued pursuant to the terms of the contract of shipment, as permitted by the Act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1916, § 8563), § 1, which excepts necessary caretakers of live stock from the prohibition against the issuance of any "interstate free pass," must be regarded as a passenger for hire, to whom the carrier must respond in damages in case of his injury through the carrier's negligence, notwithstanding a stipulation in the contract purporting to release the carrier from all liability for any personal injury which he may sustain.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 980.]

For other definitions, see Words and Phrases, First and Second Series, Passenger.]

ESTOPPEL ⇨68(4)—URGING INCONSISTENT DEFENSES.

2. A connecting carrier defending a personal-injury action under a release from liability contained in a contract of carriage issued as required by the Act of June 29, 1906 (34 Stat. at L. 595, chap. 3591), § 7, pursuant to the published tariffs of the initial carrier, will not be heard in the courts to urge the inconsistent defense that its own tariff made unlawful this contract on which it relies.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 168.]

CARRIERS ⇨253½—FREE TRANSPORTATION—CARETAKERS.

3. A notice to shippers that return passes to caretakers of live stock will not be allowed is all that can be claimed for a provision in a carrier's published tariff that "free or reduced transportation shall not be issued for shippers or caretakers in charge of live-stock shipments, whether carloads or less, and such shippers or caretakers shall pay full fare returning." Such provision implies that passes will be issued by the carrier to the destination of the shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1019.]

CARRIERS ⇨242—PUBLISHED RATES—PAYMENT IN MONEY—SEPARATE RATE FOR CARRIAGE OF CARETAKER.

4. The failure of the published tariffs of a carrier to make a separate rate, payable in money, for the carriage of a caretaker of an interstate shipment of live stock, or to state separately how much of the published rate for which the carrier is to transport the live stock and their caretaker to destination is to be treated as payment for the transportation of the stock and how much for the carriage of the caretaker, does not make the latter's presence on a freight train in charge of the shipment unlawful, so as to defeat his right to recover

damages in case of injury through the carrier's negligence, since, by the Act of February 4, 1887 (24 Stat. at L. 380, chap. 104), § 6, as amended by the acts of June 29, 1906 (34 Stat. at L. 586, chap. 3591), June 18, 1910 (36 Stat. at L. 548, chap. 309, § 9), and August 24, 1912 (37 Stat. at L. 568, chap. 390, § 11, Comp. Stat. 1916, § 8569), the determining and prescribing of the form in which tariff schedules shall be prepared and arranged is committed to the Interstate Commerce Commission, this obviously being an administrative function with which the courts will not interfere in advance of a prior application to the Commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 980.]

[No. 192.]

Argued April 20, 1917. Decided May 21, 1917.

IN ERROR to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of North Carolina in favor of plaintiff in a personal-injury action. Affirmed.

See same case below, 138 C. C. A. 350, 222 Fed. 802.

The facts are stated in the opinion.

Messrs. C. M. Bain (by special leave), W. B. Rodman, John H. Small, and J. Kenyon Wilson for plaintiff in error.

Messrs. Charles Whedbee and P. W. McMullan for defendant in error.

* Mr. Justice Clarke delivered the opinion²⁷⁷ of the court:

The judgment obtained in this case by the plaintiff in the district court, W. C. Chatman, and affirmed by the circuit court of appeals for the fourth circuit, is here for review on writ of error.

On December 1, 1911, the plaintiff below (hereinafter designated as the plaintiff) delivered to the Pennsylvania Railroad Company at Jersey City a carload of horses to be carried to Hertford, North Carolina, and was tendered by an agent of the company for his signature the customary "uniform live stock contract" of the Pennsylvania Company, the essential provisions of which are printed in the margin.¹

¹ The provisions of the contract essential to be considered are, in substance, that the company had received from Chatman a carload of horses for transportation to Port Norfolk for Hertford, North Carolina, "with W. C. Chatman in charge;" and that it was received by the Pennsylvania Company "for itself and on behalf of connecting carriers for transportation subject to the official tariffs, classifications and rules of said company;" and "that the said shipper is at

* This contract was retained by the company, but from it was detached a "coupon" which was given to Chatman, containing in substance an acknowledgment that he had delivered live stock of the kind and nature therein described, consigned to W. C. Chatman, destination Port Norfolk, Virginia, for Hertford, North Carolina, "W. C. Chatman, man*in charge." Without other pass or ticket than this "coupon," and without other payment than the published tariff on the carload of stock, the Pennsylvania Railroad Company carried the plaintiff, with his carload of horses, on a freight train to Norfolk, Virginia, where the car was delivered to and accepted by the defendant company for transportation to its destination.

The plaintiff testifies that defendant's conductor saw him and knew he was on the car up to the time the accident complained of occurred.

The car in which the horses and the plaintiff were being carried was derailed on defendant's line, and the plaintiff, being injured, sued for damages and secured the judgment which we have before us.

The negligence of the defendant is not disputed.

On this record the defendant claims two defenses, the first of which is:

That the plaintiff is not entitled to recover, because when injured, he was traveling on a free pass issued pursuant to the terms of the live-stock contract in which he had released the carriers from all liability for any personal injury which he might sustain, thus bringing his claim within the authority of *Northern P. R. Co. v. Adams*,

his own sole risk and expense to load and take care of and feed and water said stock whilst being transported . . . and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same . . . and that the shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock." It further provided that, in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge, other than the sum paid or to be paid for the transportation of the live stock in his or her charge, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier from all claims and liabilities of every kind, by reason of personal injury sustained by the person in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or otherwise.

192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408.

In *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 384, 21 L. ed. 627, 641, it was decided that a person traveling on a "drover's pass," issued upon a live-stock contract precisely similar in its terms to that which we have in this case, was a passenger for hire, and that a release from liability for injuries caused by the carrier's negligence was void because a common carrier could not lawfully stipulate for such exemption.

This decision was rendered in 1873, and has been frequently approved: *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535, 10 Am. Neg. Cas. 638; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* (The Montana), 129 U. S. 397, 32 L. ed. 788, 90 Sup. Ct. Rep. 469; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 505, 44 L. ed. 560, 564, 20 Sup. Ct. Rep. 385; *Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co.* 228 U. S. 177, 184, 57 L. ed. 787, 791, 33 Sup. Ct. Rep. 474; *George N. Pierce Co. v. Wells, F. & Co.* 236 U. S. 278, 283, 59 L. ed. 576, 581, 35 Sup. Ct. Rep. 351. This court continues of the opinion expressed by it in 1899, in *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 505, 44 L. ed. 560, 564, 20 Sup. Ct. Rep. 385, that the *Lockwood Case* "must be regarded as establishing a settled rule of policy."

But the plaintiff in error claims that this rule is no longer applicable to such a case as this we are considering, for the reason that, while the plaintiff, as the shipper of the stock, was within the exception of § 1 of the amendment to the Act "to Regulate

There was printed upon this contract, as a part of it, the following:

"Release for Man or Men in Charge.

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock . . . in charge, the undersigned does hereby voluntarily assume all risks of accidents or damage to his person or property, and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees, or otherwise.

"(Signature of man in charge)
"W. C. Chatman."

Commerce" of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1916, § 8563), prohibiting the issuance of any "interstate . . . free pass . . . except . . . to necessary caretakers of live stock, poultry, and fruit," yet this exception permitted him to travel free of charge upon a "free pass or free transportation," and not as a passenger for hire on a free pass, which would be a contradiction in terms.

The Lockwood Case shows that live-stock contracts such as we have here, providing for the transportation of caretakers of stock on free passes, were in use by carriers as early as 1859 (17 Wall. 357, 365), and that they have continued in use up to this time is apparent from the decisions hereinbefore cited, from the case at bar, and from many recently reported cases. *Tripp v. Michigan C. R. Co.*, 238 Fed. 449. Notwithstanding the fact, as we have seen, that such transportation has been declared by a long line of decisions not to be "free" in the popular sense, but to be transportation for hire, with all of the legal incidents of paid transportation, the carriers of the country have continued to issue it and to designate it as "free."

With this legal and commercial history before us we must conclude that the designation "free pass," as applied to transportation issued or given by railroad companies to shippers and caretakers of stock, had acquired a definite and well-known meaning, sanctioned by the decisions of this court and widely by the decisions of the courts of the various states, long prior to the enactment of June 29, 1906, and that, therefore, Congress must be presumed to have used the designation "free pass" in the sense given to it by this judicial determination when, in § 1 of that act, by specific exception, it permitted the continuance of the then long established custom of issuing free transportation or passes to shippers or caretakers of live stock. *Kepner v. United States*, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; *Lawder v. Stone*, 187 U. S. 281, 293, 47 L. ed. 178, 183, 23 Sup. Ct. Rep. 79; *Sutherland*, Stat. Constr. § 333.

It results that the "settled rule of policy" established by the Lockwood Case, and the decisions following it, must be considered unmodified by the Act to Regulate Commerce; that the plaintiff in charge of his stock, traveling upon a pass permitted to be issued by that act, was a passenger for hire, and that defendant's first claim must therefore be denied.

The claim of the defendant that the plaintiff was unlawfully upon its train because its published tariff did not allow the issu-

ing of such a pass as that which the plaintiff was using when injured is without merit.

The extract from the defendant's tariff, relied upon to sustain this claim, reads:

"Free or reduced transportation shall not be issued for shippers or caretakers in charge of live-stock shipments, whether carloads or less, and such shippers or caretakers shall pay full fare *returning*."

It is sufficient answer to this claim to say that the railroad company is here defending under the release from liability contained in a contract of carriage, issued as required by law (§ 7 of the Act of June 29, 1906, 34 Stat. at L. 595, chap. 3591), pursuant to the published tariffs of its connecting, the initial, carrier, the Pennsylvania Railroad Company, and it will not be heard in the courts to urge the inconsistent defense that its own tariff made unlawful this contract on which, in the alternative, it relies.

To this we add that passes for caretakers, not only to destination, but returning to point of shipment, were formerly general (*Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362), and in some parts of the country are still issued (*Kirkendall v. Union P. R. Co.* 118 C. C. A. 383, 200 Fed. 197, 200), and that, in our opinion, the language of the notice quoted, while obscurely worded, implies that such passes will be issued by the defendant to destination of the shipment, and was intended as notice to shippers that return passes would not be allowed. The meaning now claimed for this notice would have been unmistakably expressed without the final clause, "and such shippers or caretakers shall pay full fare *returning*." Why "returning" if full fare were also to be paid "going?" Tariffs must not be made cunningly devised nets in which to entangle unsuspecting or inexperienced shippers.

The second defense of the railroad company is in the alternative, and must be considered because its first defense has failed.

This claim is that, under the Interstate Commerce Law, payment for the transportation of passengers for hire could be made only in money, and at a rate stated in a tariff filed and published in the manner required by law; that no separate payment for plaintiff's transportation was made in money, and the consideration for it must be found, if at all, incorporated in the rate charged for the stock, or in the service which he was to render in caring for it in transit; and that, as neither of these was separately stated in any filed and published tariff, the plaintiff's presence upon the car was unlawful and he should not recover for injuries sustained.

223 In the consideration of this second claim of the defendant these facts, appearing of record, are decisive: The defendant relies for its defense upon the terms of the live-stock contract entered into between its connecting carrier, the Pennsylvania Company, and the plaintiff; and, averring in its answer that it received the shipment of horses "in accordance with the terms of said contract," it claims immunity from liability for damages to the plaintiff under the declaration of that contract that: "In consideration of the carriage of the undersigned (plaintiff) upon a freight train of the carrier or carriers named in the contract without charge other than the sum paid or to be paid for the carriage . . . of the live stock . . . the plaintiff assumed the risk of accident and released said carrier or carriers from all liability to him for any injury which he might sustain."

While the record is not as clear as could be wished, the excerpts which it contains from the filed tariffs of the Pennsylvania Company and the live-stock contract, both introduced in evidence by the defendant, justify the conclusion, certainly as against the defendant, that the contract was a part of the tariffs of the Pennsylvania Company, filed and published according to law, and that the defendant is bound by its terms.

Treating this live-stock contract as a part of the lawfully published tariffs of the Pennsylvania Company, under which the contract for the carriage of the plaintiff was made, and by which the defendant confesses itself bound, it is clear that such tariffs show the two carriers declaring that, for the published rate, payable in money, the plaintiff's carload of stock and the plaintiff himself, as a caretaker, would be carried on freight trains from Jersey City to the North Carolina destination; and, as we have seen, the law declares that a caretaker so carried is a passenger for hire, against whom the release of liability on which the defendant relies must be treated as unreasonable and void.

224 *The objection that the published tariff of the Pennsylvania Company did not specify how much of the stipulated payment by the plaintiff should be treated as payment for the transportation of the stock, and how much for the transportation of the caretaker, and that the payment for the carriage of the plaintiff was not separately stated in a passenger tariff, cannot be considered in this case, for the reason that the Act to Regulate Commerce (§ 6, as amended June 29, 1906, June 18, 1910 [36 Stat. at L. 548, chap. 309, § 9], and August 24, 1912 [37 Stat. at L. 568, chap. 390, § 11, Comp. Stat. 1916, § 8569]) commits to the Interstate Commerce Commission the determin-

ing and prescribing of the form in which tariff schedules shall be prepared and arranged, and this is an obviously administrative function with which the courts will not interfere in advance of a prior application to the Interstate Commerce Commission. *Atchison, T. & S. F. R. Co. v. United States*, 232 U. S. 199, 221, 58 L. ed. 568, 577, 34 Sup. Ct. Rep. 291; *Texas & P. R. Co. v. American Tie & Timber Co.* 234 U. S. 138, 58 L. ed. 1255, 34 Sup. Ct. Rep. 885.

It results that the second claim of the defendant must be rejected because the fare of the plaintiff was paid in money, pursuant to published tariffs, which clearly showed the terms of the shipment of the stock, with transportation for the plaintiff included, in a form which, in the state of this record, must be considered as having been satisfactory to the Interstate Commerce Commission, to which the determination of such form was committed by law.

The claim that *Charleston & W. C. R. Co. v. Thompson*, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964, rules this case, cannot be allowed, for the sufficient reason that the plaintiff in that case was found to be traveling upon a gratuitous pass, issued without consideration, to a member of the family of an employee. Behind such a pass there lay no such background of court decision and of railroad practice as we have here, giving definite interpretation to the statute as applied to "caretakers' passes," and therefore that case fell without the scope of the *Lockwood* decision and withing the principle of *Northern P. R. Co. v. Adams*, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408, and *Boeing v. Chesapeake Beach R. Co.* 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515.

The judgment of the Circuit Court of Appeals is affirmed.

(244 U. S. 285)

RAILROAD SUPPLY COMPANY, Petitioner,
v.
ELYRIA IRON & STEEL COMPANY.

PATENTS — 328 — WHAT CONSTITUTES INVENTION — IMPROVEMENTS.

1. The slight variations claimed for the Wolhaupter patents Nos. 538,809; 691,332; 721,644, for improvements in railroad tie plates, from prior forms of such plates, do not constitute patentable invention.

PATENTS — 328 — FOR IMPROVEMENTS — CONSTRUCTION OF CLAIMS.

2. The state of the prior art requires that the Wolhaupter patents Nos. 538,809; 691,332; 721,644, for improvements in rail-

road tie plates, be limited strictly to the forms described in the claims.

[No. 95.]

Argued April 17 and 18, 1917. Decided May 21, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, which affirmed a decree of the District Court for the Northern District of Ohio, dismissing the bill in a patent infringement suit. Affirmed.

See same case below, 130 C. C. A. 447, 213 Fed. 789.

The facts are stated in the opinion.

Messrs. Taylor E. Brown and Clarence E. Mehlhope for petitioner.

Messrs. Frederick P. Fish, Frank F. Reed, and Edward S. Rogers for respondent.

* Mr. Justice Clarke delivered the opinion of the court:

On March 26, 1909, the Railroad Supply Company, petitioner, commenced this suit against the Elyria Iron & Steel Company in the circuit (now district) court for the northern district of Ohio, claiming infringement of claim No. 8 of United States letters patent No. 538,809, granted May 7, 1895, of claims Nos. 1, 2, and 3 of patent No. 691,332, granted January 14, 1902, and of claims Nos. 7 and 9 of patent No. 721,644, granted February 24, 1903. All of these patents, granted to B. Wolhaupter, were acquired by the petitioner, and each of the three purported to describe a new and useful improvement in railroad tie plates.

Such proceedings were had in the case that on March 4, 1912, the district court decided that the petitioner's patents were not infringed by the device manufactured and sold by the defendant.

On appeal to the circuit court of appeals for the sixth circuit, that court, on April 7, 1914, affirmed the decree of the district court, dismissing the bill, and held in its opinion that the claims of the patents relied upon were void for want of patentable novelty. This decree is now here for review on certiorari.

A railroad tie plate, sometimes called a "wear plate," is a rectangular piece of metal, originally with both surfaces flat, designed to be placed upon the tie immediately under the rail, for the purpose of protecting the tie from the wear, which, in soft wood, is very great, incident to the vibration of the rail caused by passing engines and trains, and for the purpose of holding the rail more firmly in place than it could otherwise be held by the spikes without

the plate, thereby preserving the gauge of the track.

In the early days of railroading, when engines and cars were small and light, when speed was comparatively slow, and when hardwood, which held the spikes firmly in place, was abundant and cheap, such plates were little used; but the increase in weight of rails and rolling stock, the higher speed of trains, and the necessary use of the cheaper soft woods for ties, have brought them into extensive use. The general use of these plates with heavy rolling stock and traffic presented the problem of making them as strong and inexpensive as possible, and in a form such that they would adhere firmly to the ties while doing the least possible damage to the fiber of the wood.

The statement of this problem shows convincingly that even at the beginning it offered a very limited field for invention, if, indeed, it presented any field at all for the exercise of that inventive genius which it is the policy of the law to protect and reward with a monopoly for seventeen years.

The claims of the patents declared on are as follows: Claim 8 of Patent No. 538,809 reads:

"A railway tie plate formed on the under side with devices more or less sharpened adapted to penetrate and engage the tie, and on its upper side with a series of flanges on which the rail rests, substantially as described."

* It would be difficult to write in more general terms a description of any plate, whether channeled, corrugated, grooved, or ribbed on both sides.

Claims Nos. 1 and 2 of Patent No. 691,332, differ so slightly that No. 1 will suffice:

"A railway tie plate provided on its upper side with one or more flanges on which the rail may rest or by which it is directly sustained and on the under side with one or more tie-engaging flanges extending parallel with the upper flanges and directly beneath the latter, substantially as described."

Claims 7 and 9 of patent No. 721,644 are so similar that only No. 7 need be quoted:

"A tie plate provided in its rail-supporting surface with transverse grooves or channels, and at one margin of said supporting surface with a transverse rail-abutting shoulder."

Wolhaupter, the grantee of the three patents, was a civil engineer employed by a railroad company, and he testifies that he first turned his attention to tie plates for the purpose of improving them "in the year 1893 or early in 1894," and the earliest of his three patents in suit is dated May 7, 1895.

The earliest patent for a "wear" or tie plate by that specific name, which is shown by this record, was issued in 1881, and between that date and the date of the issuing of the first patent in suit to Wolhaupter in 1895 twenty-six patents were issued, and in the seven years between 1895 and 1902, when Wolhaupter's second patent in suit was issued, nineteen more patents were issued for various forms of this simple device.

Thus it is seen that Wolhaupter came late into this narrow, and even then much exhausted, field of investigation, and in his first patent (not here in suit), dated December 11, 1894, he claims invention for placing one, or permissibly two, "elongated divided ridges" on the under*side of such a plate to engage the tie, and on the upper side a series of ridges parallel with those on the lower side, but adapted, after being rolled, to being cut away to form a seat for the rail. There is no claim as to the relative positions of the ridges on the two faces of the plate.

In his second patent (the first in suit), his claim of invention is for "one or more" flanges "more or less sharpened" (not divided now) on the under side of the plate to engage the tie, and on the upper side a series of flanges (ridges) on which the rail may rest. The flanges (ridges) on the upper surface must not be placed vertically above the flanges or ridges on the lower, and there is no provision for cutting them away for a rail seat as in the first patent. The dominating thought of this patent is the cutting of the plate "on a diagonal line with relation to the rail flange," but as this form of plate is not claimed by the patentee in his later patents, and as no merit is claimed for it in the testimony in the record, it will be neglected.

In his third patent Wolhaupter's inventive genius placed the flanges on the under side parallel with and directly beneath those on the upper side of the plate, instead of between them, as in the second patent, or regardless of either position, as in the first.

In his fourth patent the flanges on the lower side are given a position "transverse" to the ridges on the upper side.

In the first three of petitioner's patents the flanges on both surfaces of the plate are for use parallel to the grain of the tie and transverse to the length of the rail. In the fourth patent the flanges on the under side are described in the specifications and drawings as transverse to, but in claim four as parallel to, the grain of the tie.

The minute and obviously wholly tentative variations, thus described, in the plates in the Wolhaupter patents, are fairly illustrative of the slight differences in form given to this simple device, on which this

record shows forty*five separate patents were granted during the twenty-two years between 1881 and 1903.

This discussion of the record and reference to the respondent's patents brings us to the question, Do the claims of these patents describe an "invention or discovery" or "a new and useful . . . manufacture . . . or improvement thereof," such as our patent laws were designed to protect?

We have seen that long before Wolhaupter's patents, tie plates were used for the purposes for which his plates were designed. It was certainly obvious that if wedge-shaped flanges, or ribs or claws, or other downward projections, were placed on the under side of such plates, they would penetrate the ties when weight was put upon them, and thus assist in holding the rail in place.

Very certainly it was also general knowledge before 1895 that if one wished to reduce the weight of a plate without loss of strength, this could be done by using channel iron, angle iron, or corrugated iron, or, which comes to the same thing, by having the plate made with flanges or ribs (Servis v. Tie Plate Co. v. Hamilton Steel & I. Co. 8 Can. Exch. 381); and the placing of flanges on the upper side of such plates to engage the outer flange of the bottom of the rail, and thus to receive the lateral thrust caused by the flanges of the wheels, tending to spread the rails, was also obvious and well known before Wolhaupter's patents.

To the obviousness of the elements necessary to the solution of this problem must be added the state of the art, if such it may be called, when Wolhaupter, late in 1893 or early in 1894, began, as he says, the investigation of tie plates, and "familiarized himself with the literature of the subject." He testifies that he had seen the tie plates of Servis (patented 1881, No. 249,407; 1884, No. 294,816) and of Goldie (patented 1887, No. 356,760; 1890, No. 426,530; 1891, No. 457,584; 1891, No. 457,585; and*1892, No. 485,030), and he is presumed by the law to have had all prior patents before him when he applied for his patent. Duer v. Corbin Cabinet Lock Co. 149 U. S. 216, 223, 37 L. ed. 707, 710, 13 Sup. Ct. Rep. 850; Mast, F. & Co. v. Stover Mfg. Co. 177 U. S. 485, 493, 44 L. ed. 856, 860, 20 Sup. Ct. Rep. 708.

In the plates of Servis, Wolhaupter saw a plate with "a flange or flanges formed on the lower side" to engage the tie lengthwise of the grain of the wood, and, of course, transverse to the rail, and in the Goldie patents he saw in No. 457,584 "a triangular tooth-like projection" extending downward from the bottom of the plate and a raised

shoulder on the upper side to receive the lateral thrust of the edge of the rail flange, and in patent No. 485,030 he saw a plate with two downward projecting ribs to engage the tie, with a shoulder on the upper side to receive the thrust of the rail, and with a "transverse depression" in the upper surface, and bearings or flanges on each side of this depression to receive and support the base of the rail.

We thus have Wolhaupter confessing that before he applied for a patent he had knowledge of tie plates with "ridges," "flanges," and "teeth" projecting downward from the under side of them to engage the tie, differing at most only in form, and in this but slightly, from the similar downward projecting flanges "more or less sharpened" which appear in all three of his patents in suit; that he had knowledge of plates with a shoulder on the upper surface to receive the thrust of the side of the bottom of the rail, not differing from the "rail-abutting shoulder" shown in all three of his patents, and that he also had knowledge of the latest Goldie patented plate, with the upper surface "channeled" by having a depression extending across the plate under the central portion of the bottom of the rail, and with a bearing on each side of it to support the rail.

²⁰² It is thus made very clear that the only appearance*even of novelty or of invention in the Wolhaupter plates is in their having flanges on the upper surface, on which it is intended the rail shall rest, for downward extending flanges on the under side and the rail-abutting shoulder on the upper side are found in earlier patents in almost precisely the form which he gave to them. But such flanges on the upper surface of the Wolhaupter plate cannot constitute of themselves patentable invention or novelty, for it is very clear, as we have already said, that a resort to channels, grooves, and corrugations was a familiar method of reducing the weight and thereby the cost of iron plates without decreasing their strength, long before the Wolhaupter patents, and this form was, therefore, one to which any skilful mechanic would turn to accomplish the purpose that Wolhaupter claimed for it, and that others did so resort to this form is sufficiently shown by reference to the Wells patent, No. 203,570 (1878), the Wilson patent, No. 522,867 (1894), and the Dunham patent, No. 469,386 (1892).

With these facts before him, the most that can be said for the patents in suit is that they gave a somewhat different form to three features which were perfectly familiar and were similarly grouped in prior forms of tie plates, but without giving to any of them any new function and without accom-

plishing by them any new result. This brings the patents within the principle so often declared that the "mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent. *Roberts v. Ryer*, 91 U. S. 150, 23 L. ed. 267; *Belding Mfg. Co. v. Challenge Corn Planter Co.* 152 U. S. 100, 38 L. ed. 370, 14 Sup. Ct. Rep. 492;" *Market Street Cable R. Co. v. Rowley*, 155 U. S. 621, 629, 39 L. ed. 284, 288, 15 Sup. Ct. Rep. 224.

The device involved in these patents is, so simple and familiar in all of its forms that a description of it seems*²⁰³sufficient to visualize it to the reader, but cuts of it in various forms may be found in the reported decisions of this case (*Railroad Supply Co. v. Elyria Iron & Steel Co.* 130 C. C. A. 447, 213 Fed. 789), and in the report of the case, involving the same claims of the same patents, in the seventh circuit, to be found in *Railroad Supply Co. v. Hart Steel Co.* 193 Fed. 418, and 138 C. C. A. 23, 222 Fed. 261.

Clearly persuaded as we are that the slight variations claimed for the patents in suit from the plates which had gone before do not constitute patentable invention, we cannot consent to further extend this discussion by a minute comparison of them with earlier patents appearing in the record, but we content ourselves with adopting as comment not to be improved upon in such a case as we have here the following from a former decision of this court:

"The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventions are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith."

Atlantic Works v. Brady, 107 U. S. 192, 200, 27 L. ed. 438, 441, 2 Sup. Ct. Rep. 225.

*We add that each of the patents of the petitioner being in terms for an "improvement in tie plates," the state of the "prior art" as described in this opinion requires that they be limited strictly to the form described in the claims, and therefore the patents in suit, even if they had proved valid, would not have been infringed by the plates manufactured by the defendant.

The decree of the Circuit Court of Appeals is affirmed.

Mr. Justice Day did not take any part in the decision of this case.

(244 U. S. 294)

HART STEEL COMPANY and Guilford S. Wood, Petitioners,

v

RAILROAD SUPPLY COMPANY.

PATENTS ⚡324(3)—**PRIOR ADJUDICATIONS**
—**TIME AND MANNER OF RAISING QUESTIONS.**

1. A claim that a final judgment of a Federal circuit court of appeals in a patent infringement suit is res judicata in a suit then pending undetermined in another circuit court of appeals, because of identity of subject-matter and privity of the parties, was presented properly and in time by a motion filed on the first day of the next ensuing term of the latter court, praying that court to affirm the decree below upon the ground that all the issues in the case had been fully and finally determined and adjudicated in the other suit, which, the motion stated, was brought by the same complainant against a defendant with which the moving parties were in privity, together with a copy of the record and journal in such other suit, showing that the two records were identical.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 602.]

JUDGMENT ⚡701—**RES JUDICATA — PARTIES—PRIVITY.**

2. The salaried manager of a corporation and the corporation itself, the capital stock of which is all owned by another corporation for which it is a mere sales agent, are so obviously in privity with the holding corporation that a final decree of a Federal circuit court of appeals in favor of that corporation in a suit brought against it for the infringement of certain patents which the court finds to be void for want of invention must be treated as res judicata in a suit brought in another circuit by the same complainant, against the former corporation and its manager, involving the same subject-matter and issues.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1226.]

[No. 67.]

Argued April 17 and 18, 1917. Decided May 21, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which reversed a decree of the District Court for the Northern District of Illinois, dismissing the bill in a patent infringement suit. Reversed.

See same case below, 138 C. C. A. 23, 222 Fed. 261.

The facts are stated in the opinion.

Messrs. Frederick P. Fish, Frank F. Reed, and Edward S. Rogers, for petitioners.

Messrs. Taylor E. Brown and Clarence E. Mehlhope for respondent.

* Mr. Justice Clarke delivered the opinion* of the court:

This suit is here on certiorari to review the decision of the circuit court of appeals for the seventh circuit.

On December 9, 1908, the respondent herein, the Railroad Supply Company, as owner of three United States patents, viz., Nos. 538,809, 691,332, and 721,644, filed a bill in the district court for the northern district of Illinois against the Hart Steel Company and Guilford S. Wood, praying that the defendants be restrained from infringing certain designated claims of its patents, which are described in their specifications as covering new and useful improvements in railway tie plates. This case will be hereinafter referred to as the First Case.

Three months later, on March 26, 1909, the same plaintiff commenced a second suit against the Elyria Iron & Steel Company in the district court for the northern district of Ohio, praying for the same relief with respect to the same claim of the same patents as in the First Case.

*The two bills differed only as to the parties defendant. The Elyria Iron & Steel Company, the defendant in the Second Case, was a manufacturing corporation and was the owner of all of the capital stock of the Hart Steel Company, the defendant in the First Case, which was the selling agent of the Elyria Company, and Wood was its manager.

The same defenses being relied upon in the two cases, the evidence was taken in the first one, and by stipulation a carbon copy of it was filed in the second, and the same exhibits were used in the two.

The claimed infringement consisted in the manufacture of a single order of tie plates by the Elyria Company and the sale of them by the Hart Company, with Wood as its

manager, to the Atchison, Topeka, & Santa Fe Railroad Company.

Such proceedings were had in the First Case that on December 18, 1911, the circuit court for the northern district of Illinois decided that the construction or device sold by the defendants did not infringe the claims of the plaintiff's patents relied upon, and dismissed the bill for want of equity.

In the Second Case such proceedings were had that on March 4, 1912, the district court for the northern district of Ohio entered precisely the same decree as was entered in the First Case.

Each case was appealed to the appropriate circuit court of appeals and on April 7, 1914, that court for the sixth circuit, in a carefully considered opinion, found the claims of the patents relied upon void for want of novelty and invention, and affirmed the decision of the district court. A petition for rehearing was denied on the 30th day of the following June.

On the 6th day of October, 1914, the first day of the next ensuing term of the circuit court of appeals for the seventh circuit, the defendants in the first suit, which was still pending undetermined, filed a motion praying that court to affirm the decree of the circuit court, upon the ground that all of the issues in the case had been fully and finally determined and adjudicated by the circuit court of appeals of the sixth circuit in the Second Case between the plaintiff and the Elyria Iron & Steel Company, with which the moving defendants, the Hart Steel Company and Guilford S. Wood, were in privity. In support of this motion a copy of the record and journal entries in the Second Case was filed, which showed that the two records were "identical."

The record shows that this motion to affirm the decree of the circuit court was argued orally on October 6, 1914, and was on the same day denied, but no reason appears in the record for such denial.

Subsequently the case was argued on its merits and on January 5th, 1915, the circuit court of appeals for the seventh circuit found the plaintiff's patents valid and infringed, and, reversing the decision of the circuit court (then the district court), remanded the case with an order for an accounting.

The Hart Steel Company and Wood, as petitioners in this court, assign as error the overruling by the circuit court of appeals of the seventh circuit of their motion to affirm the decision of the circuit court in their favor.

It is apparent from the foregoing statement that the question presented to the circuit court of appeals of the seventh circuit by the petitioners' motion to affirm was

whether or not the decree of the circuit court of appeals of the sixth circuit was a final determination of the issues presented in the case pending and not yet argued in the circuit court of appeals of the seventh circuit so as to be res judicata and binding on that court because of the identity of the subject-matter and the claims and because of the privity of the parties.

The doctrine of res judicata is fully applicable to cases* of patent infringement (Robinson, Patents, § 933; Walker, Patents, § 468), and while the record does not show the grounds upon which the motion to affirm was overruled, it does show that the motion was argued, was considered by the court, and denied. If authority be needed to the point that the claim thus made for the effect of the judgment of the circuit court of appeals of the sixth circuit was presented properly and in time, it may be found in *Stout v. Lye*, 103 U. S. 66, 26 L. ed. 428; *Sheldon v. Patterson*, 55 Ill. 507; *Howard v. Mitchell*, 14 Mass. 241.

There can be no doubt from the record before us that the Elyria Company owned all of the capital stock of the Hart Company, that the latter company was a mere sales agent of the former, that Wood was the salaried manager of the latter, that both the Hart Company and Wood were agents, subject to the control of the Elyria Company, and that in selling the tie plates and as defendants in the litigation they acted wholly under the authority and in the interest of their principal. Identity of interest could not be clearer or closer than it was between the defendants in the two cases,—they represented precisely the same, single interest, and the Hart Company and Wood, as agents of the Elyria Company, were obviously and necessarily privies to the judgment rendered in its favor in the circuit court of appeals for the sixth circuit. *Bank of Kentucky v. Stone*, 88 Fed. 383, affirmed in *Kentucky Bank Tax Cases*, 174 U. S. 408 (43 L. ed. 1187, 19 Sup. Ct. Rep. 881); *Emery v. Fowler*, 39 Me. 329, 63 Am. Dec. 627; *Castle v. Noyes*, 14 N. Y. 326; *Emma Silver Min. Co. v. Emma Silver Min. Co.* 7 Fed. 401.

With the identity of the subject-matter and issues of the two cases admitted, the privity of parties to them clear, and the question of the ruling effect of the decree of the circuit court of appeals for the sixth circuit presented in an appropriate manner to the circuit court of appeals of the seventh circuit, a court of co-ordinate jurisdiction,* we cannot doubt that the latter court fell into error in not sustaining the motion of the petitioners to affirm the decision of the circuit court. The defendants should not have been put to further expense, delay,

and trouble after the motion was presented. The question is ruled by *Kessler v. Eldred*, 206 U. S. 285, 51 L. ed. 1065, 27 Sup. Ct. Rep. 611; *Brill v. Washington R. & Electric Co.* 215 U. S. 527, 54 L. ed. 311, 30 Sup. Ct. Rep. 177; and *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214.

This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, "of public policy and of private peace," which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect. *Kessler v. Eldred*, *supra*.

The conclusion which we have reached in the Second Case, *Railroad Supply Co. v. Elyria Iron & Steel Co.* this day decided [244 U. S. 285, 61 L. ed. —, 37 Sup. Ct. Rep. 502], with respect to the merits of the patents involved in this litigation, is such that it leaves our decision in this case uncomplicated by the one in that. The decree of the Circuit Court of Appeals is reversed.

Mr. Justice Day did not take any part in the decision of this case.

(244 U. S. 288)

PATRICK SUTTON, Plff. in Err.,

v.

STATE OF NEW JERSEY. (No. 189.)

FRANK MIHM, Plff. in Err.,

v.

STATE OF NEW JERSEY. (No. 190.)

CARRIERS ~~vs~~ 12(1)—POLICE POWER — REQUIRING STREET RAILWAYS TO CARRY POLICE OFFICERS FREE—RESERVED POWER TO AMEND CORPORATE CHARTER.

The requirement of N. J. Laws 1912, p. 235, that street railway companies grant free transportation to city detectives not in uniform when in the discharge of their public duties, cannot be said to contravene United States Const. 14th Amend., as being an arbitrary or unreasonable exercise of the police power,—especially where the charter of the street railway company in question was, under N. J. Const. art. 4, § 7, par. 11, and N. J. Laws 1846, p. 17, subject to alteration, in the discretion of the legislature.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 7, 15-20.]

[Nos. 189, 190.]

Argued and submitted April 20, 1917. Decided May 21, 1917.

TWO WRITS of Error to the Court of Errors and Appeals of the State of New Jersey to review judgments which affirmed judgments of the Supreme Court of that state, affirming convictions in the First Criminal Court of Jersey City of violations of a state statute requiring street railway companies to carry police officers free. Affirmed.

See same case below, in No. 189, 87 N. J. L. 192, L.R.A.—, —, 94 Atl. 788; in No. 190, 87 N. J. L. 332, 94 Atl. 789.

The facts are stated in the opinion.

Mr. Frank Bergen for plaintiffs in error.

Mr. John Bentley for defendant in error.

Mr. Justice Brandeis delivered the opinion of the court:

These cases were argued together. In each the New Jersey statute (Pamph. Laws 1912, p. 235¹) requiring street-railway companies to grant free transportation to police officers while engaged in the performance of their public duties is assailed as invalid under the 14th Amendment. In each a prosecution for assault and battery was brought against an inspector employed by the Public Service Railway Company of Jersey City, for ejecting a city detective who refused to pay his fare. Both detectives were in plain clothes, but showed their badges and claimed the right to ride free of charge. Both detectives were on duty at the time,—one was on his way to report at headquarters; the other to interview the victim of a robbery. The defense in each case was the unconstitutionality of the statute and that the detective, having wrongfully refused to pay his fare, was ejected with no more than necessary force. The police justice, before whom the prosecutions were instituted, found the defendants guilty and fined them. These judgments were affirmed in successive appeals to the supreme court and to the court of errors and appeals of New Jersey. 83 N. J. L. 46, 84 Atl. 1057; 87 N. J. L. 192, L.R.A.—, —, 94 Atl. 788. The case comes here on writ of error.

The supreme court of New Jersey said: "Policemen are frequently required to be

"1. On and after the passage of this act each street railway company or corporation referred to in the act to which this act is a supplement shall grant free transportation of uniformed public officers while engaged in the performance of their public duties, or police officers of whatever grade or rank acting as detectives, county detectives, or detectives attached to or connected with the office of the prosecutor of the pleas in any county in this state while engaged in the performance of their public duties, whose duties require police duty to be performed without uniform."

¹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

on street cars in the execution of their duties to preserve the peace, to enforce ordinances, and to prevent or detect crime. It would be difficult to say that the mere presence of a police officer might not be of value for securing these objects . . . at any rate, the legislature might reasonably think so, and legalize his presence on the car without payment of fare."

Freedom to come and go upon the street cars without the obstacle or discouragement incident to payment of fares may well have been deemed by the legislature essential to efficient and pervasive performance of the police duty. Increased protection may thereby enure to both the company and the general public without imposing upon the former an appreciable burden. If any evidence of the reasonableness of the provision were needed, it could be found in the fact that such officers had been voluntarily carried free by the company and its predecessors for at least eighteen years prior to July 4, 1910, when the practice was prohibited by the Public Utilities Act (Pamph. Laws 1910, p. 58). In the following year such free transportation was expressly permitted (Pamph. Laws 1911, p. 29), and it was made mandatory by the act here in question. We cannot say that the requirement that city detectives not in uniform be carried free on street cars when in the discharge of their duties is an arbitrary or unreasonable exercise of the police power.

Furthermore, the charter of the Railway Company was subject to alteration in the discretion of the legislature (N. J. Const. art. 4, § 7, ¶ 11; Pamph. Laws 1846, p. 17). The obligation to carry free city detectives engaged in the discharge of their duties is a burden far lighter than others imposed upon street-using corporations which have been sustained by this court as a valid exercise of the reserved power.²

The statute is broad in scope, extending also to all "uniformed public officers;" but the court below expressly confined its decision to the case presented, sustaining the law "in so far as it applies to police officers;" and our decision is likewise so limited.

The judgments are affirmed.

Mr. Justice McKenna and Mr. Justice Pitney dissent.

² Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 261, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261; Fair Haven & W. R. Co. v. New Haven, 203 U. S. 379, 51 L. ed. 237, 27 Sup. Ct. Rep. 74.

UNITED COPPER SECURITIES COMPANY and Arthur P. Heinze, Plffs. in Error,

v.

AMALGAMATED COPPER COMPANY, Anaconda Copper Company, Adolph Lewishohn, United Copper Company, et al.

CORPORATIONS ¶206(1) — STOCKHOLDERS' SUITS—ACTION AT LAW OR IN EQUITY.

1. A stockholder in a corporation which is alleged to have a cause of action in damages against others for conduct in violation of the Sherman-Anti-trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1916, § 8820), may not sue at law to recover such damages in the right of the corporation upon the latter's refusal, after request, to institute the suit itself,—especially where there is no claim that the corporation is in the control of the alleged wrongdoers, or that its directors stand in any relation to them, or that they have been guilty of any misconduct, and there is not even an allegation that their action in refusing to bring such suit is unwise, and no application appears to have been made to any of the other stockholders, since even if the circumstances were such—as they are not—as to justify individual stockholders in seeking the aid of the court to enforce rights of the corporation, their remedy is in equity, not at law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 791.]

APPEAL AND ERROR ¶330(2)—PARTIES — SUBSTITUTION.

2. Receivers of a New Jersey corporation, appointed by a court of chancery of that state, will not be substituted as plaintiffs in error in a stockholders' suit pending in the Federal Supreme Court on writ of error, where the affidavits opposing the motion for substitution disclose that more than four years previously a Federal district court in another state had appointed other persons receivers for such corporation, and had vested in those receivers all the corporate assets, and that these persons had been appointed ancillary receivers by the Federal district court for the district of New Jersey.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1841.]

[No. 208.]

Argued April 24, 1917. Decided May 21, 1917.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the District Court for the Southern District of New York, sustaining demurrers to, and dismissing, the complaint in an action at law brought by a stockholder on behalf of the corporation to recover damages under the Sherman Anti-trust Act. Affirmed.

See same case below, L.R.A.—, —, 139 C. C. A. 15, 223 Fed. 421.

The facts are stated in the opinion.

Messrs. Ferdinand E. M. Bullova and Ralph James M. Bullova for plaintiffs in error.

Messrs. Louis Marshall, John A. Garver, and Edward Lauterbach for defendants in error.

* Mr. Justice Brandeis delivered the opinion of the court:

This is an action at law. The complaint alleges that plaintiffs are the holders of more than 200 of the 500,000 shares of the outstanding stock of the defendant United Copper Company, a New Jersey corporation; that the defendants other than that company have by conduct violating the Sherman Law (Act of July 2, 1890, chap. 647, 26 Stat. at L. 209, Comp. Stat. 1916, § 8820) injured it to the extent of more than \$5,000,000;¹ and that:

"IV. In or about the month of January, 1912, and before the commencement of this action, the plaintiffs, United Copper Securities Company and Arthur P. Heinze, each made a demand upon the defendant, United Copper Company, that this or a like action be instituted by said corporation defendant, and said corporation defendant and its board of directors have refused to comply with said demand, and have failed and refused to commence or cause to be commenced any action whatever in compliance therewith.

"V. This action is commenced and prosecuted by the plaintiff United Copper Securities Company, and by the plaintiff Arthur P. Heinze, each individually and for himself and also on his own behalf and on behalf of all the other stockholders of said United Copper Company."

The complaint concludes:

"Wherefore, the plaintiffs demand judgment in their favor and in favor of any stockholders of the United Copper Company who may join with them in the prosecution of this action in the sum of threefold damages under § 7 of the act of Congress aforesaid, and that each of the defendants shall be compelled to pay the damages sus-

tained by the United Copper Company, as hereinbefore alleged."

The district court sustained a demurrer and dismissed the complaint. Its judgment was affirmed by the circuit court of appeals. L.R.A.—, —, 139 C. C. A. 15, 223 Fed. 421; and the case comes here on writ of error. A motion for substitution of plaintiffs, hereafter referred to, was made in this court and argued with the merits.

There is no statement in the complaint that the alleged wrongful acts have caused injury to the plaintiffs as individual shareholders; and no recovery is sought for damages to them or to their property. The case involves, therefore, this single question: Whether a stockholder in a corporation which is alleged to have a cause of action in damages against others for conduct in violation of the Sherman Act may sue at law to recover such damages in the right of the corporation if, after request, it refuses to institute the suit itself? Insurmountable obstacles to the maintenance of the action are presented both by the substantive law and by the law of procedure.

Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management, and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion intra vires the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery.² In the instant case there is no allegation that the United Copper Company is in the control of the alleged wrongdoers, or that its directors stand in any relations to them, or that they have been guilty of any misconduct whatsoever. Nor is there even an allegation that their action in refusing to bring such suit is unwise. No application

¹ The bill is framed on the theory that the injury to the United Copper Company was suffered directly, as a competitor of the other defendants, and the case will be discussed on that supposition. It is proper to observe, however, that the allegations of the bill are ambiguous in this respect, and that the United Copper Company appears to have been a mere holding company, which suffered injury only indirectly as controlling stockholder in various mining companies alleged to have been damaged by the con-

spiracy, and which were not made parties to this suit.

² *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 26 L. ed. 827; *Quincy v. Steel*, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520; *Corbus v. Alaska Treadwell Gold Min. Co.* 187 U. S. 455, 47 L. ed. 256, 23 Sup. Ct. Rep. 157; *Delaware & H. Co. v. Albany & S. R. Co.* 213 U. S. 435, 53 L. ed. 862, 29 Sup. Ct. Rep. 540. See *Macon, D. & S. R. Co. v. Shailer*, 72 C. C. A. 631, 141 Fed. 585.

appears to have been made to the stockholders as a body, or indeed to any other stockholders individually; nor does it appear that there was no opportunity to make it, and no special facts are shown which render such application unnecessary. For aught that appears, the course pursued by the directors has the approval of all the stockholders except the plaintiffs. The fact that the cause of action is based on the Sherman Law does not limit the discretion of the directors or the power of the body of stockholders; nor does it give to individual shareholders the right to interfere with the internal management of the corporation.

But even if the circumstances were such as to justify individual stockholders in seeking the aid of the court to enforce rights of the corporation, it is clear that their remedy is not at law.³ The particular equitable relief^{* 2596} sought in *Fleitmann v. Welsbach Street Lighting Co.* 240 U. S. 27, 60 L. ed. 505, 36 Sup. Ct. Rep. 233, was denied; but this denial affords no reason for assuming that the long-settled rule under which stockholders may seek such relief only in a court of equity will be departed from because the cause of action involved arises under the Sherman Law.

This action was commenced May 3, 1912. The judgment dismissing the complaint was rendered in the district court September 24, 1914, and affirmed by the circuit court of appeals April 13, 1915. The case was entered in this court July 27, 1915. On April 7, 1917, about a fortnight before the case was reached for argument, George D. Hendrickson and Luther Martin, Jr., filed in this court a motion that they be substituted as plaintiffs in error. The motion recites that they had, on March 1, 1917, been appointed receivers of the United Copper Company by the court of chancery of New Jersey, and had on April 2, 1917, been authorized by it to apply for such substitution. Annexed to the motion is a copy of the petition for appointment of the receivers which alleges that the United Copper Company had on February 28, 1912, been dissolved by proclamation of the governor of New Jersey for failure to pay franchise taxes; and that it had assets of large value; but that

its directors named (who, under the statute, thereupon became trustees for the corporation) had taken no steps whatever to collect its assets or settle its affairs and were not fit and proper persons to be intrusted with them. Only by opposing affidavits, filed by defendants, was it disclosed that, on February 10, 1913, more than four years previously, the district court of the United States for the southern district of New York had appointed other receivers of the United Copper Company, and had vested in those receivers the possession of

"all the properties owned by the said defendant" [the United Copper Company] "or in which the said defendant has any ownership or interest, whether such property be real, personal, or mixed, of whatsoever kind and description, and wheresoever situated, including . . . things in action, credits, stocks, bonds, securities, shares of stock in the corporations described in the said bill of complaint, and all shares of stock, certificates of equitable interest, and other certificates representing any interest in any property, and all other securities of whatsoever character owned by the defendant company or in which it has any interest or which it controls directly or indirectly," and that on February 14, 1913, the same persons had been appointed ancillary receivers by the United States district court for the district of New Jersey. We have no occasion to consider the power of this court to grant the motion for substitution. See *Kansas P. R. Co. v. Twombly*, 100 U. S. 78, 81, 25 L. ed. 550. It is without merit and is denied.

Judgment affirmed.

(244 U. S. 266)

JOHN W. HAMER et al., App'ts.,
v.

NEW YORK RAILWAYS COMPANY et al.

JUDGMENT  691—MERGER OF CAUSE OF ACTION.

1. The recovery by the trustee in a corporate mortgage of a deficiency judgment against the guarantor of the mortgage bonds extinguished through merger any original cause of action which the bondholders individually or collectively may have had under such guaranty.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1214.]

COURTS  314—JURISDICTION — DIVERSE CITIZENSHIP—ALIGNMENT OF PARTIES.

2. A controversy between citizens of different states, justiciable in a Federal district court, is not involved in a suit by nonresidents, who constituted a bondholders' committee representing a large majority of the holders of defaulted mortgage bonds, against the trustee, refusing to sue, the guarantor of the bonds, and the latter's successor under a reorganization plan,—all

³ *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 454, 26 L. ed. 827, 829; *Quincy v. Steel*, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520. The latter case was an equity suit by a stockholder to enforce a purely legal claim of the corporation,—damages for breach of contract; and the court sustained a demurrer to the bill, not because the suit should have been at law, but because the bill failed to show that complainant had made sufficient effort to induce the directors to enter suit.

three defendants being domestic corporations,—to enforce out of the property of the new corporation satisfaction of a deficiency judgment entered against the guarantor in the foreclosure suit, since the trustee, holding such deficiency judgment for the benefit of all the bondholders, has a real interest in the controversy which makes it a necessary party to the suit, and must be aligned as a party plaintiff, where its interest lies.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 860.]

COURTS $\Leftrightarrow$ 264(5) — ANCILLARY JURISDICTION.

3. A suit by the members of a bondholders' committee against the trustee in the mortgage, the corporate guarantor of the bonds, and the latter's successor under a reorganization plan, to enforce out of the property of the new corporation satisfaction of a deficiency judgment against the guarantor upon its guaranty, cannot be maintained in a Federal court without regard to the citizenship of the parties, as being ancillary to foreclosure proceedings in that court against the guarantor, where there was no reservation concerning liens or similar rights when the property was sold under the foreclosure decree, and the bill does not purport to be ancillary to the foreclosure proceedings, but seeks to establish an equity against the property of the reorganized corporation on the theory that rights of the holders of the guaranteed bonds were improperly ignored.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801.]

[No. 968.]

Argued April 10, 1917. Decided May 21, 1917.

APPPEAL from the District Court of the United States for the Southern District of New York to review a decree dismissing, for lack of diversity of citizenship, a suit by the members of a bondholders' committee to enforce a deficiency judgment entered against the guarantor of the bonds. Affirmed.

The facts are stated in the opinion.

Mr. A. S. Gilbert for appellants.

Mr. Richard Reid Rogers for appellees.

* * * Mr. Justice Brandeis delivered the opinion of the court:

This appeal presents the single question whether the district court erred in dismissing the bill for want of jurisdiction, on the ground that the controversy involved was not one between citizens of different states. The question was duly certified in conformity to § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1916, § 1215]. The facts are these:

The Twenty-eighth & Twenty-ninth Street Crosstown Railroad Company, of New York city, issued, on October 1, 1896, bonds to the amount of \$1,500,000, and secured

them by a mortgage of its property to the Central Trust Company. The Metropolitan Street Railway Company, having previously leased the Crosstown Railroad, delivered with the mortgage stamped on each of the bonds, a guaranty to the Trust Company in the following terms:

"For Value Received, the Metropolitan Street Railway Company hereby guarantees to the trustee of the within-mentioned mortgage, for the benefit of the holders thereof, punctual payment of the principal of the within bond and the interest thereon at the time and in the manner therein specified and according to the tenor of the several coupons belonging thereto."

In September, 1907, the Metropolitan Company passed into the hands of receivers appointed by the circuit (now district) court of the United States for the southern district of New York. Soon thereafter default was made in the payment of interest on the Crosstown bonds. The customary bondholders' committee was formed, and 1,373 of the 1,500 bonds outstanding were deposited with it. At its request the Trust Company declared the bonds due and brought suit in the supreme court of New York to foreclose the mortgage. The court by special order granted an application of the Trust Company for permission to liquidate, in the foreclosure suit, its claim against the Metropolitan Company on the guaranty. For that purpose the Metropolitan Company was joined as defendant; and a deficiency judgment for \$1,745,344.21 was entered against it on February 20, 1912, in favor of the Trust Company.

The property of the Metropolitan Company had meanwhile been administered by receivers appointed by the district court of the United States for the southern district of New York; and the several committees representing its bondholders, stockholders, and creditors had adopted a plan and agreement for the reorganization of that company. Pursuant thereto its franchise and assets had been, on January 1, 1912, transferred to a new corporation, the New York Railways Company; and the securities and cash issued in exchange thereof were distributed among security holders, creditors, and otherwise, as in the plan provided. No provision was made in the plan for adjusting the liability of the Metropolitan Company arising out of its guaranty of the Crosstown bonds. The district court refused to allow the claim on the deficiency judgment to be proved in the Metropolitan receivership, because the date as of which claims against the property were ordered to be proved was January 15, 1908, and the claim on the guaranty was at that date contingent merely. Consequently neither the

committee nor the Trust Company representing the Crosstown bondholders assented to the plan for reorganizing the Metropolitan Company.

In October, 1913, the members of the Crosstown bondholders' committee, suing on behalf of themselves and "all other similarly situated bondholders," brought suit in the district court of the United States for the southern district of New York against the New York Company, the Metropolitan Company, and the Central Trust Company, to enforce out of the property of the New York Company satisfaction of the liability of the Metropolitan Company arising out of its guaranty. The bill set forth facts to bring the case within the rule declared in *Northern P. R. Co. v. Boyd*, 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554, and *Kansas City Southern R. Co. v. Guardian Trust Co.* 240 U. S. 166, 60 L. ed. 579, 36 Sup. Ct. Rep. 334, and, as reason for the suit being brought in the name of the bondholders, alleged the following:

"That the defendant Central Trust Company of New York holds the said judgment against the defendant Metropolitan Street Railway Company, amounting to \$1,745,344.21, for the benefit of and as the trustee for the plaintiffs and the other holders of said bonds of the Twenty-eighth and Twenty-ninth Streets Crosstown Railroad Company, hereinbefore described; and that the reason why this action is brought by the plaintiffs and why the Central Trust Company of New York is made a party defendant is that the plaintiffs are the lawful owners and holders of said bonds in the amount hereinbefore alleged, and the beneficial and equitable owners of said judgment held by the defendant Central Trust Company of New York; and that the defendant Central Trust Company of New York has refused to bring this action after due demand by the plaintiffs upon said defendant Central Trust Company of New York, although the plaintiffs have offered proper indemnification to the said defendant Central Trust Company of New York, as such trustee, to institute this suit to enforce the rights of the trustee and of the bondholders under said judgment and guaranty made by said defendant Metropolitan Street Railway Company, as aforesaid."

Jurisdiction of the district court was rested wholly on diversity of citizenship, plaintiffs being all citizens and residents of states other than New York, and the three defendants, corporations organized under the laws of that state. The Trust Company filed an answer in substance joining in the prayer of the bill and admitting its allegations. The New York Railways Company, besides answering to the merits, alleged:

37 S. C.—33.

"That the interests of the plaintiffs, and all other security holders, and the interests of said defendant Central Trust Company of New York, are identical and in all respects similar to the interests of the plaintiffs, and all other owners or holders of bonds secured by the mortgage . . . ; that the parties to this action should be realigned by the court, and placed according to their interests in the subject-matter of this suit, and for the reasons hereinbefore alleged, and for divers other reasons appearing on the face of the bill upon the trial of this action, this defendant alleges that this court is without jurisdiction to entertain this complaint, or to give judgment for the relief demanded therein."

It also appeared by stipulation that the holders of a large part of the Crosstown bonds deposited with the committee were citizens and residents of New York.

Plaintiffs admit that in respect to the Crosstown Company no cause of action on the bond vested in any one bondholder; since the bondholders were bound by the terms of the mortgage, under which all right to sue on the bonds and to foreclose the mortgage was in the Trust Company. But they insist that the rights of the bondholders against the Metropolitan Company on the guaranty were entirely distinct from their rights against the Crosstown Company on the bonds; that the guaranty vested in the holder of each bond a cause of action on which he could sue in his own name; that the original guaranty to the Trust Company was a naked promise to one for the benefit of another; that the judgment obtained by the Trust Company belongs to the holders of the bonds; that it is in this suit merely a "use plaintiff," a title owner of the judgment, who owes no duty to the plaintiff or other bondholders with reference thereto, has no interest in the result of the suit, and need not have been made a party thereto; and that, being a merely formal party, should be disregarded in determining the question of jurisdiction. Before discussing whether the Trust Company has an interest, and, if so, its character and effect, the nature of this suit should be considered.

1. The cause of action.

This is not a suit upon the original guaranty. It is a suit to enforce a judgment. The prayer of the bill is that the property acquired by the New York Railways Company "be declared to be subject to the lien of said judgment." The rights on the original guaranty, whether they be treated, by virtue of the stamping on each bond, as an aggregation of 1,500 separate causes of action, or be treated as a single cause of action for the benefit of the 1,500 bondholders, were merged in that judgment.

This is true, even if, as contended, the guaranty to the Trust Company stamped on each bond "for the benefit of the holders thereof" be construed as importing a promise of payment directly to the holder, on which he was at liberty to sue in his own name. For the recovery of the judgment extinguished through merger the original cause or causes of action, and the judgment is one recovered by the Trust Company as trustee.¹

2. The interest of the Trust Company.

Whatever may have been the situation originally with respect to rights of individual bondholders on the guaranty, we have now a single judgment held by the Trust Company as trustee for the pro rata benefit of 1,500 bondholders. The plaintiffs allege that they hold 1,373 of these bonds,—that is, a fraction only of the beneficial interest. It is thus clear that the minority bondholders as well as the railway companies defendant require for the protection of their respective interests that the Trust Company be a party to the litigation; the minority bondholders, so that they may share ratably in the proceeds; the railway companies, in order that they may, upon paying the amount of the judgment, be discharged from the possibility of further liability. The judgment is a unit and the relief sought on it is necessarily for the benefit of all. *Blacklock v. Small*, 127 U. S. 96, 104, 32 L. ed. 70, 73, 8 Sup. Ct. Rep. 1096. But a suit by some bondholders does not, by the allegation that it is in behalf of all others similarly situated, become a class suit, binding on all. *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 57, 52 L. ed. 379, 387, 28 Sup. Ct. Rep. 182. And for the protection of the Trust Company itself joinder as a party is essential, in order that, upon distribution of any proceeds, it may be discharged from obligations to its beneficiaries.

To the state of facts presented here, *Greene v. Republic F. Ins. Co.* 84 N. Y. 572, which is strongly relied upon by plaintiffs, has no application. In that case the assignee of a chose in action, having recovered a judgment in Mississippi, where he was obliged (as by the common-law procedure) to sue for his own use in the assignor's

name, was permitted to sue on the judgment in New York in his own name, since the New York Code requires suit to be brought in the name of the real party in interest. There the assignor, having assigned the cause of action, had no interest in it when the action was commenced in Mississippi, and consequently no interest in the judgment; and the judgment record so recited, declaring that it was "for the use and benefit of Edward A. Greene." Here there has been no assignment either of the cause of action or of the judgment. The prayer of the complaint was that the Trust Company "as trustee may have judgment against . . . said Metropolitan Company;" and in accordance with that prayer judgment for the deficiency was entered. So far as the record discloses, the deficiency judgment against the Metropolitan Company, like that against the Crosstown Company, and the property transferred by the mortgage, is held by the Trust Company as trustee for all the bondholders.² That under such circumstances the trustee is a necessary party to this suit is clear.

3. The affiliation of the Trust Company.

It is clear that the interest of the Trust Company in this controversy lies wholly with the plaintiffs. This is shown, among other things, by the request in its answer that the relief prayed for in the bill be granted. No reason is assigned in the bill or in the answer of the Trust Company for its refusal to sue; and none suggests itself save the willingness of an accommodating trustee to enable its beneficiaries to present that appearance of diversity of citizenship essential to conducting this litigation in the Federal court. It is not contended that this refusal to sue makes the Trust Company an adversary, to be classed for purposes of jurisdiction with the real defendants,—as in those cases where the refusal to sue was part of a fraudulent participation in the wrongdoing, and where the trustee or corporation in effect ranged itself in opposition to the relief sought.³ The Trust Company having, as we have shown, a real interest in the controversy, which makes it a necessary party to the suit, must be aligned as a party plaintiff, where its interest lies.⁴

¹ "If there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action, in the language of the law, transit in rem judicatum, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever." *United States v. Lefler*, 11 Pet. 86, 100, 101, 9 L. ed. 642, 647, 648. See also *Mason v. Eldred*, 6 Wall. 231, 18 L. ed. 783; *Gaines v. Miller*, 111 U. S. 395, 399, 28 L. ed. 466, 467, 4 Sup. Ct. Rep. 426.

² See *Knapp v. Troy & B. R. Co.* 20 Wall. 117, 123, 22 L. ed. 328, 330; *Richter v. Jerome*, 123 U. S. 233, 246, 31 L. ed. 132, 137, 8 Sup. Ct. Rep. 106.

³ *Venner v. Great Northern R. Co.* 209 U. S. 24, 52 L. ed. C66, 28 Sup. Ct. Rep. 328; *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606, 25 Sup. Ct. Rep. 355; *Kelly v. Mississippi River Coaling Co.* 175 Fed. 482; *Groel v. United Electric Co.* 132 Fed. 252.

⁴ *Blacklock v. Small*, 127 U. S. 96, 104, 32 L. ed. 70, 73, 8 Sup. Ct. Rep. 1096; *Hart-*

Since the necessary realignment of the Trust Company as party plaintiff is fatal to the jurisdiction of the district court, it is unnecessary to consider the legal effect of the fact stipulated, that a large part of the bondholders* represented by plaintiffs are likewise citizens and residents of New York.

4. Whether the suit is an ancillary one.

The plaintiffs, relying upon *Wabash R. Co. v. Adelbert College*, 203 U. S. 38, 53, 52 L. ed. 379, 385, 28 Sup. Ct. Rep. 182, attempt to sustain the jurisdiction of the court on the ground that this suit is ancillary to the foreclosure proceedings against the Metropolitan Company in the district court. But the facts in that case bear no resemblance to those here under consideration. There the rights and lien which it was declared the Federal court had exclusive jurisdiction to ascertain and enforce were expressly reserved by the decree; and the purchaser under the decree took title expressly subject to them. The decree of foreclosure under which sale was made of the property of the Metropolitan Company, which was later transferred to the New York Company, contained, so far as appears from the record, no reservation whatsoever concerning liens or similar rights. And there is in the answer of the New York company the uncontroverted statement that the properties subject to the foreclosure "were sold to the purchasers and to the New York Railways Company, free and clear of any lien, claims, or interest in any party outstanding, except the interests" of those expressly provided for in the plan of reorganization; and that the proceedings resulting in the deficiency judgment against the Metropolitan Company here sued on "did not constitute a claim against, or a lien on, or an interest in, any of the property rights or estate of the Metropolitan Street Railway Company." Furthermore, the bill in the instant case does not purport to be ancillary to the Metropolitan Company foreclosure proceedings. Plaintiffs here seek merely to establish an equity against the property of the New York Company, on the theory that the rights of the Crosstown bondholders have been improperly ignored. They set up a wholly independent cause of action.

Decree affirmed.

er Twp. v. Kernochan, 103 U. S. 562, 26 L. ed. 411; *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. ed. 932; *Allen-West Commission Co. v. Brashear*, 176 Fed. 119; *Shipp v. Williams*, 10 C. C. A. 247, 22 U. S. App. 380, 62 Fed. 4.

LEHIGH VALLEY RAILROAD COMPANY, Plff. in Err.,
v.

JAMES H. BARLOW.

COMMERCE — 27(7)—EMPLOYERS' LIABILITY — WHEN SERVANT IS ENGAGED IN "INTER-STATE COMMERCE."

A member of a switching crew assisting in placing on an unloading trestle in the railway company's yards coal cars belonging to such company and loaded with supply coal for it, which, with their contents, had passed over its line from a point outside the state, and had remained in the yards upon sidings and switchings for several days before removal to the trestle, was not then engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, §§ 8657-8665), since the interstate movement of the cars had terminated before they left the sidings.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

[No. 194.]

Argued April 20, 1917. Decided May 21, 1917.

IN ERROR to the Supreme Court of the State of New York in and for the County of Cortland to review a judgment entered pursuant to a mandate from the Court of Appeals of that state, which had affirmed a judgment of the Appellate Division of the Supreme Court for the Third Department, affirming a judgment of a trial term of such Supreme Court in favor of plaintiff in an action under the Federal Employers' Liability Act. Reversed and remanded for further proceedings.

See same case below, in appellate division, 158 App. Div. 768, 143 N. Y. Supp. 1053; in court of appeals, 214 N. Y. 116, 107 N. E. 814.

The facts are stated in the opinion.

Messrs. Peter F. McAllister and F. O. McCleary for plaintiff in error.

Mr. Clayton R. Lusk for defendant in error.

Mr. Justice McReynolds delivered the opinion of the court:

Basing his claim upon the Federal Employers' Liability Act, defendant in error sought damages for personal injuries. The New York court of appeals affirmed a judgment in his favor (214 N. Y. 116, 107 N. E. 814), and the question now presented is whether there is evidence tending to show that he was injured while engaging in interstate commerce. The accident occurred July 27, 1912, when, as member of a switch-

*184
ing crew, he was assisting in placing three cars containing supply coal for plaintiff in error on an unloading trestle within its yards at Cortland, New York. These cars belonged to it, and with their contents had passed over its line from Sayre, Pennsylvania. After being received in the Cortland yards—one July 3 and two July 10—they remained there upon sidings and switches until removed to the trestle on the 27th.

We think their interstate movement terminated before the cars left the sidings, and that while removing them the switching crew was not employed in interstate commerce. The essential facts in *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992, did not materially differ from those now presented. There we sustained a recovery by an employee, holding he was not engaged in interstate commerce; and that decision is in conflict with the conclusion of the Court of Appeals. The judgment under review must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

(244 U. S. 184)

D. B. SMITH and Gertrude W. Smith, Plffs.
in Err.,
v.

THIRD NATIONAL EXCHANGE BANK
OF SANDUSKY, OHIO, and F. P. Zol-
linger.

PUBLIC LANDS  19—UNLAWFUL OCCUPANCY—BONA FIDE CLAIM OR COLOR OF TITLE.

The further occupancy of a tract of public land within the limits of the original survey of a Mexican land grant by those in possession under color of title, and in good faith, or by their vendees, after such grant had been finally confirmed by the court of private land claims, with boundaries which exclude the tract in question, was not rendered unlawful by the provision of the Act of February 25, 1885 (23 Stat. at L. 321, chap. 149, Comp. Stat. 1916, § 4997), forbidding the inclosure of, or the assertion of a right to the exclusive use and occupancy of, any part of the public lands without claim or color of title, made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry at the proper land office.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26.]

[No. 214.]

Argued April 24 and 25, 1917. Decided May 21, 1917.

IN ERROR to the Supreme Court of the State of New Mexico to review a judg-

ment which, on a second appeal, affirmed a judgment of the District Court of Doña Ana County, in that state, in favor of plaintiffs in an action upon certain promissory notes, and for the foreclosure of a mortgage securing their payment. Affirmed.

See same case below, 20 N. M. 264, 148 Pac. 512.

The facts are stated in the opinion.

Messrs. F. G. Morris and W. B. Grant for plaintiffs in error.

Messrs. W. H. Winter, A. Seymour Thurmond, J. H. Paxton, and R. L. Young for defendants in error.

*Mr. Justice McReynolds delivered the opinion of the court: *185

Defendants in error brought suit in the district court, Doña Ana county, New Mexico, seeking judgment against plaintiff in error Smith upon his three notes for forty-five hundred dollars (\$4,500) each, and also foreclosure of the mortgage upon lands in that county, given to secure them. Recovery was resisted upon the ground that although Smith was in actual possession of the lands under deed from Reinhart, they belonged to the United States and were unlawfully in the vendor's possession when so conveyed without bona fide claim or color of title, contrary to the Act of Congress approved February 25, 1885 (23 Stat. at L. 321, chap. 149, Comp. Stat. 1916, § 4997); and that the notes were given in part payment therefor. The state supreme court affirmed a judgment in the bank's favor. Quotations from its statement will suffice to indicate the essential facts (20 N. M. 264, 148 Pac. 512).

"In 1851 the government of Mexico granted certain lands now embraced within the limits of Doña Ana county, this state, to the Colony of Refugio. The grant was similar to many others found in this state. Settlements were made upon it by many people, and individual allotments were made from time to time by the commissioners. *186

"The territorial legislature, by the Act of March 7th, 1884, constituted the owners of lands within the limits of the grant a body corporate and politic under the name and style of the Grant of the Colony of Refugio, under which they were authorized by said act to sue and be sued and have perpetual succession.

"Many years ago the lands involved in this litigation, embracing some 400 acres, were allotted to ten individuals, who subsequently, by separate deeds of conveyance, transferred the same to Leon Alvarez, probably some time in the 80's, but the date is wholly immaterial. From that time to 1909 various deeds were executed to diverse parties, all of whom had possession and cul-

tivated and improved the lands. Something like six or seven thousand dollars, possibly more, have been expended in improvements on the land in constructing irrigation ditches. In 1909 W. H. Reinhart claimed to be the owner of the lands, under deeds of conveyance, and was in possession of the same. In that year he conveyed the same to D. B. Smith, the appellant here, receiving perhaps one half of the purchase money in cash, and to secure the balance took Smith's promissory notes, secured by a mortgage on the real estate. The notes aggregated \$13,500. It is not disputed that Reinhart was the owner of said lands if the original allottees were invested with the legal title to the same.

"Some time prior to 1893, the grant was surveyed by Elkins & Marmon, and the lands in question here were within the limits of that survey. In 1893, the commissioners of the grant, acting under the power and authority conferred by the Act of March 7, 1884, instituted proceedings in the United States court of private land claims to have the title of said grant confirmed and settled. Leon Alvarez was one of the commissioners of the grant*at that time and acting as such. The title of the grant was confirmed and a survey was ordered to determine what lands were embraced within the limits of the same. This survey was made by the surveyor general of New Mexico and reported to the court, and the title to the lands so embraced within the limits of such survey was confirmed in the Colony of Refugio. This survey, so made as aforesaid, embraced a smaller tract than did the Elkins & Marmon survey, and the lands in question here, together with the other lands, was without the limits of the survey made under the direction and by authority of the court of private land claims. The judgment of the court of private land claims establishing the boundaries and confirming the title to the lands within the limits of such survey, so made by the surveyor general of New Mexico, was entered in the year 1903, and from which no appeal was taken.

"The parties owning land without the limits of the grant as confirmed, but within the Elkins & Marmon survey, continued in possession thereof and resided thereon with their families, and dealt with said lands as though they had been invested with the legal title to the same. No action was ever taken by the United States, so far as the record discloses, to dispossess them, although the legal title to said lands was in the United States. In 1909, when the deed to Smith was executed by Reinhart, a bill was pending before Congress to validate the titles of the bona fide claimants to said

lands, so found to be without the limits of the confirmed survey."

"Said lands were for many years, before and after the Mexican cession to the United States, in good faith considered to be a part of the Refugio Colony grant, a Mexican community grant, and were so held in good faith, by the owners of the said grant; and that the commissioners of the said grant, in good faith, allotted and conveyed the said lands to certain members of said community who settled on the said grant; and that the titles and claims of the allottees thereto were passed and deraigned by a chain of sufficient mesne conveyance to the said W. H. Reinhart; and that said W. H. Reinhart and his predecessors in title and claim held, occupied, and possessed the said lands for more than fifteen years, under and by virtue of the conveyances from the commissioners of the Refugio Colony Grant and the said mesne conveyances; and that the said defendant D. B. Smith and his assigns now hold and possess and are cultivating the said lands under and by virtue of the said conveyances from the commissioners of the Refugio Colony Grant and the said mesne conveyances, and the said conveyance from the said W. H. Reinhart to defendant D. B. Smith, and subsequent conveyances from D. B. Smith to his said assigns."

"The plaintiffs have such deed of conveyance from the Refugio Colony Grant owners and mesne chain of conveyances down to W. H. Reinhart and D. B. Smith and wife, as they plead in their reply, and such as defendants plead that they hold under.

"During the examination of a witness by plaintiff, Dionicio Alvarez, counsel for defendants made the following admission:

"It is admitted by the defendants, for the purpose of shortening the testimony, that the parties mentioned in the chain of transfers from the Refugio Colony down to the date of the rendition of the decree of the court of private land claims in evidence were holders under the chain of title mentioned, in good faith, under color of title, and in good faith."

Section 1, Act of Congress February 25, 1885, follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party,*association,* or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or

color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim, color of title, or asserted right as above specified as to inclosures, is likewise declared unlawful, and hereby prohibited."

Section 4 of the same act makes violation of any provision thereof a misdemeanor punishable by fine and imprisonment.

The supreme court declared: "Upon this appeal, the only question which requires consideration is whether the evidence shows that Reinhart had 'no claim or color of title made or acquired in good faith' to the land in question at the time he conveyed the same. If he did not, the judgment must be reversed; on the other hand, if he had color of title to the land, made or acquired in good faith, the judgment entered was proper and must be affirmed. . . . The deed from Potter to Reinhart constituted color of title, so that the only question of any practical importance for determination is whether Reinhart's title was acquired and held in good faith, within the meaning of the act of Congress." And relying upon *Cameron v. United States*, 148 U. S. 301, 305, 37 L. ed. 459, 460, 13 Sup. Ct. Rep. 596, and *Searl v. School Dist.* 133 U. S. 553, 33 L. ed. 740, 10 Sup. Ct. Rep. 374, it held that although Reinhart was fully cognizant of all the facts, he, nevertheless, had a claim or color of title to the lands, made or acquired *in good faith within the true intentment of the Act of 1885. With this conclusion we agree.

In *Cameron v. United States*, supra, we said: "The act of Congress [approved February 25, 1885] which forms the basis of this proceeding was passed in view of a practice which had become common in the western territories, of inclosing large areas of lands of the United States by associations of cattle raisers, who were mere trespassers, without shadow of title to such lands, and surrounding them by barbed wire fences, by which persons desiring to become settlers upon such lands were driven or frightened away, in some cases by threats or violence. The law was, however, never intended to operate upon persons who had taken possession under a bona fide claim or

color of title; nor was it intended that, in a proceeding to abate a fence erected in good faith, the legal validity of the defendant's title to the land should be put in issue. It is a sufficient defense to such a proceeding to show that the lands inclosed were not public lands of the United States, or that defendant had claim or color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States. As the question whether the lands inclosed by the defendant in this case were public lands of the United States depends upon the question whether he had claim or color of title to them, the two questions may be properly considered together."

Without doubt Reinhart and his predecessors were upon the lands for more than fifteen years; and it is admitted that, prior to entry of the decree of the court of private land claims in 1903, their occupancy was under color of title and in good faith. We cannot conclude that further occupancy by those then in possession under bona fide claims, or their vendees, was rendered unlawful—criminal indeed—by the Act of 1885. They were not mere naked trespassers dishonestly seeking to appropriate public property, and they did not belong to that class of offenders intended to be hit by the act. Their claim deserved consideration, as plainly appears from the circumstances above narrated. This is further shown by "An Act to Quiet Title to Certain Lands in Doña Ana County, New Mexico," approved February 3, 1911 (36 Stat. at L. 896, chap. 35), through which Congress granted them the right to make entries of and receive patents to lands in their possession, and empowered the General Land Office to assist them, at public expense, in making proofs necessary to that end.

Affirmed.

(244 U. S. 191)

MISSOURI PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.

McGREW COAL COMPANY.

CARRIERS ⇨ 12(3)—CONSTITUTIONAL LAW ⇨ 242, 298(2)—DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS—FORBIDDING THE CHARGING OF MORE FOR SHORTER THAN FOR LONGER INTRASTATE HAULS.

1. Prohibiting a railway company from charging more for shorter than for longer intrastate hauls without regard to direction, circumstances, or condition, and giving a shipper an absolute right to recover any overcharge paid by him if this inhibi-

tion is disobeyed, as is done by Mo. Const. 1875, art. 12, § 12, as construed by the highest state court, does not, in the absence of special controlling circumstances, amount to a denial of due process of law, or the equal protection of the laws.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 9, 15-20; Constitutional Law, Cent. Dig. §§ 691, 847.]

COMMERCE — 34 — STATE REGULATION — PROHIBITING CHARGING MORE FOR SHORTER THAN FOR LONGER INTRASTATE HAULS.

2. Unconstitutional interference with interstate commerce does not necessarily result from the application to an interstate carrier of the provisions of Mo. Const. 1875, art. 12, § 12, under which, as construed by the highest state court, railway companies are prohibited from charging more for shorter than for longer intrastate hauls, and shippers given an absolute right to recover any overcharge paid by them, if this inhibition is disobeyed.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 82.]

[No. 222.]

Argued April 26, 1917. Decided May 21, 1917.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Lafayette County, in that state, in favor of plaintiff in an action by a shipper to recover alleged freight overcharges. Affirmed.

See same case below, — Mo. —, 178 S. W. 1179.

The facts are stated in the opinion.

Messrs. James F. Green and Edward J. White for plaintiff in error.

Messrs. Edwin A. Krauthoff, Alexander Graves, William S. McClintock, Arthur L. Quant, and Maurice McNeill for defendant in error.

* Mr. Justice McReynolds delivered the opinion of the court:

Defendant in error filed a petition containing forty-seven counts in the Lafayette circuit court, seeking to recover what it paid in excess of alleged lawful freight rates upon as many shipments of coal from Myrick, Missouri, to other points in that state. The first count follows. It is identical in substance with all others except as to dates, amount of coal shipped, charges paid, destination, and comparative rates.

"Plaintiff avers that on April, 1908, it was and still is a coal mining company incorporated under the law of the state of Missouri.

"Plaintiff, for first cause of action, avers that on October,*1879, the defendant was and has been ever since a railroad corporation duly organized under the law of

said state and a common carrier for hire of freight and passengers between its stations, hereinafter named, in said state.

"That within five years last past and on the dates hereinafter named plaintiff produced and sold bituminous coal from its own mines near Myrick, one of defendant's stations in said county, and that on the various dates named in exhibit No. 1, and in the cars therein described by number and initial, it shipped by defendant's road from said Myrick in the aggregate 867,000 pounds of its said coal in carload lots to the consignee named in said exhibit at Strasburg, Missouri, another station on defendant's road.

"Plaintiff avers that for the said carriage of the said coal defendant fixed, charged, and demanded and received of the plaintiff 80 cents per ton, an illegal freight rate, being 30 cents per ton more than defendant was by law entitled to fix, demand, charge, and receive, in this: that during all said times and dates herein named defendant had fixed, charged, demanded, and received for the carriage for the same class of coal over its said line and over another part of said road from its station of Liberal, Missouri, and to another of its said stations, viz., Granby, in said state, a distance of 77.14 miles, 50 cents per ton by the carload, while the distance from said Myrick to said Strasburg was only 61.95 miles, for which said rate of 80 cents per ton for said carriage fixed, charged, demanded, and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand, and receive for said shipments by the sum of \$130.05.

"And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of \$130.05; wherefore it prays judgment for the same and for damages not exceeding \$1,000, and for all other and general relief, according to the statutes in such case made and provided."

* The answer to count one,—identical in effect with answers to all others,—formal and some presently unimportant parts being omitted, follows:

"Comes now the defendant and for answer to the first count of plaintiff's petition states that the same is founded upon the Session Laws of Missouri 1872, page 69, now §§ 3173 and 3211 of the Revised Statutes of Missouri 1909, and § 12 of article 12 of the Constitution of Missouri 1875, and that said sections are null and void and of no legal force and effect for the following reasons:

"(a) Because said §§ 3173 and 3211 of the Revised Statutes of Missouri 1909, when

enacted by the legislature, were passed in violation of § 32 of article 4 of the Constitution of Missouri 1865, in this: . . .

"(b) Because said §§ 3173 and 3211 are repugnant to and in violation of § 14 of article 12 of the Constitution of Missouri 1875, in this: . . .

"(c) Because said §§ 3173 and 3211, Revised Statutes of Missouri 1909, when re-enacted by the legislature in 1879, were not legally re-enacted, but were enacted in violation of § 28 of article 4 of the Constitution of Missouri 1875, in this: . . .

"(d) Because said §§ 3173 and 3211 of the Revised Statutes of Missouri 1909 were repealed by an act of the legislature passed in 1887, entitled, 'An Act to Regulate Railroad Corporations,' passed at the extra session of 1887, same being found in the Session Laws of 1887 at page 15, now §§ 3185 and 3193 of the Revised Statutes 1909.

"For further answer to said count, the defendant says that § 12 of article 12 of the Constitution of Missouri 1875, and §§ 3173 and 3211 and §§ 3185 and 3193 of the Revised Statutes of Missouri 1909, are in violation of § 1 of article 14 of the Amendments to the Constitution of the United States in this: that said sections of the Constitution of Missouri and of the Revised Statutes of Missouri deprive defendant of its property without due process of law and deny to it the equal protection of the laws.

" . . . Sections 3173 and 3211 of the Revised Statutes of Missouri 1909 are repugnant to and in violation of article 5 of the Amendments to the Constitution of the United States in this: That said sections deprive the defendant of its property without due process of law.

" . . . Sections 3173 and 3211 and §§ 3185 and 3193 of the Revised Statutes of Missouri 1909, and § 12 of article 12 of the Constitution of Missouri 1875, are in conflict with § 8 of article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: that the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run into other states than Missouri, and into the states of Kansas, Colorado, Nebraska, Oklahoma, Illinois, Arkansas, and Louisiana, and that the train in which the plaintiff's property described in said count was being transported was at the time engaged in interstate commerce and contained carload lots and shipments of merchandise consigned and being carried from points without the state of Missouri to points within this state, and from points within this state to points without the same, and from points without

this state across the state of Missouri and to points in other states, and that, by reason of the premises, this state is without jurisdiction to adopt and pass the sections named and to enforce the provisions of the same against this defendant while so engaged in interstate commerce.

" . . . Sections 3173 and 3211 and §§ 3185 and 3193 of the Revised Statutes of Missouri 1909, and § 12 of article 12 of the Constitution of Missouri 1875, are in conflict with § 8 of article 1 of the* Constitution of the United States and the various laws passed by Congress thereunder in this: that the defendant's railroad is an interstate road and its lines extend over and through the states of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas, and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said states, and operates trains over the same in transporting freight and passengers through said states; that said section of the Constitution of Missouri and sections of the Revised Statutes seek to compel the defendant arbitrarily to fix its rates in this state and in all of said states, and in comparison with rates existing in all such states, without regard to the laws passed by Congress regulating interstate commerce.

" . . . Defendant denies each and every allegation therein contained. . . ."

Upon motion, the trial court struck from the answer "all alleged defenses pleaded to each of the counts in the petition except the traverses." No evidence was offered except the stipulation quoted below:

"It is hereby stipulated between the parties that the defendant's stations, the rates charged by the defendant, including those paid by the plaintiff, the amount of coal transported, and the distance set out in the several counts of the petition, are correctly stated therein. It is further stipulated that such coal was delivered by the plaintiff to the defendant for shipment in the usual and ordinary way without any direction or request by plaintiff as to what particular trains the same was to be transported in, and that the defendant received and transported the same in the usual and ordinary course of business, on the usual trains passing over its road. It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this state to points without the same, from points without the same to points within this state, and from* points* without this state through this state and to points in other states."

A jury being waived, the court rendered judgment upon each count for alleged over-

charge, without penalty,—on the first count \$130.05, total upon all, \$16,504.19; and this action the state supreme court affirmed. — Mo. —, 178 S. W. 1179.

The insistence here is that, as construed and applied, § 12, article 12, Missouri Constitution 1875, and also §§ 3173 and 3211, Revised Statutes 1909, deprive plaintiff in error of property without due process of law and deny it equal protection, contrary to the 14th Amendment, and also conflict with § 8, article 1, Federal Constitution.

Sections 3173 and 3211 originated in the Act of 1872. The first provides that no railroad corporation organized or doing business within the state shall "charge or collect for the transportation of goods, merchandise or property over any portion of its road a greater amount as toll or compensation than shall be charged or collected by it for the transportation of similar quantities of the same class of goods, merchandise or property over any other portion of its road of equal distance." And the second prescribes a penalty for violating the first, not exceeding \$1,000, with costs, etc., to be recovered by aggrieved party.

The supreme court declared: "Each count of the petition is in legal effect identical with the counts of the petition in McGrew v. Missouri P. R. Co. 258 Mo. 23, 166 S. W. 1033, and with those in the cases between the same parties, cited in the opinion in that case, differing only in amounts, dates, and destination of shipments, and in distances used for purposes of comparison.

... The assignments of error in this case, in legal effect, and the points and authorities, verbatim, are identical with those in that case. The authorities cited are exactly the same." And upon the opinion in the cause referred to, it affirmed the trial court.

In McGrew v. Missouri P. R. Co. supra, the court followed McGrew v. Missouri P. R. Co. 230 Mo. 496, 132 S. W. 1076, where (the issues being the same as those here presented), after considering the whole subject, it was held that plaintiff's judgment could be sustained under § 12, article 12, Constitution of Missouri 1875, without reliance upon any statute. The court said:

(230 Mo. 546.) "The petition was framed upon the Act of 1872, but in view of the fact that the trial court denied the penalties asked, and allowed only the difference between the higher rates charged plaintiff and the lower rates charged by defendant for the longer distances, the judgment could be sustained upon § 12 of article 12 of the Constitution, without the aid of the Act of 1872, provided that said section of the Constitution is self-enforcing.

Because if said section is self-enforcing, that is to say, if it, without the aid of any statutory enactment, makes it unlawful for a railroad company to charge more for a shorter haul than a longer one of the same class of property in any direction, the same or not, and under any or all circumstances and conditions, then clearly the measure of damages for doing the unlawful thing, in the absence of any statute upon the subject, is the amount of the excess charged for the shorter distance over that charged for the longer distance."

(561.) "Section 12 of article 12 of our Constitution clearly establishes an unconditional short-haul rule, without regard to direction or to circumstances and conditions. Said section declares that it shall be unlawful for any railroad company to charge for the transportation of freight or passengers a greater amount for a less distance than 'the amount charged for any greater distance.' That declaration establishes a rule, and creates a right in every passenger and shipper to a compliance with, and an obedience to, its terms. . . . Said section has the same force and effect as if it read: 'It shall not be lawful in this state for any railroad company to charge, under penalties which the general assembly shall prescribe, for freight or passengers, a greater amount for the transportation of the same for a less distance than the amount charged for any greater distance.' Had said section read that way, its effect as an operative law would have been too clear for controversy. To my mind it is equally clear under the present reading."

In view of this ruling, it is unnecessary for us to consider either terms, validity, or possible application of sections of Revised Statutes mentioned in the answer.

Section 12, article 12, Constitution of Missouri, provides: "It shall not be lawful in this state for any railway company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance; and suitable laws shall be passed by the general assembly to enforce this provision; but excursion and commutation tickets may be issued at special rates." As construed and applied in the present cause, this section prohibits the carrier from charging in respect of intra-state commerce more for a shorter haul than for a longer one over any portion of its line within the state, without regard to direction, circumstance, or condition; and if this inhibition is disobeyed the shipper acquires an absolute right to recover any overcharge paid by him.

The record does not disclose when plaintiff in error was incorporated, or what pro-

visions its charter contains. There is no suggestion of anything therein amounting to a contract exempting it from legislation commonly within the police power. No claim is made that the cost of moving freight over its lines in Missouri is without substantial relation to distance; and no facts are alleged which indicate material differences between conditions and circumstances under which the hauls from mines at Myrick were made and those surrounding the longer shipments for less charges over other portions of the road.

Arguments identical in principle with those now presented to show invalidity of the inhibition under consideration, because of conflict with the 14th Amendment and interference with interstate commerce, were considered and rejected in *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95, approved in *Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.)* 234 U. S. 476, 489, 58 L. ed. 1408, 1423, 34 Sup. Ct. Rep. 986. And we think it must be accepted as settled that unless some controlling circumstance of a character not here disclosed is established, or a special protecting contract exists, there is nothing in the provisions of the Federal Constitution or laws presently relied on which necessarily restricts the power of a state by general rule to prohibit railway companies from receiving higher charges for shorter hauls than for longer ones when both are wholly within its borders. Such a prohibition is not necessarily an arbitrary, unreasonable, or grossly oppressive measure for preventing discriminations and insuring equal and just treatment to all shippers.

We find no error in the judgment below, and it is affirmed.

(244 U. S. 191)

MISSOURI PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.

EDWARD J. MCGREW and James C. McGrew, Executors of James C. McGrew, Deceased.

This case is governed by the decision of *Missouri Pacific Railway Company v. McGrew Coal Company*, ante, p. 518.

[No. 223.]

Argued April 26, 1917. Decided May 21, 1917.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Lafayette County, in that state,

in favor of plaintiffs in an action to recover alleged freight overcharges. Affirmed.

See same case below, — Mo. —, 178 S. W. 1179.

Mr. James F. Green for plaintiff in error
Mr. Alexander Graves for defendants in error.

Mr. Justice McReynolds delivered the opinion of the court:

A stipulation of counsel for the respective parties that this cause abide the decision in case No. 222 having been filed [244 U. S. 191, 61 L. ed. —, 37 Sup. Ct. Rep. 518], the judgment in this case is affirmed.

(244 U. S. 200)

MISSOURI PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.

MARGARET L. TABER, Guardian of
Harry H. Small, Grace L. Small, and
Margaret G. Small, Minors.

COURTS  394(7)—FEDERAL QUESTION —
HOW RAISED.

The refusal of the highest court of a state to pass upon the question whether the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, §§ 8657-8665), should not have been applied to the action, is not reviewable in the Federal Supreme Court, where the original action was based upon a state statute, the answer did not set up or rely upon the Federal act, the trial court's attention was not called thereto, and the highest state court did nothing more than to decline to pass upon the point because it was not presented to the trial court, as required by the state practice.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1053.]

[No. 760.]

Submitted April 10, 1917. Decided May 21, 1917.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Jackson County, in that state, in favor of plaintiff in an action for death. Dismissed for want of jurisdiction.

See same case below, — Mo. —, 186 S. W. 688.

The facts are stated in the opinion.

Messrs. Edward J. White, Thomas Hackney, and Martin Lyons for plaintiff in error.

Messrs. John T. Wayland, R. J. Ingraham, L. E. Durham, and Hale Houts for defendant in error.

*Mr. Justice McReynolds delivered the opinion of the court.

Charles H. Small was killed at Kansas City while employed by plaintiff in error as a switchman. Relying upon a state statute, the guardian of his minor children sued for damages in the Jackson county circuit court and recovered a judgment which the supreme court of Missouri affirmed, May 15, 1916. We are asked to reverse that action because the Federal Employers' Liability Act was not applied, but rights and liabilities were determined according to state laws.

Unless some right, privilege, or immunity under the Federal act was duly and especially claimed, we have no jurisdiction. Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1916, § 1214]. Speaking for the court in *Erie R. Co. v. Purdy*, 185 U. S. 148, 154, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605, Mr. Justice Harlan announced the applicable rule: "Now, where a party—drawing in question in this court a state enactment as invalid under the Constitution of the United States, or asserting that the final judgment of the highest court of a state denied to him a right or immunity under the Constitution of the United States—did not raise such question or especially set up or claim such right or immunity in the trial court, this court cannot review such final judgment and hold that the state enactment was unconstitutional, or that the right or immunity so claimed had been denied by the highest court of the state, if that court did nothing more than decline to pass upon the Federal question because not raised in the trial court, as required by the state practice. *Spies v. Illinois*, 123 U. S. 131, 181, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21, 22; *Miller v. Texas*, 153 U. S. 535, 538, 38 L. ed. 812, 813, 14 Sup. Ct. Rep. 874; *Morrison v. Watson*, 154 U. S. 111, 115, 38 L. ed. 927, 929, 14 Sup. Ct. Rep. 995."

The original action was based upon a state statute; the answer did not set up or rely upon the Federal act; the trial court's attention was not called thereto; and although urged to hold liability depended upon it, the supreme court declined to pass upon that point because not presented to the trial court. This ruling seems in entire accord with both state statutes and established practice. *Mo. Rev. Stat. 1909, § 2081*; *St. Louis Nat. Bank v. Flanagan*, 129 Mo. 178, 31 S. W. 773; *Freeland v. Williamson*, 220 Mo. 217, 119 S. W. 560.

The writ must be dismissed.
Dismissed.

VALLEY STEAMSHIP COMPANY, Plff. in

Err.,
v.

JOHN J. WATAWA. (No. 469.)

VALLEY STEAMSHIP COMPANY, Plff. in

Err.,
v.

JOSEPH MRAZ. (No. 470.)

COURTS ⇐394(15) — FRIVOLOUS FEDERAL QUESTION—STATE REGULATION OF INTER-STATE COMMERCE.

1. The contention that a steamship company engaged in interstate commerce could not be subjected to the Ohio Workmen's Compensation Act of May 31, 1911,* without burdening such commerce, contrary to U. S. Const. art. 1, § 8, is so lacking in merit that it will not serve as the basis of a writ of error from the Federal Supreme Court to a state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1064.]

COURTS ⇐391(2)—ERROR TO STATE COURT —FEDERAL QUESTION—HOW RAISED.

2. The objection to the application to a steamship company of the Ohio Workmen's Compensation Act of May 31, 1911, on the ground that the Federal judicial power was extended by U. S. Const. art. 3, § 2, to all cases of admiralty and maritime jurisdiction, thereby rendering the general maritime law part of the Federal laws, not subject to alteration by state statutes, will not serve as the basis of a writ of error from the Federal Supreme Court to a court of appeals of the state of Ohio, where it was not presented to the trial court in any form, and was not pointed out clearly, if at all, by the petition in error before such court of appeals, and was not definitely mentioned in the opinion of that court, whose powers, under the local law, only extend to a review of the trial court's judgment for errors appearing on the record.

[Nos. 469 and 470.]

Argued January 10 and 11, 1917. Decided May 21, 1917.

TWO WRITS of Error to the Court of Appeals for the Eighth District of the State of Ohio to review judgments which affirmed judgments of the Common Pleas Court of Cuyahoga County, in that state, in favor of plaintiffs in personal-injury actions. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Messrs. Tracy H. Duncan and Frank S. Masten for plaintiff in error.

Mr. George H. Eichelberger for defendants in error.

*Memorandum opinion by Mr. Justice Mc-Reynolds:

Number 469.

Seeking damages under the laws of Ohio, defendant in error, Wattawa, brought this action in the common pleas court of Cuyahoga county. He alleged that, by reason of the Steamship Company's negligence, he suffered personal injuries in September, 1913, while employed by it as a deck hand on the Edwin N. Ohl, then lying at Sandusky, Ohio; and that although an employer of more than five men, the company was not a subscriber or contributor to the state insurance fund provided for by the Act of May 31, 1911,—the first Ohio Workmen's Compensation Act. In defense the company claimed that, although employing more than five men, it was engaged in interstate commerce, and therefore was not required to subscribe to the state insurance fund; denied negligence; and alleged that the accident resulted wholly from the employee's want of care; and moreover, that he had assumed the risk. Upon motion the allegation as to assumption of risk was stricken out.

The court charged that as the company had not accepted the Compensation Act, it could not rely upon common-law defenses based on the fellow-servant rule, assumption of risk, or contributory negligence. Judgment upon a verdict for \$5,200 was affirmed by the court of appeals, and petitions in error and for certiorari were denied by the supreme court.

We are asked to reverse the action of the court of appeals upon two grounds: First, because the company was engaged in interstate commerce and therefore could not be subjected to the Compensation Act without burdening such commerce, contrary to the commerce clause of the Federal Constitution. Second, because article 3, § 2 of the Constitution extended judicial power to all cases of admiralty and maritime jurisdiction, and thereby rendered the general maritime law part of the Federal laws not subject to alteration by state statutes.

The first point relied upon is entirely without merit, and inadequate to support our jurisdiction. In the absence of congressional legislation the settled general rule is that, without violating the commerce clause, the states may legislate concerning relative rights and duties of employers and employees while within their borders, although engaged in interstate commerce. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. ed. 702, 706, 19 Sup. Ct. Rep. 465; *Minnesota Rate Cases* (Simpson v. Shepard) 230 U. S. 352, 408, 57 L. ed.

1511, 1545, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

The second reason for reversal now set up was not presented to the trial court in any form. It was not pointed out clearly, if at all, by the petition in error before the court of appeals, and was not definitely mentioned in the opinion of that court, whose powers only extend to a review of the trial court's judgment for errors appearing on the record. Section 12,247 Ohio General Code, as amended by 103 Ohio Laws, pp. 405, 431. The question, therefore, is not properly before us. *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 308, 309, 47 L. ed. 480, 484, 485, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375.

The writ of error must be dismissed for want of jurisdiction.

Number 470.

Counsel for the Steamship Company have admitted of record here that this cause involves the same state of facts and questions of law as those presented in Number 469. They were heard together and the same judgment will be entered in each of them.

Dismissed.

(244 U. S. 205)

SOUTHERN PACIFIC COMPANY, Plff. in Err.,
v.
MARIE JENSEN.

COMMERCE — EMPLOYERS' LIABILITY — APPLICABILITY OF STATUTE TO OCEAN-GOING SHIPS — "BOAT."

1. Congress did not establish a rule of liability with respect to injuries received by an employee on an ocean-going ship plying between ports of different states, owned and operated by a corporation which is also an interstate railway carrier, by enacting the provisions of the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, §§ 8657-8665), giving a right of recovery against interstate carriers by railroad for the death or injury of employees while engaged in interstate commerce, caused by the negligence of the carriers' officers, agents, or employees, or by any defect or insufficiency, due to its negligence, in its "cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." The word "boats" in the statute refers to vessels which may be properly regarded as in substance part of a railroad's extension or equipment, as understood and applied in common practice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Boat.]

ADMIRALTY —1—EXCLUSIVENESS OF FEDERAL JURISDICTION—STATE LEGISLATION AFFECTING MARITIME LAW.

2. State legislation changing, modifying, or affecting the general maritime law which contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of such general maritime law, or interferes with the proper harmony or uniformity of that law in its international and interstate relations, is invalid as being repugnant to U. S. Const. art. 3, § 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction, U. S. Const. art. 1, § 8, giving Congress power to make all laws necessary and proper to carry into execution the powers vested in the Federal government, and U. S. Judicial Code, §§ 24, 256, giving the Federal district courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1-17.]

MASTER AND SERVANT —347—EXCLUSIVENESS OF FEDERAL JURISDICTION—STATE WORKMEN'S COMPENSATION LAWS.

3. The application to an injury sustained by a longshoreman while he was unloading in a New York port an ocean-going steamship owned by a nonresident corporation, and plying between ports of different states, of the provisions of the New York Workmen's Compensation Act (N. Y. Laws 1913, chap. 816; Laws 1914, chaps. 41, 316), which, in lieu of the common-law liability enforceable by suit in cases of negligence, imposes a liability upon employers, enforceable without judicial action, to make compensation for disabling or fatal accidental injuries to employees, without regard to fault as a cause, graduating compensation for disabilities according to a prescribed scale based upon loss of earning power, and measuring death benefits according to the dependency of the surviving wife, husband, or infant children, renders the statute, to that extent, invalid as conflicting with U. S. Const. art. 3, § 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction, U. S. Const. art. 1, § 8, giving Congress power to make all laws necessary and proper to carry into execution the powers vested in the Federal government, and U. S. Judicial Code, §§ 24, 256, giving Federal district courts exclusive judicial cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right to a common-law remedy where the common law is competent to give it, being also inconsistent with the policy of Congress to encourage investments in ships, manifested by U. S. Rev. Stat. §§ 4283-4285, Comp. Stat. 1916, §§ 8021-8023, Act of June 26, 1884 (23 Stat. at L. 57, chap. 121,

Comp. Stat. 1916, § 8023), § 18, which declare a limitation upon the liability of their owners.

[No. 280.]

Argued February 28, 1916. Restored to docket for reargument November 13, 1916. Reargued January 31 and February 1, 1917. Decided May 21, 1917.

IN ERROR to the Supreme Court, Appellate Division, Third Department, of the State of New York, to review a judgment, affirmed by the Court of Appeals of that state, approving an award of the state Workmen's Compensation Commission to the dependents of a longshoreman killed on an ocean-going steamship. Reversed and remanded for further proceedings.

See same case below in court of appeals, 215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276, 9 N. C. C. A. 286.

The facts are stated in the opinion.

Messrs. Norman B. Beecher and Ray Rood Allen for plaintiff in error.

Messrs. E. Clarence Aiken, Harold J. Hinman, and Mr. Egbert E. Woodbury, Attorney General of New York, for defendant in error.

Mr. Christopher M. Bradley as amicus curiæ.

*Mr. Justice McReynolds delivered the opinion of the court:

Upon a claim regularly presented, the Workmen's Compensation Commission of New York made the following findings of fact, rulings, and award, October 9, 1914:

1. "Christen Jensen, the deceased workman, was, on August 15, 1914, an employee of the Southern Pacific Company, a corporation of the state of Kentucky, where it has its principal office. It also has an office at Pier 49, North river, New York city. The Southern Pacific Company at said time was, and still is, a common carrier by railroad. It also owned and operated a steamship, El Oriente, plying between the ports of New York and Galveston, Texas.

2. "On August 15, 1914, said steamship was berthed*for discharging and loading at Pier 49, North river, lying in navigable waters of the United States.

3. "On said date Christen Jensen was operating a small electric freight truck. His work consisted in driving the truck into the steamship El Oriente, where it was loaded with cargo, then driving the truck out of the vessel upon a gangway connecting the vessel with Pier 49, North river,

and thence upon the pier, where the lumber was unloaded from the truck. The ship was about 10 feet distant from the pier. At about 10:15 A. M., after Jensen had been doing such work for about three hours that morning, he started out of the ship with his truck loaded with lumber, a part of the cargo of the steamship *El Oriente*, which was being transported from Galveston, Texas, to New York city. Jensen stood on the rear of the truck, the lumber coming about to his shoulder. In driving out of the port in the side of the vessel and upon the gangway, the truck became jammed against the guide pieces on the gangway. Jensen then reversed the direction of the truck and proceeded at third or full speed backward into the hatchway. He failed to lower his head and his head struck the ship at the top line, throwing his head forward and causing his chin to hit the lumber in front of him. His neck was broken and in this manner he met his death.

4. "The business of the Southern Pacific Company in this state consisted at the time of the accident and now consists solely in carrying passengers and merchandise between New York and other states. Jensen's work consisted solely in moving cargo destined to and from other states.

5. "Jensen left surviving him Marie Jensen, his widow, twenty-nine years of age, and Howard Jensen, his son, seven years of age, and Evelyn Jensen, his daughter, three years of age.

6. "Jensen's average weekly wage was \$19.60 per week.

7. "The injury was an accidental injury and arose out of and in the course of Jensen's employment by the Southern Pacific Company, and his death was due to such injury. The injury did not result solely from the intoxication of the injured employee while on duty, and was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another.

"This claim comes within the meaning of chapter 67 of the Consolidated Laws as re-enacted and amended by chapter 41 of the Laws of 1914, and as amended by chapter 316 of the Laws of 1914.

"Award of compensation is hereby made to Marie Jensen, widow of the deceased, at the rate of \$5.87 weekly during her widowhood, with two years' compensation in one sum in case of her marriage; to Harold Jensen, son of the deceased, at the rate of \$1.96 per week, and to Evelyn Jensen, daughter of the deceased, at the rate of \$1.96 per week until the said Harold Jensen and Evelyn Jensen respectively shall arrive at the age of eighteen years, and there is

further allowed the sum of one hundred (\$100) dollars for funeral expenses."

In due time the Southern Pacific Company objected to the award "upon the grounds that the act does not apply, because the workman was engaged in interstate commerce on board a vessel of a foreign corporation of the state of Kentucky, which was engaged solely in interstate commerce; that the injury was one with respect to which Congress may establish, and has established, a rule of liability, and under the language of § 114¹ [copied in the margin], the act has no application; on the ground that the act includes only those engaged in the operation of vessels other than those of other states and countries in foreign and interstate commerce, while the work upon which the deceased workman was engaged at the time of his death was part of the operation of a vessel of another state, engaged in interstate commerce, and hence does not come within the provisions of the act; further, that the act is unconstitutional, as it constitutes a regulation of and burden upon commerce among the several states, in violation of article 1, § 8, of the Constitution of the United States; in that it takes property without due process of law, in violation of the 14th Amendment of the Constitution; in that it denies the Southern Pacific Company the equal protection of the laws, in violation of the 14th Amendment of the Constitution, because the act does not afford an exclusive remedy, but leaves the employer and its vessels subject to suit in admiralty; also that the act is unconstitutional in that it violates article 3, § 2, of the Constitution, conferring admiralty jurisdiction upon the courts of the United States."

Without opinion, the appellate division approved the award and the court of appeals affirmed this action (215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas.

¹Section 114. "The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the Commission and so far as not forbidden by any act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

1916B, 276), holding that the Workmen's Compensation Act applied to the employment in question and was not obnoxious to the Federal Constitution. It said: "The scheme of the statute is essentially and fundamentally one by the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments. The state fund is created from premiums* paid by employers based on the pay roll, the number of employees, and the hazards of the employment. The employer has the option of insuring with any stock corporation or mutual association authorized to transact such business, or of furnishing satisfactory proof to the Commission of his own financial ability to pay. If he does neither, he is liable to a penalty equal to the pro rata premium payable to the state fund during the period of his noncompliance, and is subject to a suit for damages by the injured employee, or his legal representative in case of death, in which he is deprived of the defenses of contributory negligence, assumed risk, and negligence of a fellow servant. By insuring in the state fund, or by himself or his insurance carrier paying the prescribed compensation, the employer is relieved from further liability for personal injuries or death sustained by employees. Compensation is to be made without regard to fault as a cause of the injury, except where it is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another, or results solely from his intoxication while on duty. Compensation is not based on the rule of damages applied in negligence suits, but, in addition to providing for medical, surgical, or other attendance or treatment and funeral expenses, it is based solely on loss of earning power. Thus, the risk of accidental injuries occurring with or without fault on the part either of employee or employer is shared by both, and the burden of making compensation is distributed over all the enumerated hazardous employments in proportion to the risks involved." See also *Walker v. Clyde S. S. Co.* 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B, 87.

In *New York C. R. Co. v. White* (decided March 6th), 243 U. S. 188, 61 L. ed. 667, 37 Sup. Ct. Rep. 247, we held the statute valid in certain respects; and, considering what was there said, only two of the grounds relied on for reversal now demand special consideration. First. Plaintiff in error, being an interstate common*carrier by railroad, is responsible for injuries received by employees while engaged therein

under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. chap. 149, p. 65, Comp. Stat. 1916, § 8657), and no state statute can impose any other or different liability. Second. As here applied, the Workmen's Compensation Act conflicts with the general maritime law, which constitutes an integral part of the Federal law under art. 3, § 2, of the Constitution, and to that extent is invalid.

The Southern Pacific Company, a Kentucky corporation, owns and operates a railroad as a common carrier; also the steamship *El Oriente*, plying between New York and Galveston, Texas. The claim is that therefore rights and liabilities of the parties here must be determined in accordance with the Federal Employers' Liability Act. But we think that act is not applicable in the circumstances.

The First Federal Employers' Liability Act (June 11, 1906, 34 Stat. at L. 232, chap. 3073) extended in terms to all common carriers engaged in interstate or foreign commerce, and, because it embraced subjects not within the constitutional authority of Congress, was declared invalid. *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, Jan. 6, 1908. The later act is carefully limited and provides that "every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment."

Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct

thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. The word "boats" in the statute refers to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice.

The fundamental purpose of the Compensation Law, as declared by the court of appeals, is "the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments," among them being "longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same, on any dock, platform or place, or in any warehouse or other place of storage." Its general provisions are specified in our opinion in *New York C. R. Co. v. White*, supra, and need not be repeated. Under the construction adopted by the state courts no ship may load or discharge her cargo at a dock therein without incurring a penalty, unless her owners comply with the act, which, in order to secure payment of compensation for accidents, generally without regard to fault, and based upon annual wages, provides (§ 50) that—"an employer shall secure compensation to his employees in one of the following ways:

"1. By insuring and keeping insured the payment of such compensation in the state fund, or 2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state. If insurance be so effected in such a corporation of mutual association the employer shall forthwith file with the Commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association together with a copy of the contract or policy of insurance. 3. By furnishing satisfactory proof to the Commission of his financial ability to pay such compensation for himself, in which case the Commission may, in its discretion, require the deposit with the Commission of securities of the kind prescribed in section thirteen of the Insurance Law, in an amount to be determined by the Commission, to secure his liability to pay the compensation provided in this chapter."

"If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of noncompliance to be recovered in an action brought by the Commission."

Article 3, § 2, of the Constitution, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction;" and article 1, § 8, confers upon the Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler v. Boston & S. S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; *Re Garnett*, 141 U. S. 1, 14, 35 L. ed. 631, 634, 11 Sup. Ct. Rep. 840. And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. *The Lottawanna* (*Rodd v. Heartt*) 21 Wall. 558, 22 L. ed. 654; *Butler v. Boston & S. S. S. Co.* 130 U. S. 527, 557, 32 L. ed. 1017, 1024, 9 Sup. Ct. Rep. 612; *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212.

In *The Lottawanna*, Mr. Justice Bradley, speaking for the court, said: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the

states with each other or with foreign states."

By § 9, Judiciary Act of 1789 (1 Stat. at L. 76, 77, chap. 20), the district courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." And this grant has been continued. Judicial Code, §§ 24 and 256 [36 Stat. at L. 1091, 1160, chap. 231, Comp. Stat. 1916, §§ 991 (1), 1233].

In view of these constitutional provisions and the Federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute (*The Lottawanna* (Rodd v. Hearitt) 21 Wall. 558, 579, 580, 22 L. ed. 654, 663, 664; *The J. E. Rumbell*, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498); pilotage fees fixed (*Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996; *Ex parte McNeil*, 13 Wall. 236, 242, 20 L. ed. 624, 626); and the right given to recover in death cases (*The Hamilton* (Old Dominion S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133; *La Bourgogne* (*Deslions v. La Compagnie Générale Transatlantique*) 210 U. S. 95, 138, 52 L. ed. 973, 993, 28 Sup. Ct. Rep. 664). See *The City of Norwalk*, 55 Fed. 98, 106. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings in rem according to the course in admiralty (*The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397; *American S. B. Co. v. Chase*, 16 Wall. 522, 534, 21 L. ed. 369, 372; *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930); nor create liens for materials used in repairing a foreign ship (*The Roanoke*, 189 U. S. 185, 47 L. ed. 770, 23 Sup. Ct. Rep. 491). See *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are

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forcefully indicated in the foregoing quotations from *The Lottawanna*.

A similar rule in respect to interstate commerce, deduced* from the grant to Congress of power to regulate it, is now firmly established. "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 507, 508, 31 L. ed. 700, 714, 715, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674; *Clark Distilling Co. v. Western Maryland R. Co.* 242 U. S. 311, 61 L. ed. 326, L. R.A. 1917B, 1218, 37 Sup. Ct. Rep. 180, decided January 8, 1917. And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the states to interpose where maritime matters are involved.

The work of a stevedore, in which the deceased was engaging, is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 59, 60, 58 L. ed. 1208, 1211, 1212, 51 L.R.A. (N.S.) 1157, 34 Sup. Ct. Rep. 733.

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien, condemned in *The Roanoke*. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. *So applied, it conflicts with the Constitution and to that extent is invalid.

Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal district courts, "saving to suitors in all cases the right of a

common-law remedy where the common law is competent to give it." The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction. The *Hine v. Trevor*, 4 Wall. 571, 572, 18 L. ed. 456; The *Bel-fast*, 7 Wall. 624, 644, 19 L. ed. 266, 272; *American S. B. Co. v. Chase*, 16 Wall. 522, 531, 533, 21 L. ed. 369, 371, 372; The *Glide*, 167 U. S. 606, 623, 42 L. ed. 296, 302, 17 Sup. Ct. Rep. 930. And finally, this remedy is not consistent with the policy of Congress to encourage investments in ships, manifested in the Acts of 1851 [9 Stat. at L. 635, chap. 43] and 1884 (Rev. Stat. 4283-4285, Comp. Stat. 1916, §§ 8021-8023; § 18, Act of June 26, 1884, 23 Stat. at L. 57, chap. 121, Comp. Stat. 1916, § 8028), which declare a limitation upon the liability of their owners. *Richardson v. Harmon*, 222 U. S. 96, 104, 56 L. ed. 110, 113, 32 Sup. Ct. Rep. 27.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Holmes, dissenting:

The Southern Pacific Company has been held liable under the statutes of New York for an accidental injury happening upon a gang-plank between a pier and the company's vessel, and causing the death of one of its employees. The company not having insured as permitted, the statute may be taken as if it simply imposed a limited but absolute liability in such a case. The short question is whether the power of the state to regulate the liability in that place and to enforce it in the state's own courts is taken away by the conferring of exclusive jurisdiction* of all civil causes of admiralty and maritime jurisdiction upon the courts of the United States.

There is no doubt that the saving to suitors of the right of a common-law remedy leaves open the common-law jurisdiction of the state courts, and leaves some power of legislation, at least, to the states. For the latter I need do no more than refer to state pilotage statutes, and to liens created by state laws in aid of maritime contracts. Nearer to the point, it is decided that a statutory remedy for causing death may be enforced by the state courts, although the death was due to a collision upon the high seas. *American S. B. Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369; *Sherlock v. Alling*, 93 U. S. 99, 104, 23 L. ed. 819, 820; *Knapp, S. & Co. Co. v. McCaffrey*,

177 U. S. 638, 646, 44 L. ed. 921, 925, 20 Sup. Ct. Rep. 824; *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 409, 57 L. ed. 1511, 1545, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. The misgivings of Mr. Justice Bradley were adverted to in *The Hamilton* (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133, and held at least insufficient to prevent the admiralty from recognizing such a state-created right in a proper case, if indeed they went to any such extent. *La Bourgogne* (*Deslions v. La Compagnie Générale Transatlantique*) 210 U. S. 95, 138, 52 L. ed. 973, 993, 28 Sup. Ct. Rep. 664.

The statute having been upheld in other respects (*New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, 37 Sup. Ct. Rep. 247), I should have thought these authorities conclusive. The liability created by the New York act ends in a money judgment, and the mode in which the amount is ascertained, or is to be paid, being one that the state constitutionally might adopt, cannot matter to the question before us if any liability can be imposed that was not known to the maritime law. And as such a liability can be imposed where it was unknown not only to the maritime but to the common law, I can see no difference between one otherwise constitutionally created for death caused by accident and one for death due to fault. Neither can the statutes limiting the liability of owners affect the case. Those statutes extend to nonmaritime torts, which, of course, are the creation of state law. *Richardson v. Harmon*, 222 U. S. 96, 104, 56 L. ed. 110, 113, 32 Sup. Ct. Rep. 27. They are paramount to but not inconsistent with the new cause of action. However, as my opinion stands on grounds that equally would support a judgment for a maritime tort not ending in death, with which admiralty courts have begun to deal, I will state the reasons that satisfy my mind.

No doubt there sometimes has been an air of benevolent gratuity in the admiralty's attitude about enforcing state laws. But of course there is no gratuity about it. Courts cannot give or withhold at pleasure. If the claim is enforced or recognized it is because the claim is a right, and if a claim depending upon a state statute is enforced, it is because the state had constitutional power to pass the law. Taking it as established that a state has constitutional power to pass laws giving rights and imposing liabilities for acts done upon the high seas when there were no such rights or liabilities before, what is there to hinder its doing so in the case of a maritime tort? Not the existence of

an inconsistent law emanating from a superior source, that is, from the United States. There is no such law. The maritime law is not a *corpus juris*—it is a very limited body of customs and ordinances of the sea. The nearest to anything of the sort in question was the rule that a seaman was entitled to recover the expenses necessary for his cure when the master's negligence caused his hurt. The maritime law gave him no more. *The Osceola*, 189 U. S. 158, 175, 47 L. ed. 760, 764, 23 Sup. Ct. Rep. 483. One may affirm with the sanction of that case that it is an innovation to allow suits in the admiralty by seamen to recover damages for personal injuries caused by the negligence of the master, and to apply the common-law principles of tort.

Now, however, common-law principles have been applied to sustain a libel by a stevedore in personam against the master for personal injuries suffered while loading a ship. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733, and *The Osceola* recognizes that in some cases, at least, seamen may have similar relief. From what source do these new rights come? The earliest case relies upon "the analogies of the municipal law" (*The Edith Godden*, 23 Fed. 43, 46),—sufficient evidence of the obvious pattern, but inadequate for the specific origin. I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, "I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court." No more could a judge, exercising the limited jurisdiction of admiralty, say, "I think well of the common-law rules of master and servant, and propose to introduce them here en bloc." Certainly he could not in that way enlarge the exclusive jurisdiction of the district courts and cut down the power of the states. If admiralty adopts common-law rules without an act of Congress, it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a state. The only authority available is the common law or statutes of a state. For from the often-repeated statement that there is no common law of the United States (*Wheaton v. Peters*, 8 Pet. 591, 658, 8 L. ed. 1055, 1079; *Western U. Teleg. Co. v. Call Pub. Co.* 181 U. S. 92, 101, 45 L. ed. 765, 770, 21 Sup. Ct. Rep. 561), and from the principles recognized in *Atlantic Transport Co.*

v. Imbrovek having been unknown to the maritime law, the natural inference is that, in the silence of Congress, this court has believed the very limited law of the sea to be supplemented here as in England by the common law, and that here that means, by the common law of the state. *Sherlock v. Alling*, 93 U. S. 99, 104, 23 L. ed. 819, 820. *Taylor v. Carryl*, 20 How. 583, 598, 15 L. ed. 1028, 1033. So far as I know, the state courts have made this assumption without criticism or attempt at revision from the beginning to this day; e. g., *Wilson v. MacKenzie*, 7 Hill, 95, 42 Am. Dec. 51; *Gabrielson v. Waydell*, 135 N. Y. 1, 11, 17 L.R.A. 228, 31 Am. St. Rep. 793, 31 N. E. 969; **Kalleck v. Deering*, 161 Mass. 469, 37 N. E. 450, 42 Am. St. Rep. 421, 15 Am. Neg. Cas. 672. See *Ogle v. Barnes*, 8 T. R. 188, 101 Eng. Reprint, 1338; *Nicholson v. Mounsey*, 15 East, 384, 104 Eng. Reprint, 890, 13 Revised Rep. 501. Even where the admiralty has unquestioned jurisdiction the common law may have concurrent authority and the state courts concurrent power. *Schoonmaker v. Gilmore*, 102 U. S. 118, 26 L. ed. 95. The invalidity of state attempts to create a remedy for maritime contracts or torts, parallel to that in the admiralty, that was established in such cases as *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397, and *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451, is immaterial to the present point.

The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It always is the law of some state, and if the district courts adopt the common law of torts, as they have shown a tendency to do, they thereby assume that a law not of maritime origin, and deriving its authority in that territory only from some particular state of this Union, also governs maritime torts in that territory,—and if the common law, the statute law has at least equal force, as the discussion in *The Osceola* assumes. On the other hand, the refusal of the district courts to give remedies coextensive with the common law would prove no more than that they regarded their jurisdiction as limited by the ancient lines,—not that they doubted that the common law might and would be enforced in the courts of the states as it always has been. This court has recognized that in some cases different principles of liability would be applied as the suit should happen to be brought in a common law or admiralty court. Compare *The Max Morris*, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29, with *Belden v.*

Chase, 150 U. S. 674, 691, 37 L. ed. 1218, 1224, 14 Sup. Ct. Rep. 269. But hitherto it has not been doubted authoritatively, so far as I know, that even when the admiralty had a rule of its own to which it adhered, as in *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212, the state law, common or statute,* would prevail in the courts of the state. Happily such conflicts are few.

It might be asked why, if the grant of jurisdiction to the courts of the United States imports a power in Congress to legislate, the saving of a common-law remedy, i. e., in the state courts, did not import a like if subordinate power in the states. But leaving that question on one side, such cases as *American S. B. Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369; *The Hamilton (Old Dominion S. S. Co. v. Gilmore)* 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133, and *Atlantic Transport Co. v. Imbrovek*, supra, show that it is too late to say that the mere silence of Congress excludes the statute or common law of a state from supplementing the wholly inadequate maritime law of the time of the Constitution, in the regulation of personal rights, and I venture to say that it never has been supposed to do so, or had any such effect.

As to the specter of a lack of uniformity, I content myself with referring to *The Hamilton (Old Dominion S. S. Co. v. Gilmore)* 207 U. S. 398, 406, 52 L. ed. 264, 270, 28 Sup. Ct. Rep. 133. The difficulty really is not so great as in the case of interstate carriers by land, which, "in the absence of Federal statute providing a different rule, are answerable according to the law of the state for nonfeasance or misfeasance within its limits." *Minnesota Rate Cases (Simpson v. Shepard)* 230 U. S. 352, 408, 57 L. ed. 1511, 1545, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, and cases cited. The conclusion that I reach accords with the considered cases of *Lindstrom v. Mutual S. S. Co.* 132 Minn. 328, L.R.A.1916D, 935, 156 N. W. 669; *Kennerson v. Thames Towboat Co.* 89 Conn. 367, L.R.A.1916A, 436, 94 Atl. 372; and *North Pacific S. S. Co. v. Industrial Acci. Commission*, — Cal. —, 163 Pac. 199, as well as with the New York decision in this case. 215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276, 9 N. C. C. A. 286.

Mr. Justice Pitney, dissenting:

While concurring substantially in the dissenting opinion of Mr. Justice Holmes, I deem it proper, in view of the momentous consequences of the decision, to present some additional considerations.

* This dissent is confined to that part of the prevailing opinion which holds that the Workmen's Compensation Act of New York, as applied by the state court to a fatal injury sustained by a stevedore while engaged in work of a maritime nature upon navigable water within that state, conflicts with the Constitution of the United States and the act of Congress conferring admiralty and maritime jurisdiction in civil cases upon the district courts of the United States, and is to that extent invalid. Except for the statute, an action might have been brought in a court of admiralty. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 62, 58 L. ed. 1208, 1212, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733. No question is raised respecting the jurisdiction of the state court over the subject-matter. But plaintiff in error contends, and the prevailing opinion holds, that it was a violation of a Federal right for the state court to apply the provisions of the local statute to a cause of action of maritime origin, because, by the Constitution of the United States, admiralty jurisdiction was conferred upon the Federal courts.

It should be stated, at the outset, that the case involves no question of penalties imposed by the New York act, but affects solely the responsibility of the employer to make compensation to the widow, in accordance with its provisions, which are outlined in *New York C. R. Co. v. White*, 243 U. S. 188, 192-195, 61 L. ed. 667, 37 Sup. Ct. Rep. 247.

The argument is that, even in the absence of any act of Congress prescribing the responsibility of a shipowner to his stevedore, the general maritime law, as accepted by the Federal courts when acting in the exercise of their admiralty jurisdiction, must be adopted as the rule of decision by state courts of common law when passing upon any case that might have been brought in the admiralty; and that, just as the absence of an act of Congress regulating interstate commerce in some cases is equivalent to a declaration by Congress that commerce in that respect shall be free, so nonaction by Congress amounts to an imperative limitation upon the power of the states to interpose where maritime matters are involved.

This view is so entirely unsupported by precedent, and will have such novel and far-reaching consequences, that it ought not to be accepted without the most thorough consideration.

Section 2 of article 3 of the Constitution reads as follows: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their

Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Acting under the authority of article 1, § 8, which empowers Congress to make all laws necessary and proper for carrying into execution the powers vested in the government or in any department or officer thereof, the first Congress, in the original Judiciary Act (Act of September 24, 1789, chap. 20, § 9, 1 Stat. at L. 73, 77), conferred upon the Federal district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." The saving clause has been preserved in all subsequent revisions. Rev. Stat. § 563 (8), Judicial Code, § 24 (3), 36 Stat. at L. 7087, 1091, chap. 231, Comp. Stat. 1916, §§ 968, 991 (3).

From the language quoted from the Constitution, read in the light of the general purpose of that instrument and the contemporaneous construction found in the Judiciary Act, with regard also to the mischiefs that called for the establishment of a national judiciary, and from what I believe to be the unbroken current of decisions in this court from that day until the present, I draw the following conclusions: (1) That the framers of the Constitution intended to *establish jurisdiction*,—the power to hear and determine controversies of the various classes specified,—and *not to prescribe particular codes or systems of law* for the decision of those controversies; (2) that the civil jurisdiction in admiralty was not intended to be exclusive of the courts of common law, at least not until Congress should deem it proper so to enact; (3) that by the law of England, and by the practice of the colonial governments, the courts of common law, of equity, and of admiralty, were controlled in their decisions by separate, and, in a sense, independent systems of substantive law, and the constitutional grant of judicial power in "all cases in law and equity," and in "all cases of admiralty and maritime jurisdiction," was no more intended (in the absence of legislation by Congress) to make the rules of maritime law binding upon the Federal courts of common law when exercising their concurrent jurisdiction, than to make the rules of the

common law binding upon the courts of admiralty; (4) that, if not binding upon the Federal courts, it results, *a fortiori*, that the rules of maritime law were not intended to be made binding upon the courts of the states; (5) that it is not necessary, in order to give full effect to the grant of admiralty and maritime jurisdiction, to imply that the rules of decision prevailing in admiralty must be binding upon common-law courts exercising concurrent jurisdiction in civil causes of maritime origin, and to give such a construction to the Constitution is to render unconstitutional the saving clause in § 9 of the Judiciary Act, and also to trench upon the proper powers of the states by interfering with their control over their water-borne internal commerce; and (6) that, in the absence of legislation by Congress abrogating the saving clause, the states are at liberty to administer their own laws in their own courts when exercising a jurisdiction concurrent with that of admiralty, and at liberty to change those laws by statute.

That the language of § 2 of art. 3 of the Constitution speaks only of establishing jurisdiction, and does not prescribe the mode in which or the substantive law by which the exercise of that jurisdiction is to be governed, seems to me entirely plain; and upon this point I need only refer to the language itself, which I have quoted.

That this view is in harmony with the general purpose of the Constitution seems to me equally plain. At this late date it ought not to be necessary to repeat that the object of the framers of that instrument was to lay the foundations of a government, to set up its framework, and to establish merely the general principles by which it was to be animated; avoiding, as far as possible, any but the most fundamental regulations for controlling its operations, and these usually in the form of restrictions. *Vanhorne v. Dorrance*, 2 Dall. 304, 308, 1 L. ed. 391, 393, Fed. Cas. No. 16,857; *Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. ed. 97, 102.

The object was to enumerate, rather than to define, the powers granted. *Gibbons v. Ogden*, 9 Wheat. 1, 189, 194, 6 L. ed. 23, 68, 69; *Passenger Cases*, 7 How. 283, 549, 12 L. ed. 702, 813; *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 346, 47 L. ed. 492, 497, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561. To delineate only the great outlines of the judicial power, leaving the details to Congress, while providing for the organization of the legislative department and the mode in which and the restrictions under which its authority should be exercised. *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 9 L. ed. 1233, 1259. The reason

for adopting general outlines only was well expressed by Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L. ed. 579, 601: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution is not only to be inferred from the nature of the instrument, but from the language."

The adoption of any particular system of substantive law was not within the purpose of the Constitutional Convention; and the clause establishing the judicial power was ill-adapted to the purpose, had it existed. So far as they intended to prescribe permanent rules of substantive or even procedural law in connection with the establishment of the judicial system, the framers employed express terms for the purpose, as appears from other provisions of article 3, including the definition of treason, the character of proof required, the limitation of the punishment, and the requirement of a jury trial for this and other crimes.

In a somewhat exhaustive examination of various sources of information, including Elliot's Debates, Farrand's Records of the Federal Convention, and *The Federalist*, Nos. 80-83, I have been unable to find anything even remotely suggesting that the judicial clause was designed to establish the maritime code or any other system of laws for the determination of controversies in the courts by it established, much less any suggestion that the maritime code was to constitute the rule of decision in common-law courts, either Federal or state.

Certainly, there is nothing in the mere provision establishing jurisdiction in admiralty and maritime causes to have that effect, unless the jurisdiction so established was in its nature exclusive. But, in civil causes, the jurisdiction was not exclusive by the law of England and of the colonies, and it was not made an exclusive jurisdiction by the Constitution.

In discussing this point, the distinction between the instance court and the prize court of admiralty must be observed. It was held in England that the question of prize or no prize, and other questions aris-

ing out of it, were exclusively cognizable in the admiralty, because that court took jurisdiction owing to the fact of possession of a prize of war, and the controversy turned upon belligerent rights and was determinable by the law of nations, and not the particular municipal law of any country. *Le Caux v. Eden* (1781) 2 Dougl. K. B. 594, 602-613, 99 Eng. Reprint, 375, 379-385; *Lindo v. Rodney*, reported in a note to *Le Caux v. Eden*, 2 Dougl. K. B. 613, 99 Eng. Reprint, 385; *Smart v. Wolff* (1789) 3 T. R. 323, 340, et seq., 100 Eng. Reprint, 600; *Camden v. Home* (1791) 4 T. R. 382, 393, et seq., 100 Eng. Reprint, 1076, 6 Bro. P. C. 203, 2 Eng. Reprint, 1028, 2 H. Bl. 533, 126 Eng. Reprint, 687. But of civil actions in personam the instance court exercised a jurisdiction concurrent with that of the courts of common law. As *Ld. Mansfield* said in *Lindo v. Rodney*, 2 Dougl. K. B. 614: "A thing being done upon the high sea don't exclude the jurisdiction of the court of common law. For seizing, stopping, or taking a ship, upon the high sea, *not as prize*, an action will lie; but for taking *as prize*, no action will lie. The nature of the question excludes; not the locality." And again, referring to the effect of certain statutes (p. 615): "The taking a ship upon the high sea is triable at law to repair the plaintiff in damages; but a taking on the high sea as *prize* is not triable at law to repair the plaintiff in damages. The nature of the ground of the action—*prize or no prize*—not only authorizes the prize court, but excludes the common law. These statutes don't exclude the common law in any case, and they confine the admiralty by the locality of the thing done, which is the cause of action. It must be done upon the high sea."

So, with respect to actions *ex contractu*, Mr. Justice* Blackstone says, 3 Bl. Com. 107: "It is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the royal exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster Hall." The concurrent jurisdiction of the courts of common law was affirmed by Dr. Browne, the first edition of whose work was published in 1797-1799. 2 Browne, *Civil & Admiralty Law*, 1st Am. ed. 112, 115.

The declaration of Mr. Justice Nelson, speaking for this court in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 390, 12 L. ed. 465, 485, that the lodging by the Constitution of the entire admiralty power in the Federal judiciary, and the 9th section of the Judiciary Act, with its saving of common-law remedies, left the concurrent power of the courts of common law and

of admiralty where it stood at common law, was not a chance remark. It has been so ruled in many other cases, to which I shall refer hereafter. The principles and history of the common law were well known to the framers of the Constitution and the members of the first Congress; it was from that system that their terminology was derived; and the provisions of the Constitution and contemporaneous legislation must be interpreted accordingly.

The statement that there is no common law of the United States (*Wheaton v. Peters*, 8 Pet. 591, 658, 8 L. ed. 1055, 1079; *Smith v. Alabama*, 124 U. S. 465, 478, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564) is true only in the sense that the Constitution neither of its own force imposed, nor authorized Congress to impose, the common law or any other general body of laws upon the several states for the regulation of their internal affairs. As was pointed out in *Smith v. Alabama* (p. 478): "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."

As was well expressed by Shiras, District Judge, in *Murray v. Chicago & N. W. R. Co.* 62 Fed. 24, 31: "From them [citations of the decisions of this court] it appears beyond question, that the Constitution, the Judiciary Act of 1789, and all subsequent statutes upon the same subject, are based upon the general principles of the common law, and that, to a large extent, the legislative and judicial action of the government would be without support and without meaning if they cannot be interpreted in the light of the common law. When the Constitution was adopted, it was not the design of the framers thereof to create any new systems of general law, nor to supplant those already in existence. At that time there were in existence and in force in the colonies or states, and among the people thereof, the law of nations, the law admiralty and maritime, the common law, including commercial law, and the system of equity. Upon these foundations the Constitution was erected. The problem sought to be solved was not whether the Constitution should create or enact a law of nations, of admiralty, of equity, or the like, but rather how should the executive, legislative, and judicial powers and duties based upon these systems, and necessary for the proper development and enforcement thereof, be apportioned between the national and state governments."

And it is not to be supposed that the framers of the Constitution, familiar with the institutions and the principles of the common law, by which the admiralty jurisdiction was allowed on sufferance, and with a degree of jealousy born of the fact that the courts of admiralty were not courts of record, that they followed the practice of the civil law, allowed no trial by jury, and administered an exotic system of laws (3 Bl. Com. 69, 86, 87, 106-108),—it is not to be supposed, I say, that the framers of the Constitution, in granting judicial power²¹ over cases of admiralty and maritime jurisdiction, along with like power over all cases in law and equity arising under the laws of the United States, intended to exclude common-law courts, state or national, from any part of their concurrent jurisdiction in cases of maritime origin, or to deprive them of the judicial power, theretofore existing, to decide such cases according to the rules of the common law.

It is matter of familiar history that one of the chief weaknesses of the Confederation was in the absence of a judicial establishment possessed of general authority. Except that the Continental Congress, as an incident of the war power, was authorized to establish rules respecting captures and the disposition of prizes of war, and to appoint courts for the trial of piracies and felonies committed on the high sea, and for determining appeals in cases of capture, and except that the Congress itself, through commissioners, was to exercise jurisdiction in disputes between the states and in controversies respecting conflicting land grants of different states, there was no provision in the Articles of Confederation for establishing a judicial system under the authority of the general government.

The result was that not only private parties, in cases arising out of the laws of the Congress, but the United States themselves, were obliged to resort to the courts of the states for the enforcement of their rights. Many cases of this character are reported, some even antedating the Confederation. *Respublica v. Sweers* (1779) 1 Dall. 41, 1 L. ed. 29; *Respublica v. Powell* (1780) 1 Dall. 47, 1 L. ed. 31; *Respublica v. De Longchamps* (1784) 1 Dall. 111, 1 L. ed. 59. Even treason was punished in state courts and under state laws. See cases of *Molder*, *Malin*, *Carlisle*, and *Roberts* (1778) 1 Dall. 33-39, 1 L. ed. 25-27.

Before the Revolution, courts of admiralty jurisdiction were a part of the judicial systems of the several colonies.* *War* v. *Clarke*, 5 How. 441, 454-456, 12 L. ed. 226, 232-234, *Benedict*, Admiralty, §§ 118-165. Upon the outbreak of the war questions of prize law became acute, and the

colonial Congress, by resolutions of November 25, 1775, passed in the exercise of the war power (*Penhallow v. Doane*, 3 Dall. 54, 80, 1 L. ed. 507, 518), made appropriate recommendations for the treatment of prizes of war, but remitted the jurisdiction over such questions to the courts of the several colonies, reserving to itself only appellate authority. This system continued until the year 1780 (after the submission of the Articles of Confederation, but before their final ratification), when the Congress established a court for the hearing of appeals from the state courts of admiralty in cases of capture. The opinions of this court are reported in 2 Dall. 1-42, 1 L. ed. 263-281, and numerous cases decided without opinion, as well as some of those decided by committees of the Congress prior to the establishment of the court, are referred to in the late Bancroft Davis's "Federal Courts Before the Constitution," 131 U. S. xix.-xlix., Appx. The weak point of this system was the want of power in the central government to enforce the judgment of the appellate tribunal when it chanced to reverse the decree of a state court. There were some curious cases of conflicting jurisdiction, illustrated by *Doane v. Penhallow* (1787) 1 Dall. 218, 221, 1 L. ed. 108, 109; *Penhallow v. Doane* (1795) 3 Dall. 54, 79, 86, 1 L. ed. 507, 517, 520; and *United States v. Peters* (1809) 5 Cranch, 115, 135, 137, 3 L. ed. 53, 59, 60.

It was under the influence of numerous experiences of the inefficiency of a general government unendowed with judicial authority that the Constitutional Convention assembled in the year 1787. The fundamental need, to which the Convention addressed itself in framing the judiciary article, was to set up a judicial power covering all subjects of national concern. There was no greater need to establish jurisdiction over admiralty and maritime causes than over controversies arising under the Constitution and laws of the Union. There was no purpose to*establish a system of substantive law in any of the several classes of cases included within the grant of judicial power. The language employed makes it plain that, with the few express exceptions already noted (treason, etc.) the rules of decision were to be sought elsewhere. The entire absence of a purpose to establish a maritime code is manifest not only from the omission of any reference to the laws of Oleron, the laws of Wisbuy, or any other of the maritime codes recognized by the nations of Europe, but further from the fact that the colonies differed among themselves as to maritime law and admiralty practice, and that their system in general differed from that which was ad-

ministered in England. The evident purpose, in this as in the other classes of controversy, was that the courts of admiralty should administer justice according to the previous course and practice of such courts in the colonies, just as the courts of common law and equity jurisdiction were to proceed according to the several systems of substantive law appropriate to courts of their respective kinds; subject, of course, to the power of Congress to change the rules of law respecting matters lying within its appropriate sphere of action.

Undoubtedly the framers of the Constitution were advised of the ancient controversy in England between the common-law courts and the courts of admiralty respecting the extent of the jurisdiction of the latter. They were aware of the dual function of the admiralty courts as courts of instance and as prize courts, and of the established rule that in civil causes the jurisdiction of the instance court was concurrent with that of the courts of common law. They must have known that, whatever question had existed as to the territorial limits of the jurisdiction of the admiralty, it never had been questioned that in suits for mariners' wages and suits upon policies of marine insurance, and in other actions *ex contractu* having a maritime character, and also in actions of tort*arising upon the sea, the courts of common law exercised, and long had exercised, concurrent jurisdiction. Whatever early doubts may have existed had been based not upon any inherent incapacity of the common-law courts to deal with the subject-matters, but upon the ancient theory of the venue, and disappeared with the recognition of the fictitious venue.

The grant of judicial power in cases of admiralty and maritime jurisdiction never has been construed as excluding the jurisdiction of the courts of common law over civil causes that, before the Constitution, were subject to the concurrent jurisdiction of the courts of admiralty and the common-law courts. The first Congress did not so construe it, as the saving clause in the Judiciary Act conclusively shows. And, assuming that the states, in the absence of legislation by Congress, would be without power over the subject-matter, this saving clause, still maintained upon the statute book, is a sufficient grant of power. Jurisdiction in prize cases, as has been shown, springs out of the possession of a prize of war. Civil proceedings in rem, to be mentioned hereafter, are based upon the maritime lien, where possession in the claimant is neither necessary nor usual as is the case with common-law liens. With these exceptions, both resting upon grounds peculiar to the forum of the admiralty, concurrent-

jurisdiction of the courts of common law in civil cases of maritime origin always has been recognized by this court. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 390, 12 L. ed. 465, 485; *The Genesee Chief v. Fitzhugh*, 12 How. 443, 458, 13 L. ed. 1058, 1065; *The Belfast*, 7 Wall. 624, 644, 645, 19 L. ed. 266, 272; *New England Mut. M. Ins. Co. v. Dunham*, 11 Wall. 1, 32, 20 L. ed. 90, 99; *Leon v. Galceran*, 11 Wall. 185, 187, 188, 20 L. ed. 74, 75; *American S. B. Co. v. Chase*, 16 Wall. 522, 533, 21 L. ed. 369, 372; *Schoonmaker v. Gilmore*, 102 U. S. 118, 26 L. ed. 95; *Manchester v. Massachusetts*, 139 U. S. 240, 262, 35 L. ed. 159, 166, 11 Sup. Ct. Rep. 559.

236 Nor is the reservation of a common-law remedy limited to such causes of action as were known to the common law* at the time of the passage of the Judiciary Act. It includes statutory changes. *American S. B. Co. v. Chase*, 16 Wall. 522, 533, 534, 21 L. ed. 369, 372, 373; *Knapp, S. & Co. v. McCaffrey*, 177 U. S. 638, 644, 44 L. ed. 921, 924, 20 Sup. Ct. Rep. 824. Those remedies which were held not to be common-law remedies, within the saving clause, in *The Moses Taylor*, 4 Wall. 411, 427, 431, 18 L. ed. 397, 400, 402; *The Hine v. Trevor*, 4 Wall. 555, 571, 572, 18 L. ed. 451, 456; *The Belfast*, 7 Wall. 624, 644, 19 L. ed. 266, 272; *American S. B. Co. v. Chase*, 16 Wall. 522, 533, 21 L. ed. 369, 372, and *The Glide*, 167 U. S. 606, 623, 42 L. ed. 296, 302, 17 Sup. Ct. Rep. 930, provided for imposing a lien on the ship by proceedings in the nature of admiralty process in rem, and it was for this reason only that they were held to trench upon the exclusive admiralty jurisdiction of the courts of the United States. The distinction was noticed in *Leon v. Galceran*, 11 Wall. 185, 189, 20 L. ed. 74, 75, and again in *Knapp, S. & Co. v. McCaffrey*, 177 U. S. 638, 642, 44 L. ed. 921, 923, 20 Sup. Ct. Rep. 824. In the latter case it was pointed out (p. 644) that the reservation of a common-law remedy where the common law is competent to give it was not confined to common-law actions, but included remedies without action, such as a distress for rent or for the trespass of cattle; a bailee's remedy by detaining personal property until paid for work done upon it or for expenses incurred in keeping it; the lien of an innkeeper upon the goods of his guests, and that of a carrier upon things carried; the remedy of a nuisance by abatement, and others. The most recent definition of the rule laid down in *The Hine v. Trevor* and other cases of that class is in *Rounds v. Cloverport Foundry & Mach. Co.* 237 U. S. 303, 59 L. ed. 966, 35 Sup. Ct. Rep. 596.

I have endeavored to show, from a con-

sideration of the phraseology of the constitutional grant of jurisdiction and the act of the first Congress, passed to give effect to it, from the history in the light of which the language of those instruments is to be interpreted, and from the uniform course of decision in this court, from the earliest time until the present, these propositions: first, that the grant of jurisdiction to the admiralty was not intended to be* exclusive of the concurrent jurisdiction of the common-law courts theretofore recognized; and, secondly, that neither the Constitution nor the Judiciary Act was intended to prescribe a system of substantive law to govern the several courts in the exercise of their jurisdiction, much less to make the rules of decision, prevalent in any one court, obligatory upon others, exercising a distinct jurisdiction, or binding upon the courts of the states when acting within the bounds of their respective jurisdictions. In fact, while courts of admiralty undoubtedly were expected to administer justice according to the law of nations and the customs of the sea, they were left at liberty to lay hold of common-law principles where these were suitable to their purpose, and even of applicable state statutes, just as courts of common law were at liberty to adopt the rules of maritime law as guides in the proper performance of their duties. This eclectic method had been practised by the courts of each jurisdiction prior to the Constitution, and there is nothing in that instrument to constrain them to abandon it.

The decisions of this court show that the courts of admiralty in many matters are bound by local law. The doubt expressed by Mr. Justice Bradley in *Butler v. Boston & S. S. S. Co.* 130 U. S. 527, 558, 32 L. ed. 1017, 1024, 9 Sup. Ct. Rep. 612, as to whether a state law could have force to create a liability in a maritime case at all, was laid aside in *The Corsair* (*Barton v. Brown*) 145 U. S. 335, 36 L. ed. 727, 12 Sup. Ct. Rep. 949, and definitely set at rest in *The Hamilton* (*Old Dominion S. S. Co. v. Gilmore*) 207 U. S. 398, 404, 52 L. ed. 264, 269, 28 Sup. Ct. Rep. 133. The fact is that, long before *Butler v. Boston & S. S. S. Co.*, it had been recognized that state laws might not merely create a liability in a maritime case, but impose a duty upon the admiralty courts of the United States to enforce such liability. Thus, while it was recognized that by the general maritime law a foreign ship, or a ship in a port of a state to which she did not belong, was subject to a suit in rem in the admiralty for repairs or necessities, the case of a ship in a*port of her home* state was governed by the municipal law of the state, and no lien for repairs or neces-

saries would be implied unless recognized by that law. The General Smith (1819) 4 Wheat. 438, 443, 609, 611; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 571, 578, 22 L. ed. 654, 660, 663. Conversely, it was held in the case of Peyroux v. Howard (1833) 7 Pet. 324, 341, 8 L. ed. 700, 706, that a libel in rem in the admiralty might be maintained against a vessel for repairs done in her home port where a local statute gave a lien in such a case. To the same effect, The J. E. Rumbell, 148 U. S. 1, 12, 37 L. ed. 345, 347, 13 Sup. Ct. Rep. 498. As elsewhere pointed out herein, where a state statute conferred a lien operative strictly in rem, it was uniformly held not enforceable in the state courts, but only because it trenchd upon the peculiar jurisdiction of the admiralty, and therefore was not a "common-law remedy" within the saving clause of the Judiciary Act of 1789. The Moses Taylor, 4 Wall. 411, 427, 431, 18 L. ed. 397, 400, 402; The Hine v. Trevor, 4 Wall. 555, 571, 572, 18 L. ed. 451, 456; The Belfast, 7 Wall. 624, 644, 19 L. ed. 266, 272; American S. B. Co. v. Chase, 16 Wall. 522, 533, 21 L. ed. 369, 372; The Glide, 167 U. S. 606, 623, 42 L. ed. 296, 302, 17 Sup. Ct. Rep. 930.

Under these decisions, and others to the same effect, the substance of the matter is that a state may, by statute, create a right to a lien upon a domestic vessel, in the nature of a maritime lien, which may be enforced in admiralty in the courts of the United States; but a state may not confer upon its own courts jurisdiction to enforce such a lien, because the Federal jurisdiction in admiralty is exclusive. The J. E. Rumbell, 148 U. S. 1, 12, 37 L. ed. 345, 347, 13 Sup. Ct. Rep. 498, and cases cited. But a lien imposed not upon the rem, but upon defendant's interest in the res, may be made enforceable in the state courts. Rounds v. Cloverport Foundry & Mach. Co. 237 U. S. 303, 307, 59 L. ed. 966, 968, 35 Sup. Ct. Rep. 596, and cases cited.

The Roanoke, 189 U. S. 185, 194, 198, 47 L. ed. 770, 772, 774, 23 Sup. Ct. Rep. 491, while approving The General Smith, Peyroux v. Howard, The Lottawanna, and The J. E. Rumbell, supra, gave a negative answer to the very different question whether a state could, without encroaching upon the Federal jurisdiction, create a lien* against foreign vessels to be enforced in the courts of the United States.

In the present case there is no question of lien, and, I repeat, no question concerning the jurisdiction of the state court; the crucial inquiry is, to what law was it bound to conform in rendering its decision? Or, rather, the question is the narrower one: Do the Constitution and laws of the United

States prevent a state court of common law from applying the state statutes in an action in personam arising upon navigable water within the state, there being no act of Congress applicable to the controversy? I confess that until this case and kindred cases submitted at the same time were brought here, I never had supposed that it was open to the least doubt that the reservation to suitors of the right of a common-law remedy had the effect of reserving at the same time the right to have their common-law actions determined according to the rules of the common law, or state statutes modifying those rules. This court repeatedly has so declared, at the same time recognizing fully that the point involves the question of state power. In *United States v. Bevans*, 3 Wheat. 336, 388, 4 L. ed. 404, 416, the court, by Mr. Chief Justice Marshall, said: "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction. It is obviously designed for other purposes. . . . In describing the judicial power, the framers of our Constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction. It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union. Congress may pass all laws which are necessary and proper for giving* the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of the sovereignty not yet given away." In *American S. B. Co. v. Chase*, 16 Wall. 522, 533, 21 L. ed. 369, 372, the court, by Mr. Justice Clifford, said (p. 534): "State statutes, if applicable to the case, constitute the rules of decision in common-law actions, in the circuit courts as well as in the state courts."

In *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 395, 396, 22 L. ed. 619, 621, the court, by Mr. Justice Miller, said: "The plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. . . . An important difference as regards this case is the rule for estimating the damages. In the common-law court the defendant must pay all the damages or

none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. . . . Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially." And see *The Max Morris*, 137 U. S. 1, 10, 34 L. ed. 586, 588; *Belden v. Chase*, 150 U. S. 674, 691, 37 L. ed. 1218, 1224, 14 Sup. Ct. Rep. 269; *Benedict*, Admiralty, § 201.

In the prevailing opinion, great stress is laid upon certain expressions quoted from *The Lottawanna* (Rodd v. Heartt) 21 Wall. 558, 574, 22 L. ed. 654, 661: but it seems to me they have been misunderstood, because read without regard to context and subject-matter. That was an admiralty appeal, and involved the question whether, by the general maritime law, as accepted in the United States, there was an implied lien for necessities furnished to a vessel in her home port, where no such lien was recognized by the municipal law of the state. In the course of the discussion, the court, by Mr. Justice Bradley, said: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? *The Constitution does not define it*. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. *Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary*. It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' without defining those terms, assuming them to be known and understood."

In this language there is the clearest

recognition that the Constitution, in establishing and distributing the judicial power, did not intend to define substantive law, or to make the rules of decision in one jurisdiction binding *proprio vigore* in tribunals exercising another jurisdiction. The courts of common law were to administer justice according to the common law, the courts of equity according to the principles of equity, and the courts of admiralty and maritime jurisdiction according to the maritime law.

The expression on page 575 respecting the uniform operation of the maritime law was predicated only of the operation of that law as administered in the courts of admiralty, for it is not to be believed that there was any purpose to overrule *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 395, 22 L. ed. 619, 621, decided at the same term and only about two months before *The Lottawanna* by a unanimous court, including Mr. Justice Bradley himself, in which it was held that where there was concurrent jurisdiction in the courts of common law and the courts of admiralty, each court was at liberty to adopt its own rules of decision. Moreover, the principal question at issue in *The Lottawanna* was whether the case of *The General Smith*, 4 Wheat. 438, 4 L. ed. 609, should be overruled, in which it had been held that, in the absence of state legislation imposing the lien, a ship was not subject to a libel in rem in the admiralty for repairs furnished in her home port. The general expressions referred to relate to that state of the law,—the absence of state legislation, as well as of legislation by Congress,—and upon this the decision in *The General Smith* was upheld (p. 578). But in proceeding to discuss the subordinate question whether there was a lien under the state statute, it was held (p. 580): "It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of materialmen furnishing necessities to a vessel in her home port may be regulated in each state by state legislation." And again (p. 581): "Whatever may have been the origin of the practice, and whether or not it was based on the soundest principles, it became firmly settled, and it is now too late to question its validity. . . . It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the states to legislate on the subject seems to be conceded by the uniform course of decisions."

* Again, in *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212, which, like *The Lottawanna*, was a proceeding in admiralty, the court, in quoting the

declarations contained in that case respecting the general operation of the maritime law throughout the navigable waters of the United States, was dealing only with its application in the courts of admiralty. This is plain from what was said as a preface to the discussion (p. 557): "In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not—as was the case in *Detroit v. Osborne* (1890) 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012,—whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (art. 3, § 2) upon the courts of the United States."

In the argument of the present case and companion cases, emphasis was laid upon the importance of uniformity in applying and enforcing the rules of admiralty and maritime law, because of their effect upon interstate and foreign commerce. This, in my judgment, is a matter to be determined by Congress. Concurrent jurisdiction and optional remedies in courts governed by different systems of law were familiar to the framers of the Constitution, as they were to English-speaking peoples generally. The judicial clause itself plainly contemplated a jurisdiction concurrent with that of the state courts in other controversies. In such a case, the option of choosing the jurisdiction is given primarily for the benefit of suitors, not of defendants. For extending it to defendants, removal proceedings are the appropriate means.

Certainly there is no greater need for uniformity of adjudication in cases such as the present than in cases arising on land and affecting the liability of interstate carriers to their employees. And, although the Constitution contains an express grant to Congress of the power to regulate interstate and foreign commerce, nevertheless, until Congress had acted, the responsibility of interstate carriers to their employees for injuries arising in interstate commerce was controlled by the laws of the states. This was because the subject was within the police power, and the divergent exercise of that power by the states did not regulate, but only incidentally affected, commerce among the states. *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. ed. 819, 820; *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 54, 56 L. ed.

327, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. It required an act of Congress (Act of April 22, 1908, 35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, § 8657) to impose a uniform measure of responsibility upon the carriers in such cases. So, it required an act of Congress (the so-called Carmack Amendment to the Hepburn Act of June 29, 1906, 34 Stat. at L. 584, 595, chap. 3591, Comp. Stat. §§ 8563, 8604a, 8604aa) to impose a uniform rule of liability upon rail carriers for losses of merchandise carried in interstate commerce. *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 504, 57 L. ed. 314, 319, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148. In a great number and variety of cases state laws and policies incidentally affecting interstate carriers in their commercial operations have been sustained by this court, in the absence of conflicting legislation by Congress. Among them are: Laws requiring locomotive engineers to be examined and licensed by the state authorities (*Smith v. Alabama*, 124 U. S. 465, 482, 31 L. ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564); requiring such engineers to be examined for defective eyesight (*Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 100, 32 L. ed. 352, 354, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28); requiring telegraph companies to receive despatches and transmit and deliver them diligently (*Western U. Tele. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934); forbidding the running of freight trains on Sunday (*Hennington v. Georgia*, 163 U. S. 299, 304, 308, etc. 41 L. ed. 166, 169, 170, 16 Sup. Ct. Rep. 1086); regulating the heating of passenger cars (*New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418); prohibiting a railroad company from obtaining by contract an exemption from the liability which would have existed had no contract been made (*Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 136, 137, 42 L. ed. 688, 691, 692, 18 Sup. Ct. Rep. 289); a like result arising from rules of law enforced in the state courts in the absence of statute (*Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 488, 491, 48 L. ed. 268, 272, 273, 24 Sup. Ct. Rep. 132); statutes prohibiting the transportation of diseased cattle in interstate commerce (*Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 630, 635, 42 L. ed. 878, 884, 885, 18 Sup. Ct. Rep. 488; *Reid v. Colorado*, 187 U. S. 137, 147, 151, 47 L. ed. 108, 114, 115, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506); statutes requiring the prompt settlement of claims for loss or damage to freight, applied incidentally to interstate commerce (*Atlantic Coast Line R. Co. v. Mazursky*, 216 U. S. 122, 54 L. ed.

411, 30 Sup. Ct. Rep. 378); even since the passage of the Carmack Amendment (Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 417, 420, 58 L. ed. 1377, 1381, 1382, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790); statutes regulating the character of headlights used on locomotives employed in interstate commerce (Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829; Vandalia R. Co. v. Public Service Commission, 242 U. S. 255, 61 L. ed. 276, 37 Sup. Ct. Rep. 93). All these cases affected the responsibility of interstate carriers. Until now, Congress has passed no act concerning their responsibility for personal injuries sustained by passengers or strangers, or for deaths resulting from such injuries, so that these matters still remain subject to the regulation of the several states. We have held recently that even the anti-pass provision of the Hepburn Act (34 Stat. at L. 584, 585, chap. 3591, § 1, Comp. Stat. 1916, § 8563) does not deprive a party who accepts gratuitous carriage in interstate commerce with the consent of the carrier, in actual but unintentional violation of the prohibition of the act, of the benefit and protection of the law of the state imposing upon the carrier a duty to care for his safety (Southern P. Co. v. Schuyler, 227 U. S. 601, 612, 57 L. ed. 662, 669, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277).

*246 In the very realm of navigation, the authority of the states to establish regulations effective within their own borders, in the absence of exclusive legislation by Congress, has been recognized from the beginning of our government under the Constitution. As to pilotage regulations, it was recognized by the first Congress (Act of August 7, 1789, chap. 9, § 4, 1 Stat. at L. 53, 54, Rev. Stat. § 4235, Comp. Stat. 1916, § 7981), and this court, in many decisions, has sustained local regulations of that character (Cooley v. Port Wardens, 12 How. 299, 320, 13 L. ed. 996, 1005; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 459, 17 L. ed. 805, 807; Ex parte McNeil, 13 Wall. 236, 241, 20 L. ed. 624, 626; Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; Olsen v. Smith, 195 U. S. 332, 341, 49 L. ed. 224, 229, 25 Sup. Ct. Rep. 52; Anderson v. Pacific Coast S. S. Co. 225 U. S. 187, 195, 56 L. ed. 1047, 1051, 32 Sup. Ct. Rep. 625).

It is settled that a state, in the absence of conflicting legislation by Congress, may construct dams and bridges across navigable streams within its limits, notwithstanding an interference with accustomed navigation may result. Wilson v. Black Bird Creek Marsh Co. 2 Pet. 245, 252, 7 L. ed. 412, 414; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Pound v. Turck, 95 U. S. 459,

24 L. ed. 525; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 683, 27 L. ed. 442, 445, 2 Sup. Ct. Rep. 185; Cardwell v. American River Bridge Co. 113 U. S. 205, 208, 28 L. ed. 959, 960, 5 Sup. Ct. Rep. 423; Hamilton v. Vicksburg, S. & P. R. Co. 119 U. S. 280, 30 L. ed. 393, 7 Sup. Ct. Rep. 206; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 8, 31 L. ed. 629, 631, 8 Sup. Ct. Rep. 811; Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; Manigault v. Springs, 199 U. S. 473, 478, 50 L. ed. 274, 277, 26 Sup. Ct. Rep. 127.

So, as to harbor improvements (Mobile County v. Kimball, 102 U. S. 691, 697, 26 L. ed. 238, 239); improvements and obstructions to navigation (Huse v. Glover, 119 U. S. 543, 548, 30 L. ed. 487, 490, 7 Sup. Ct. Rep. 313; Leovy v. United States, 177 U. S. 621, 625, 44 L. ed. 914, 916, 20 Sup. Ct. Rep. 797; Cummings v. Chicago, 188 U. S. 410, 427, 47 L. ed. 525, 530, 23 Sup. Ct. Rep. 472); inspection and quarantine laws (Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. ed. 23, 71); wharfage charges (Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg, 105 U. S. 559, 563, 26 L. ed. 1169, 1171; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 702, 27 L. ed. 584, 588, 2 Sup. Ct. Rep. 732; Ouachita & M. River Packet Co. v. Aiken, 121 U. S. 444, 447, 30 L. ed. 976, 977, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907); tolls for the use of an improved waterway (Sands v. Manistee River Improv. Co. 123 U. S. 288, 295, 31 L. ed. 149, 151, 8 Sup. Ct. Rep. 113).

So, of provisions fixing the tolls for transportation upon an interstate ferry (Port Richmond & B. P. Ferry Co. v. Hudson County, 234 U. S. 317, 331, 58 L. ed. 1330, 1336, 34 Sup. Ct. Rep. 821), or upon vessels plying *between two ports located within the same state (Wilmington Transp. Co. v. Railroad Commission, 236 U. S. 151, 156, 59 L. ed. 508, 517, P.U.R.1915A, 845, 35 Sup. Ct. Rep. 276).

In each of these cases, except the last, which related to intrastate transport, the state regulation had an incidental effect upon the very conduct of navigation in interstate or foreign commerce. If in such cases the states possess the power of regulation in the absence of inconsistent action by Congress, much more clearly do they possess that power where Congress is silent, with respect to a liability which arises but casually, through the accidental injury or death of an employee engaged in a maritime occupation.

Indeed, with respect to injuries that result in death, it already is settled that al-

though the general maritime law, like the common law, afforded no civil remedy for death by wrongful act (The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; The Alaska, 130 U. S. 201, 209, 32 L. ed. 923, 925, 9 Sup. Ct. Rep. 461), yet a right of action created by statute is enforceable in a state court although the tort was committed upon navigable water (American S. B. Co. v. Chase, 16 Wall. 522, 533, 21 L. ed. 369, 372; Sherlock v. Alling, 93 U. S. 99, 104, 23 L. ed. 819, 820), and the liability arising out of a state statute in such a case will be recognized and enforced in the admiralty (The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133), although not by proceeding *in rem* unless the statute expressly creates a lien (The Corsair (Barton v. Brown) 145 U. S. 335, 347, 36 L. ed. 727, 731, 12 Sup. Ct. Rep. 949).

In Sherlock v. Alling, *supra*, which was an action in a state court and based upon a state statute to recover damages for a death by wrongful act occurring in interstate navigation, it was contended that the statute could not be applied to cases where the injury was caused by a marine tort, without interfering with the exclusive regulation of commerce vested in Congress. The court, after declaring that any regulation by Congress, or the liability for its infringement, would be exclusive of state authority, proceeded to say, by Mr. Justice Field (93 U. S. 104): "But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the state govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the state to which the vessels belong; and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies," etc.

I deem The Hamilton, *supra*, to be a controlling authority upon the question now presented. It was there held, not only that

the constitutional grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, leaves open the common-law jurisdiction of the state courts over torts committed at sea, but also that it leaves the states at liberty to change the law respecting such torts by legislation, as by a statute creating a liability for death by wrongful act, which was the particular legislation there in question.

To what extent uniformity of decision should result from the grant of jurisdiction to the courts of the United States concurrent with that of the state courts is a subject that repeatedly has been under consideration in this court, but it never has been held that the jurisdictional grant required state courts to conform their decisions to those of the United States courts. The doctrine clearly *deducible from the cases is that, in matters of commercial law and general jurisprudence, not subject to the authority of Congress, or where Congress has not exercised its authority, and in the absence of state legislation, the Federal courts will exercise an independent judgment and reach a conclusion upon considerations of right and justice generally applicable, the Federal jurisdiction having been established for the very purpose of avoiding the influence of local opinion; but that where the state has legislated, its will, thus declared, is binding, even upon the Federal courts, if it be not inconsistent with the expressed will of Congress respecting a matter that is within its constitutional power. The doctrine concedes as much independence to the courts of the states as it reserves for the courts of the Union. Burgess v. Seligman, 107 U. S. 20, 33, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; East Alabama R. Co. v. Doe, 114 U. S. 340, 353, 29 L. ed. 136, 140, 5 Sup. Ct. Rep. 869; Gibson v. Lyon, 115 U. S. 439, 446, 29 L. ed. 440, 442, 6 Sup. Ct. Rep. 129; Anderson v. Santa Anna, 116 U. S. 356, 362, 29 L. ed. 633, 635, 6 Sup. Ct. Rep. 413; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 372, 37 L. ed. 772, 775, 13 Sup. Ct. Rep. 914; Folsom v. Township 96, 159 U. S. 611, 625, 40 L. ed. 278, 283, 16 Sup. Ct. Rep. 174; Stanly County v. Coler, 190 U. S. 437, 444, 47 L. ed. 1126, 1131, 23 Sup. Ct. Rep. 811; Kuhn v. Fairmont Coal Co. 215 U. S. 349, 357, 360, 54 L. ed. 228, 233, 234, 30 Sup. Ct. Rep. 140.

In Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 372, 37 L. ed. 772, 775, 13 Sup. Ct. Rep. 914, the court had under review the judgment of a circuit court of the United States in an action by a locomotive fireman injured through negligence of the engineer. The cause of action arose in the state of Ohio, and the question presented

was whether the engineer and the fireman were fellow servants. Under the decisions of the Ohio courts they were, but this court held that, as there was no state statute, the question should not be treated as a question of local law, to be settled by an examination merely of the decisions of the state court of last resort, but should be determined upon general principles; the courts of the United States being under an obligation to exercise an independent judgment. The court, by Mr. Justice Brewer, said (149 U. S. 378): "There is no question as to the power of the states to legislate and change the rules of the common law in this respect, as in others; but, in the absence of such legislation, the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the states is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution."

In other words, the general effect of the question upon interstate commerce rendered it one of the class that called for the application of general principles; nevertheless, state legislation would be controlling—in the absence of valid legislation by Congress, of course.

In *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 136, 137, 42 L. ed. 688, 691, 692, 18 Sup. Ct. Rep. 289, the doctrine was concisely stated by Mr. Justice Gray, speaking for the court, as follows (169 U. S. 136): "The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the state in which the cause of action arises. But the law to be applied is none the less the law of the state, and may be changed by its legislature, except so far as restrained by the Constitution of the state or by the Constitution or laws of the United States."

I freely concede the authority of Congress to modify the rules of maritime law so far as they are administered in the Federal courts, and to make them binding upon the courts of the states so far as they affect interstate or international relations, or regulate "commerce with foreign nations, and among the several states, and with the In-

dian tribes." What I contend is that the Constitution does not, *proprio vigore*, impose the maritime law upon the states except to the extent that the admiralty jurisdiction was exclusive of the courts of common law before the Constitution; that is to say, in the prize jurisdiction, and the peculiar maritime process in rem; and that as to civil actions in personam having a maritime origin, the courts of the states are left free, except as Congress, by legislation passed within its legitimate sphere of action, may control them; and that Congress, so far from enacting legislation of this character, has from the beginning left the state courts at liberty to apply their own systems of law in those cases where, prior to the Constitution, they had concurrent jurisdiction with the admiralty, for the saving clause in the Judiciary Act necessarily has this effect.

Surely it cannot be that the mere grant of judicial power in admiralty cases, with whatever general authority over the subject-matter can be raised by *implication*, can, in the absence of legislation, have a greater effect in limiting the legislative powers of the states than that which resulted from the *express* grant to Congress of an authority to regulate interstate commerce,—the limited effect of which, in the absence of legislation by Congress, we already have seen. The prevailing opinion properly holds that, under the circumstances of the case at bar, although plaintiff in error was engaged in interstate commerce, and the deceased met his death while employed in such commerce, the provisions of the Federal Employers' Liability Act (April 22, 1908, 35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, § 8657) do not apply, because they cover only railroad operations and work connected therewith, whereas the deceased was employed upon an ocean-going ship. In effect it holds also that, in the absence of applicable legislation by Congress, the express grant of authority to regulate such commerce, as contained in the Constitution, does not exclude the operation of the state law. It seems to me a curious inconsistency to hold, at the same time, that the rules of the maritime law exclude the operation of a state statute without action by Congress, although the Constitution contains no express grant of authority to establish rules of maritime law, and the authority must be implied from the mere constitutional grant of judicial power over the subject-matter; and most remarkable that this result is reached in the face of the fact that the judicial power in cases of admiralty jurisdiction has been put into effect by Congress subject to an express reservation of the previous concurrent ju-

risdiction of the courts of law over actions of this character. This, besides ignoring the reservation, gives a greater potency to an implied power than to a power expressly conferred.

The effect of the present decision cannot logically be confined to cases that arise in interstate or foreign commerce. It seems to be thought that the admiralty jurisdiction of the United States has limits coextensive with the authority of Congress to regulate commerce. But this is not true. The civil jurisdiction in admiralty in cases *ex contractu* is dependent upon the subject-matter; in cases *ex delicto* it is dependent upon locality. In cases of the latter class, if the cause of action arise upon navigable waters of the United States, even though it be upon a vessel engaged in commerce wholly intrastate, or upon one not engaged in commerce at all, or (probably) not upon any vessel, the maritime courts have jurisdiction. The *Genesee Chief v. Fitzhugh*, 12 How. 443, 452, 13 L. ed. 1058, 1062; *The Commerce (Commercial Transp. Co. v. Fitzhugh)* 1 Black, 574, 578, 579, 17 L. ed. 107, 109; *The Belfast*, 7 Wall. 624, 636, 638, 640, 19 L. ed. 266, 269-271; *Ex parte Boyer*, 109 U. S. 629, 632, 27 L. ed. 1056, 1057, 3 Sup. Ct. Rep. 434; *Re Garnett*, 141 U. S. 1, 15, 17, 35 L. ed. 631, 634, 635, 11 Sup. Ct. Rep. 840. It results that if the constitutional grant of judicial power to the United States in cases of admiralty and maritime jurisdiction is held by inference to make the rules of decision that prevail in the courts of admiralty binding *proprio vigore* upon state courts exercising a concurrent jurisdiction in cases of maritime origin, the effect will be to deprive the several states of their police power over navigable waters lying wholly within their respective limits, and of their authority to regulate their intrastate commerce so far as it is carried upon navigable waters.

The following additional consideration is entitled to great weight: The same Judiciary Act which, in its 9th section, conferred upon the district courts of the United States original cognizance of civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, in its 25th section allowed a writ of error from this court to review the final judgment or decree of a state court of last resort resulting from a decision overruling any special claim of right, privilege, or exemption based upon the construction of any clause of the Constitution or statutes of the United States. By later legislation the review was broadened (Act of February 5, 1867, chap. 28, § 2, 14 Stat. at L. 385, 386, § 709, Rev. Stat., § 237, Ju-

dicial Code, 36 Stat. at L. 1156, chap. 231, Comp. Stat. 1916, § 1214), and by recent legislation the writ of certiorari has been substituted for the writ of error in many cases (Act of September 6, 1916, chap. 448, 39 Stat. at L. 726, Comp. Stat. 1916, § 1207). But, at all times, the right to review in this court the decisions of the state courts upon questions of Federal law has existed, so that if, by the true construction of art. 3, § 2, of the Constitution, or of § 9 of the Judiciary Act of 1789, it had been the right of parties suing or sued in state courts upon causes of action of a maritime nature to insist that their cases should be determined according to the rules of decision found in the law maritime, this right or immunity might have been asserted as a Federal right, and its denial made the ground of a review of the resulting judgment, under a writ of error (or, now, a writ of certiorari) from this court to the state court of last resort. Yet, until the present case, and others submitted*at the same time, the reported decisions of this court show not a trace of any such question raised. I can conceive of no stronger evidence to prove that from the foundation of the government until the present time it has been the opinion of the bar and of the judiciary, in the state courts as well as in the courts of the United States, that it was not the right of parties suing or sued in state courts of law or equity upon causes of action arising out of maritime affairs, to have them decided according to the principles that would have controlled the decision had the suits been brought in the admiralty courts.

There is no doubt that, throughout the entire life of the nation under the Constitution, state courts not only have exercised concurrent jurisdiction with the courts of admiralty in actions *ex contractu* arising out of maritime transactions, and in actions *ex delicto* arising upon the navigable waters, but that, in exercising such jurisdiction, they have, without challenge until now, adopted as rules of decision their local laws and statutes, recognizing no obligation of a Federal nature to apply the law maritime. State courts of last resort, in several recent cases, have had occasion to consider the precise contention now made by plaintiff in error, and upon full consideration have rejected it. *Lindstrom v. Mutual S. S. Co.* 132 Minn. 328, L.R.A.1916D, 935, 156 N. W. 669; *North Pacific S. S. Co. v. Industrial Acci. Commission*, — Cal. —, 163 Pac. 199; *Kennerson v. Thames Towboat Co.* 89 Conn. 367, 373, L.R.A.1916A, 436, 94 Atl. 372. See also *Walker v. Clyde S. S. Co.* 215 N. Y. 529, 531, 109 N. E. 604, Ann. Cas. 1916B, 87; *Jensen v. Southern P. Co.*

215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276, 9 N. C. C. A. 286 (this case). I have found no case to the contrary except a decision by the United States district court for the northern district of Ohio in *Schuede v. Zenith S. S. Co.* 216 Fed. 566, now under consideration by this court. The reasoning is unsatisfactory, and it was repudiated in *Keithley v. North Pacific S. S. Co.* 232 Fed. 255, 259.

I may remark, in closing, that there is no conflict* between the New York Workmen's Compensation Act and the acts of Congress for limiting the liability of ship-owners (Rev. Stat. §§ 4283-4285, Comp. Stat. 1916, §§ 8021-8023; Act of June 26, 1884, chap. 121, § 18, 23 Stat. at L. 53, 57, Comp. Stat. 1916, §§ 7707, 8028). So long as the aggregate liabilities of the owner, including that under the New York law, do not amount to as much as the interest of the owner in the vessel and freight pending, the act of Congress does not come into play. Where it does apply, it reduces all liabilities proportionally, under whatever law arising; the liability under the New York law along with the others. *Butler v. Boston & S. S. S. Co.* 130 U. S. 527, 552, 558, 32 L. ed. 1017, 1022, 1024, 9 Sup. Ct. Rep. 612; *The Hamilton (Old Dominion S. S. Co. v. Gilmore)* 207 U. S. 398, 406, 52 L. ed. 264, 270, 28 Sup. Ct. Rep. 133; *Richardson v. Harmon*, 222 U. S. 96, 104, 105, 56 L. ed. 110, 113, 114, 32 Sup. Ct. Rep. 27.

Mr. Justice Brandeis and Mr. Justice Clarke concur in the dissent, both upon the grounds stated by Mr. Justice Holmes and upon those stated by Mr. Justice Pitney.

(244 U. S. 255)

CLYDE STEAMSHIP COMPANY, Plff. in Err.,
v.

WILLIAM ALFRED WALKER.

This case is governed by the decision in *Southern Pacific Company v. Jensen*, ante, 524.

[No. 281.]

Argued February 28, 1916. Restored to docket for reargument November 13, 1916. Reargued January 31 and February 1, 1917. Decided May 21, 1917.

IN ERROR to the Supreme Court, Appellate Division, Third Department, of the State of New York, to review a judgment, affirmed by the Court of Appeals of that state, approving an award by the state Workmen's Compensation Commission to a longshoreman injured on an ocean-going

37 S. C.—35.

steamship. Reversed and remanded for further proceedings.

See same case in court of appeals, 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B, 87.

The facts are stated in the opinion.

Messrs. Norman B. Beecher and Ray Rood Allen for plaintiff in error.

Messrs. E. Clarence Aiken, Harold J. Hinman, and Mr. Egburt E. Woodbury, Attorney General of New York, for defendant in error.

* Mr. Justice McReynolds delivered the opinion of the court:

Purporting to proceed under the Workmen's Compensation Law of New York (Consol. Laws, chap. 67), the State Commission on September 3, 1914, made an award to defendant in error, Walker.

It found:

"1. William Alfred Walker, a claimant, is a longshoreman, residing at 151 West 133d street, New York city. Prior to July 1, 1914, he was employed in the city of New York by the Clyde Steamship Company for longshore work. He was injured on July 1, 1914, while in the employ of the Clyde Steamship Company as a longshoreman.

"2. The Clyde Steamship Company is a corporation organized and existing under the laws of Maine, where it has its principal office. It also has an office at Pier 36, North river.

"3. During the discharge of the Cherokee and at the time of the accident, the claimant was on board the steamship Cherokee, owned and operated by the Clyde Steamship Company. During the year prior to the accident, Walker had been employed from time to time by the Clyde Steamship Company and could have been assigned to work upon the pier. The Cherokee was, at the time of the accident, moored to and alongside Pier 37, North river, New York city, lying in navigable waters of the Hudson river. Said pier is leased by Clyde Steamship Company from the city of New York.

"4. While claimant was hooking the rope of a derrick into a load of lumber in the between decks of said vessel, for the purpose of unloading it from that vessel, his hand was jammed against the lumber, resulting in laceration of the second finger of the left hand. Claimant was disabled by reason of the injury from July 1, 1914, to July 22, 1914, returning to work upon the latter date.

"5. The business of the Clyde Steamship Company in this state consists solely of carrying passengers and merchandise to New York from other states, and carrying passengers and merchandise from New York to other states. All cargo on board the

Cherokee, including the lumber aforesaid, had been taken on board in the state of North Carolina, and carried by water to New York, and was there unloaded from the steamship Cherokee. The claimant was engaged solely in handling said lumber.

"6. The injury was an accidental injury and arose out of and in the course of the employment of claimant by the Clyde Steamship Company. The injury did not result solely from the intoxication of the injured employee while on duty, and was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another.

"7. The average weekly wage of claimant was \$17.30."

Without opinion the appellate division affirmed the award, and this action was approved by the court of appeals. 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B, 87.

In *Southern P. Co. v. Jensen*, just decided [244 U. S. 205, 61 L. ed. —, 37 Sup. Ct. Rep. 524], we considered and disposed of the fundamental question here involved. The legislature exceeded its authority in attempting to extend the statute to conditions like those which the record discloses.

¹² The judgment of the court below must ¹³ be reversed and the cause remanded for further proceedings not inconsistent with our opinion in the former case.

Reversed.

Dissenting: Mr. Justice Holmes, Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke.

(244 U. S. 147)

NEW YORK CENTRAL RAILROAD COMPANY, Plff. in Err.,
v.
JAMES WINFIELD.

COMMERCE — 8(6) — CONFLICTING STATE AND FEDERAL LEGISLATION — FEDERAL EMPLOYERS' LIABILITY ACT — STATE WORKMEN'S COMPENSATION ACT.

The entire subject of the liability of interstate railway carriers for the death or injury of their employees while employed by them in interstate commerce is so completely covered by the provisions of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, §§ 8657-8665), as to prevent any award under the New York Workmen's Compensation Act (N. Y. Laws 1913, chap. 816; Laws 1914, chaps. 41, 316), where an employee was injured or killed without fault on the railway company's part while he was engaged in interstate commerce, although the Federal act gives the right of recovery only when the injury

results in whole or in part from negligence attributable to the carrier.

[No. 321.]

Argued February 29 and March 1, 1916.

Restored to docket for reargument November 13, 1916. Reargued February 1, 1917. Decided May 21, 1917.

IN ERROR to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, to review a judgment, affirmed by the Court of Appeals of that state, approving an award of the state Workmen's Compensation Commission to a railway employee injured without the carrier's fault while engaged in interstate commerce. Reversed.

See same case below in appellate division, 168 App. Div. 351, 153 N. Y. Supp. 499; in court of appeals, 216 N. Y. 284, 110 N. E. 614, Ann. Cas. 1916A, 817, 10 N. C. C. A. 916.

The facts are stated in the opinion.

Messrs. Frank V. Whiting, Robert E. Whalen, William L. Visscher, and H. LeRoy Austin, for plaintiff in error.

Messrs. E. Clarence Aiken, Harold J. Hinman, and Mr. Egbert E. Woodbury, Attorney General of New York, for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court:

While in the service of a railroad company in the state of New York, James Winfield sustained a personal injury¹⁴ whereby he lost the use of an eye. At that time the railroad company was engaging in interstate commerce as a common carrier and Winfield was employed by it in such commerce. The injury was not due to any fault or negligence of the carrier, or of any of its officers, agents, or employees, but arose out of one of the ordinary risks of the work in which Winfield was engaged. He was a section laborer assisting in the repair of the carrier's main track, and while tamping across ties struck a pebble which chanced to rebound and hit his eye. Following the injury he sought compensation therefor from the carrier under the Workmen's Compensation Law of the state¹ and an award was made to him by the state Commission, one member dissenting. The carrier appealed and the award was affirmed by the appellate division of the supreme court, two judges dissenting (168 App. Div. 351, 153 N. Y. Supp. 499), and also by the court of appeals

¹See *New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. —, 37 Sup. Ct. Rep. 247.

(216 N. Y. 284, L.R.A.—, —, 110 N. E. 614, Ann. Cas. 1916A, 817, 10 N. C. C. A. 916). Before the Commission and in the state courts the carrier insisted that its liability or obligation and the employee's right were governed exclusively by the Employers' Liability Act of Congress (chap. 149, 35 Stat. at L. 65, Comp. Stat. 1916, § 8657; chap. 143, 36 Stat. at L. 291), and therefore that no award could be made under the law of the state. That insistence is renewed here.

It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority.² Congress acted upon the subject in passing the Employers' Liability Act, and the extent to which that act covers the field is the point in controversy. By one side it is said that the act, although regulating the liability or obligation of the carrier and the right of the employee where the injury results in whole or in part from negligence attributable to the carrier, does not cover injuries occurring without such negligence, and therefore leaves that class of injuries to be dealt with by state laws; and by the other side it is said that the act covers both classes of injuries and is exclusive as to both. The state decisions upon the point are conflicting. The New York court in the present case and the New Jersey court in *Winfield v. Erie R. Co.* 88 N. J. L. 619, 96 Atl. 394, hold that the act relates only to injuries resulting from negligence, while the California court in *Smith v. Industrial Acci. Commission*, 26 Cal. App. 560, 147 Pac. 600, and the Illinois court in *Staley v. Illinois C. R. Co.* 268 Ill. 356, L.R.A.1916A, 450, 109 N. E. 342, hold that it has a broader scope and makes negligence a test,—not of the applicability of the act, but of the carrier's duty or obligation to respond pecuniarily for the injury.

In our opinion the latter view is right and the other wrong. Whether and in what circumstances railroad companies engaging

in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 378, 379, 37 L. ed. 772, 777, 778, 13 Sup. Ct. Rep. 914. It was largely in recognition of this that the Employers' Liability Act was enacted by Congress. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 51, 56 L. ed. 327, 346, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. It was drafted and passed shortly following a message from the President advocating an adequate national law covering all such injuries, and leaving to the action of the several states only the injuries occurring in intrastate employment. Cong. Rec., 60th Cong., 1st Sess., 1347. And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws, and to apply to them a national law having a uniform operation throughout all the states. House Report No. 1386 and Senate Report No. 460, 60th Cong. 1st Sess. Thus, in the House Report it is said: "It [the bill] is intended in its scope to cover all commerce to which the regulative power of Congress extends. . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees. . . . A Federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the states."

True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should

² Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.* 223 U. S. 1, 53-55, 56 L. ed. 327, 347, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; *Taylor v. Taylor*, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A.

436; *Chicago, R. I. & P. R. Co. v. Devine*, 239 U. S. 52, 60 L. ed. 140, 36 Sup. Ct. Rep. 27; *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 41, 60 L. ed. 874, 878, 36 Sup. Ct. Rep. 482; *Northern P. R. Co. v. Washington*, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; *Erie R. Co. v. New York*, 233 U. S. 671, 58 L. ed. 1149, 52 L.R.A.(N.S.) 266, 34 Sup. Ct. Rep. 756, Ann. Cas. 1915D, 138; *Southern R. Co. v. Railroad Commission*, 236 U. S. 439, 59 L. ed. 661, 35 Sup. Ct. Rep. 304.

be exacted from the carrier where, and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the states free to require compensation where the act withholds it. By declaring in § 1 that the carrier shall be liable in damages for any injury to the employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier," or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track" [35 Stat. at L. 65 chap. 149, Comp. Stat. 1916, § 8657], etc.,³ the act plainly shows, as was expressly held in *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834, that it was the intention of Congress to make negligence the basis of the employee's right to damages, and to exclude responsibility of the carrier to the employee for an injury not resulting from its negligence or that of its officers, agents, or other employees. The same principle is seen also in § 3, which requires that where the carrier and the employee are both negligent, the recovery shall be diminished in proportion to the employee's contribution to the total negligence; and in § 4, which regards injuries arising from risks assumed by the employee as among those for which the carrier should not be made to respond. The committee reports upon the bill show that this principle was adopted deliberately, notwithstanding there were those within and without the committees who looked with greater favor upon a different principle which puts negligence out of view and regards the employee as entitled to compensation wherever the injury is an incident of the service in which he is employed. A few years after the passage of the act a legislative commission drafted and the Committees on the Judiciary in the two Houses of Congress favorably reported a bill substituting the latter principle for the other (Senate Report No. 553, 62d Cong., 2d Sess., House Report No. 1441, 62d Cong., 3d Sess.), but that bill did not become a law.

That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. Thus, in *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, and other cases, it is pointed out that the subject which the

act covers is "the responsibility of interstate carriers by railroad to their employees injured in such commerce;" in *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 66, 67, 57 L. ed. 417, 419, 420, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176, it is said that "we may not piece out this act of Congress by resorting to the local statutes of the state of precedence or that of the injury;" that by it "Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce," and that it is "paramount and exclusive;" in *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 256, 58 L. ed. 591, 594, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109, it is held that where it appears that the injury occurred while the carrier was engaged and the employee employed in interstate commerce, the Federal act governs to the exclusion of the state law; in *Seaboard Air Line R. Co. v. Horton*, supra, pp. 501, 503, it is said not only that Congress intended "to exclude responsibility of the carrier to its employees" in the absence of negligence, but that it is not conceivable that Congress "intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer;" and in *Wabash R. Co. v. Haynes*, 234 U. S. 86, 89, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224, it is said: "Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling, and a recovery could not have been had under the common or statute law of the state; in other words, the Federal act would have been exclusive in its operation, not merely cumulative [citing cases]. On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application and the law of the state was controlling."

The act is entitled, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," and the suggestion is made that the words "in certain cases" require that the act be restrictively construed. But we think these words are intended to do no more than to bring the title into reasonable accord with the body of the act, which discloses in exact terms that it is not to embrace all cases of injury to the employees of such carriers, but only such as occur while the carrier is engaging and the employee is employed in "commerce between any of the several states, etc. See *Employers' Liability Cases*

³ The act is printed in full in *Second Employers' Liability Cases* (Mondon v. New York, N. H. & H. R. Co.) 223 U. S. 1, 6-10, 56 L. ed. 327, 329-331, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

(Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several states require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no state is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in *Prigg v. Pennsylvania*, 16 Pet. 539, 617, 10 L. ed. 1060, 1089, "if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it." Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both. And the reasons which operate to prevent the states from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it.

It follows that, in the present case, the award under the state law cannot be sustained.

Judgment reversed.

Mr. Justice Brandeis, dissenting:

I dissent from the opinion of the court; and the importance of the question involved induces me to state the reasons.

By the Employers' Liability Act of April 22, 1908 [35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, § 8657], Congress provided, in substance, that railroads engaged in interstate commerce shall be liable in damages for their negligence resulting in injury or death of employees while so engaged. The majority of the court now holds that by so doing Congress manifested its will to cover the whole field of compensation or relief for injuries suffered by railroad employees engaged in interstate

commerce; or, at least, the whole field of obligation of carriers relating thereto; and that it thereby withdrew the subject wholly from the domain of state action. In other words, the majority of the court declares that Congress, by passing the Employers' Liability Act, prohibited states from including within the protection of their general Workmen's Compensation Laws employees who, *without fault on the railroad's part*, are injured or killed while engaged in interstate commerce; although Congress itself offered them no protection. That Congress *could* have done this is clear. The question presented is: Has Congress done so? Has Congress so willed?

The Workmen's Compensation Law of New York here in question has been declared by this court to be among those which "bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations." *New York C. R. Co. v. White*, 243 U. S. 188, 207, 61 L. ed. 667, 37 Sup. Ct. Rep. 247. And this court has definitely formulated the rules which should govern in determining when a Federal statute regulating commerce will be held to supersede state legislation in the exercise of the police power. These rules are:

1. "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. ed. 819, 820.

2. "If the purpose of the act cannot otherwise be accomplished,—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect,—the state law must yield to regulation of Congress within the sphere of its delegated power. . . .

"But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state." *Savage v. Jones*, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 Sup. Ct. Rep. 715.

3. "The question must, of course, be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear

power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 623, 42 L. ed. 878, 881, 18 Sup. Ct. Rep. 488.

Guided by these rules and the cases in which they have been applied, we endeavor to determine whether Congress, in enacting the Employers' Liability Act, intended to

prevent states from entering the specific field of compensation for injuries to employees arising without fault on the railroad's part, for which Congress made no provision.

To ascertain the intent we must look, of course, first at what Congress has said; then at the action it has taken, or omitted to take. We look at the words of the statute to see whether Congress has used any

4 The following cases show that Congress, in legislating upon a particular subject of interstate commerce, will not be held to have inhibited by implication the exercise by the states of their reserved police power, unless such state action would actually frustrate or impair the intended operation of the Federal legislation.

1. In *Sligh v. Kirkwood*, 237 U. S. 52, 62, 59 L. ed. 835, 839, 35 Sup. Ct. Rep. 501, it was held that the Federal Food and Drugs Act, dealing, among other things, with shipment in interstate commerce of fruit in filthy, decomposed, or putrid condition, did not prevent a state from penalizing the shipment of citrus fruits "which are immature or otherwise unfit for consumption."

2. In *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 293, 58 L. ed. 1312, 1318, 34 Sup. Ct. Rep. 829, it was held that Congress did not, by the passage of the Federal Safety Appliance Acts, dealing with the equipment of locomotives, as well as of cars, and the Act to Regulate Commerce, preclude the states from legislating concerning locomotive headlights, as to which Congress had not specifically acted.

3. In *Missouri, K. & T. R. Co. v. Harris*, 234 U. S. 412, 420, 58 L. ed. 1377, 1382, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790, it was held that the Carmack Amendment (34 Stat. at L. 584, 595, chap. 3591, Comp. Stat. 1916, §§ 8563, 8604a, 8604aa), regulating the carrier's liability for loss of interstate shipments, did not prevent a state from providing for the allowance of a moderate attorney's fee in a statute applicable both in the case of interstate and intrastate shipments.

4. In *Savage v. Jones*, 225 U. S. 501, 529, 56 L. ed. 1182, 1193, 32 Sup. Ct. Rep. 715, it was held that the passage by Congress of the Food and Drugs Act of 1906, which, among other things, prohibited misbranding, did not prevent the states from regulating the sale and requiring to be affixed a statement of ingredients and minimum percentage of fat and proteins.

5. In *Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 612, 623, 53 L. ed. 352, 361, 29 Sup. Ct. Rep. 214, it was held that Congress, by granting, in the Act to Regulate Commerce, power to the Interstate Commerce Commission to compel equal switching service on cars destined to interstate commerce, did not, in the absence of the exercise by the Commission of its power, prohibit states from legislating on the subject.

6. In *Asbell v. Kansas*, 209 U. S. 251, 257,

52 L. ed. 778, 781, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101, it was held that Congress, in providing that a certificate of inspection issued by the National Bureau of Animal Industry should entitle cattle to be shipped into any state without further inspection, did not prevent a state from penalizing the importation of cattle which had not been inspected either by the Federal Bureau or by designated state officials.

7. In *Crossman v. Lurman*, 192 U. S. 189, 199, 48 L. ed. 401, 405, 24 Sup. Ct. Rep. 234, it was held that the Act of Congress of August 30, 1890 (26 Stat. at L. 414, chap. 839, Comp. Stat. 1916, § 8683), prohibiting importation into the United States of adulterated and unwholesome food, did not prevent the states from legislating for the prevention of the sale of articles of food so adulterated, as come within valid prohibitions of their statutes.

8. In *Reid v. Colorado*, 187 U. S. 137, 149, 47 L. ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, it was held that Congress, by making it an offense under the Animal Industry Act for anyone to send from state to state cattle known to be affected with communicable disease, did not prevent the states from penalizing the importation of cattle without inspection by designated state officials.

9. In *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 623, 42 L. ed. 878, 881, 18 Sup. Ct. Rep. 488, it was held that the Federal Animal Industry Act, making it a misdemeanor for any person or corporation to transport cattle known to be affected with contagious disease, did not prevent a state from imposing a civil liability for damages sustained by owners of domestic cattle by reason of the importation of such diseased cattle.

10. In *Smith v. Alabama*, 124 U. S. 465, 482, 31 L. ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, it was held that Congress did not, by the passage of the Act to Regulate Commerce, prohibit the states from enacting laws requiring persons to undergo examination before being permitted to act as locomotive engineers.

11. In *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819, it was held that Congress did not, by the passage of many laws regulating navigation, with a view to safety, and providing for liability in certain cases prohibit the application to an accident in navigable waters of a state of a statute providing for liability for wrongful death.

The following cases, holding that the Federal Employers' Liability Act supersedes

which in terms express that will. We inquire whether, without the use of explicit words, that will is expressed in specific action taken. For Congress must be presumed to have intended the necessary consequences of its action. And if we find that its will is not expressed, or is not clearly expressed, either in words or by specific action, we should look at the circumstances under which the Employers' Liability Act was passed; look, on the one hand, at its origin, scope, and purpose; and, on the other, at the nature, methods, and means of state Workmen's Compensation Laws. If the will is not clearly expressed in words, we must consider all these in order to determine what Congress intended.

First: As to words used: The act contains no words expressing a will by Congress to cover the whole field of compensation or relief for injuries received by or for death of such employees while engaged in interstate commerce; or the whole field of carriers' obligations in relation thereto. The language of that act, so far as it indicates anything in this respect, points to just the contrary. For its title is: "An Act Relative to the Liability of Common Carriers by Railroad in Certain Cases."⁵

* 153 Second: As to specific action taken: The power exercised by Congress is not such that, when exercised, it necessarily excludes the state action here under consideration. It would obviously have been possible for Congress to provide in terms,

the common or statutory laws of the states relating to the liability of railroads for negligent injuries to their employees while engaged in interstate commerce, are, of course, wholly consistent with the cases above referred to, the "field" of both Federal and state laws there under consideration being identical: Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 55, 56 L. ed. 327, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 66, 57 L. ed. 417, 419, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 704, 57 L. ed. 1031, 1033, 33 Sup. Ct. Rep. 703; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Taylor v. Taylor, 232 U. S. 363, 368, 58 L. ed. 638, 640, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Wabash R. Co. v. Hayes, 234 U. S. 86, 89, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep.

that wherever such injuries or death result from the railroad's negligence, the remedy should be sought by action for damages; and wherever injury or death results from causes other than the railroad's negligence, compensation may be sought under the Workmen's Compensation Laws of the states. Between the Federal and the state law there would be no conflict whatsoever. They would, on the contrary, be complementary.

Third: As to origin, purpose, and scope of the Employers' Liability Act and the nature, methods, and means of state Workmen's Compensation Laws: The facts are of common knowledge. Do they manifest that, by entering upon one section of the field of indemnity or relief for injuries or death suffered by employees engaged in interstate commerce, Congress purposed to occupy the whole field?

(A) The origin of the Federal Employers' Liability Act.

By the common law as administered in the several states, the employee, like every other member of the community, was expected to bear the risks necessarily attendant upon life and work, subject only to the right to be indemnified for any loss inflicted by wrongdoers. The employer, like every other member of the community, was in theory liable to all others for loss resulting from his wrongs; the scope of his liability for wrongs being amplified by the doctrine of respondeat superior. This legal

729, 6 N. C. C. A. 224; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 458, 59 L. ed. 671, 673, 35 Sup. Ct. Rep. 306; St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754; Chicago, R. I. & P. R. Co. v. Devine, 239 U. S. 52, 54, 60 L. ed. 140, 142, 36 Sup. Ct. Rep. 27; Chicago, R. I. & P. R. Co. v. Wright, 239 U. S. 548, 551, 60 L. ed. 431, 434, 36 Sup. Ct. Rep. 185; Seaboard Air Line R. Co. v. Kenney, 240 U. S. 489, 493, 60 L. ed. 762, 765, 36 Sup. Ct. Rep. 458; Osborne v. Gray, 241 U. S. 16, 19, 60 L. ed. 865, 867, 36 Sup. Ct. Rep. 486.

⁵ The title of this act may be profitably compared with that of the bill (not enacted) prepared by the Employers' Liability and Workmen's Compensation Commission pursuant to Joint Resolution No. 41, approved June 25, 1910 (36 Stat. at L. 884), proposing a Federal Workmen's Compensation Law, which reads: "A Bill to Provide an Exclusive Remedy and Compensation for Accidental Injuries Resulting in Disability or Death to Employees of Common Carriers by Railroad Engaged in Interstate or Foreign Commerce, or in the District of Columbia, and for other Purposes." (Sen. Doc. 338, p. 107, 62d Cong. 2d Sess.)

liability, which, in theory, applied between employer and employee as well as between others, came, in course of time, to be seriously impaired in practice. The protection it provided employees seemed to wane as the need for it grew. Three defenses—the doctrines of fellow servant's negligence, of assumption of risk, and of contributory negligence, rose and flourished. When applied to huge organizations and hazardous occupations, as in railroading, they practically abolished the liability of employers to employees; and in so doing they worked great hardship and apparent injustice. The wrongs suffered were flagrant; the demand for redress insistent; and the efforts to secure remedial legislation widespread. But the opponents were alert, potent, and securely entrenched. The evils of the fellow-servant rule as applied to railroads were recognized as early as 1856, when Georgia passed the first law abolishing the defense. Between the passage of that act and the passage of the first Federal Employers' Liability Act (Act of June 11, 1906, 34 Stat.

at L. 232, chap. 3073), fifty years elapsed. In those fifty years only four more states had wholly abolished the defense of fellow servant's negligence. Furthermore, in only one state had a statute been passed making recovery possible where the employee had been guilty of contributory negligence.⁶ Meanwhile, the number of accidents to railroad employees had become appalling. In the year 1905-06 the number killed while on duty was 3,807, and the number injured 55,524.⁷ The promoters of remedial action, unable to overcome the efficient opposition presented in the legislatures of the several states, sought and secured the powerful support of the President.⁸ Congress was appealed to and used its power over interstate commerce to afford relief. The promotion of safety was, of course, referred to in the committee's report as justifying congressional action; but the moving cause for the Federal Employers' Liability Act was not the desire to promote safety or to secure uniformity, as in standardizing equipment by the Safety Appliance Acts.⁹

⁶ At the time the first Federal Employers' Liability Act was passed the so-called common-law defenses remained in force, in large part, in most of the states, as to railroad employees.

A. The fellow-servant rule.—(See compilation of statutes in "Liability of Employers," Senate Hearings 1906, pp. 183-288; and in Senate Document No. 207, 60th Congress, 1st Session.)

(1) It had been completely abolished as to railroad employees in only five states: Georgia (1856), Kansas (1874), North Carolina (1897), Colorado (1901), North Dakota (1903).

(2) It remained in full force, or substantially so, in twenty-five states or territories: Arizona, California, Connecticut, Delaware, Idaho, Illinois, Kentucky, Louisiana, Michigan, Maine, Maryland, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wyoming.

(3) In sixteen other states it had been modified; abolished either as to certain more dangerous kinds of work, or as to certain classes of employees: Alabama, Arkansas, Florida, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, New York, Oregon, South Carolina, Texas, Utah, Virginia, Wisconsin.

(4) The passage of the first Federal act immediately stimulated further state legislation. In 1907 the fellow-servant rule was abolished as to railroads in Arkansas, Nevada, Oklahoma, South Dakota; and largely in California, Nebraska, Pennsylvania, and Wisconsin.

B. Contributory negligence.—(See compilations cited supra.)

(1) In all but one state there had been no statutory change of the rule that con-

tributory negligence constituted a complete defense. Georgia (1895) had substituted the comparative-negligence doctrine. In Kansas and Illinois early cases at common law seeming to apply this doctrine had been repudiated. The common law of Tennessee also contained some traces of the doctrine.

(2) During the year following the passage of the first Federal act, which adopted the rule of comparative negligence, with mitigation of damages proportionate to the degree of plaintiff's negligence, several states introduced this modification: Nebraska, Nevada, North Dakota, South Dakota, Wisconsin.

C. Assumption of risk.—(See the compilation cited supra.)

The harshness of this rule had been mitigated by statute or other statutory action taken in only fourteen states: Alabama, California, Colorado, Georgia, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Virginia. In 1907 Iowa abolished the rule as to employees giving notice of a known defect.

⁷ See Report of Interstate Commerce Commission for the year 1906. Summary of Casualties, Table A, p. 161.

⁸ President's Messages December 2, 1902; December 6, 1904; December 5, 1905; January 31, 1908.

⁹ The following facts are significant as showing that employers' liability was not deemed a factor in safety to employees or the public, or a matter in which uniformity was desirable, or as otherwise presenting a railroad problem:

(1) The Annual Reports of the Interstate Commerce Commission to Congress for the eleven years ending December, 1908, deal each year at large with accidents, casualties to employees, and the promotion of safety.

There was, in the nature of things, no more reason for providing a Federal remedy for negligent injury to employees, than there would have been for providing such a remedy for negligent injury to passengers or to other members of the public. The Federal Employers' Liability Act was, in a sense, emergency legislation. The circumstances attending its passage were such as to preclude the belief that thereby Congress intended to deny to the states the power to provide for compensation or relief for injuries not covered by it.

(B) The scope of the Federal Employers' Liability Act.

(1) The act leaves uncovered a large part of the injuries which result from the railroads' negligence. The decision of this court in the first Employers' Liability Cases (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, had declared that Congress lacked power to legislate in respect to any injuries occurring otherwise than to employees engaged in interstate commerce. Later decisions disclose how large a part of the injuries resulting from the railroads' negligence are thus excluded from the operation of the Federal law. For the act was held to apply only to those directly engaged in interstate commerce. This excludes not only those engaged in intrastate commerce, but also the many who—while engaged on work for interstate commerce, as in repairing engines or cars—are not directly engaged in it. Likewise it excludes employees who, though habitually engaged directly in interstate commerce, happen to be injured or killed through the

railroads' negligence, while performing some work in intrastate commerce.¹⁰

(2) The act leaves uncovered all of the injuries which result otherwise than from the railroad's negligence, though occurring when the employee is engaged directly in interstate commerce.

The scope of the act is so narrow as to preclude the belief that thereby Congress intended to deny to the states the power to provide compensation or relief for injuries not covered by it.

(C) The purpose of the Employers' Liability Act.

The facts showing the origin and scope of the act discussed above indicate also its purpose. It was to end the denial of the right to damages for injuries due to the railroads' negligence,—a right denied under judicial decisions through the interposition of the defenses of fellow servant, assumption of risk, and contributory negligence. It was not the purpose of the act to deny to the states the power to grant the wholly new right to protection or relief in the case of injuries suffered otherwise than through fault of the railroads.

The Federal Employers' Liability Act was, in no respect, a departure from the individualistic basis of right and of liability. It was, on the contrary, an attempt to enforce truly and impartially the old conception of justice as between individuals. The common-law liability for fault was to be restored by removing the abuses which prevented its full and just operation. The liability of the employer under the Federal act, as at common law, is merely a penalty for wrongdoing. The remedy assured to the employee is merely a more

These reports contain numerous recommendations for legislation concerning safety appliances, hours of labor, block signals, train control, inspection, and accident reporting; but no recommendation or even mention of employers' liability.

(2) The National Convention of Railroad Commissioners, an association comprising the commissioners of the several states, is formed for the purpose of discussing and aiding in the solution of American railroad problems. Likewise, in its reports for eleven years ending October, 1908, no reference has been found, either in the annual president's address, or in the report of the committee on legislation, or in the discussions, to the subject of employers' liability; or any mention of the passage by Congress of the two Employers' Liability Acts, or of the decision of this court on the first act.

The absence of such reference is particularly noteworthy in the legislative report for the year 1908, pp. 218-233, which is devoted to a consideration of harmonious

or uniform legislation. It contains a résumé of the legislation in Congress recommended and supported by the National Convention of Railroad Commissioners during a period of nineteen years and attendances at congressional hearings on safety appliances, block signal, and hours of labor legislation.

¹⁰ Compare *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, 10 N. C. A. 153; *New York C. R. Co. v. Carr*, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 7 N. C. C. A. 1; *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; *Shanks v. Delaware, L. & W. R. Co.* 239 U. S. 556, 60 L. ed. 436, L.R.A.1916C, 797, 36 Sup. Ct. Rep. 188; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. ed. 319, 37 Sup. Ct. Rep. 116; *Raymond v. Chicago, M. & St. P. R. Co.* 243 U. S. 43, 61 L. ed. 583, 37 Sup. Ct. Rep. 268.

efficient means of making the wrongdoer indemnify him whom he has wronged. This limited purpose of the Employers' Liability Act precludes the belief that Congress intended thereby to deny to the states the power to provide compensation or relief for injuries not covered by the act.

(D) The nature of Workmen's Compensation Acts.

In the effort to remove abuses, a study had been made of facts, and of the world's experience in dealing with industrial accidents. That study uncovered as fiction many an assumption upon which American judges and lawyers had rested comfortably. The conviction became widespread that our individualistic conception of rights and liability no longer furnished an adequate basis for dealing with accidents in industry. It was seen that no system of indemnity dependent upon fault on the employers' part could meet the situation, even if the law were perfected and its administration made exemplary. For, in probably a majority of cases of injury, there was no assignable fault; and in many more it must be impossible of proof. It was urged: Attention should be directed, not to the employer's fault, but to the employee's misfortune. Compensation should be general, not sporadic; certain, not conjectural; speedy, not delayed; definite as to amount and time of payment; and so distributed over long periods as to insure actual protection against lost or lessened earning capacity. To a system making such provision, and not to wasteful litigation, dependent for success upon the coincidence of fault and the ability to prove it, society, as well as the individual employee and his dependents, must look for adequate protection. Society needs such a protection as much as the individual; because ultimately society must bear the burden, financial and otherwise, of the heavy losses which accidents entail. And since accidents are a natural, and in part an inevitable, concomitant of industry as now practised, society, which is served thereby, should in some way provide the protection. To attain this end, co-operative methods must be pursued; some form of insurance,—that is, some form of taxation. Such was the contention which has generally prevailed. Thus, out of the attempt to enforce individual justice grew the attempt to do social justice. But when Congress passed the Employers' Liability Act of April 22, 1908 [35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, § 8657], these truths had gained little recognition in the United States. Not one of the thirty-seven states or territories which

now have Workmen's Compensation Laws had introduced the system. Yet the conception and value of compensation laws was not unknown to Congress. It then had under consideration the first Compensation Law for Federal Employees which was enacted in the following month (Act of May 30, 1908, 35 Stat. at L. 556, chap. 236). The need of its speedy passage had been called to the attention of Congress by the President in the same special message which urged the passage of this Employers' Liability Act.

Can it be contended that Congress, by simply passing the Employers' Liability Act, prohibited the states from providing in any way for the maintenance of such employees (and their dependents) for whose injuries a railroad, innocent of all fault, could not be called upon to make indemnity under that act? It is the state which is both primarily and ultimately concerned with the care of the injured and of those dependent upon him, even though the accident may occur while the employee is engaged directly in interstate commerce. Upon the state falls the financial burden of dependency, if provision be not otherwise made. Upon the state falls directly the far heavier burden of the demoralization of its citizenry and of the social unrest which attend destitution and the denial of opportunity. Upon the state also rests, under our dual system of government, the duty owed to the individual, to avert misery and promote happiness so far as possible. Surely we may not impute to Congress the will to deny to the states the power to perform either this duty to humanity or their fundamental duty of self-preservation. And if the states are left free to provide compensation, what is there in the Employers' Liability Act to show an intent on the part of Congress to deny to them the power to make the provision by raising the necessary contributions, in the first instance, through employers?

(E) Methods and means of Workmen's Compensation Laws.

The principle underlying Workmen's Compensation Laws is the same in all the states. The methods and means by which that principle is carried out vary materially. The principle is that of insurance, the premiums* to which are contributed by employers generally. How the insurance fund shall be raised and administered; what the scale of compensation or relief shall be; how the contributing groups of employers shall be formed; whether or not a state fund shall be created; whether the individual employer shall be permitted to become a self-

insurer: whether he shall be permitted to deal directly with the employee in making settlement of the compensation to be awarded; on all these questions the laws of the several states do and properly may differ radically.

What methods and means the state shall adopt in order to provide compensation for injuries to citizens or residents where Congress has left it free to legislate rests (subject to constitutional limitations) wholly within the judgment of the state. It might conclude, in view of the hazard involved, that no one should engage in the occupation of railroading without providing against the financial consequences of accidents through contributing an adequate amount to an accident insurance fund. It might conclude that it was wise to make itself the necessary contributions to such a fund, out of moneys raised from general taxation. Or it might conclude, as the state of Washington did, that the fairest and wisest form of taxation for the purpose was to impose upon the employer directly the duty of making the required contributions,—relying upon the laws of trade to effect, through the medium of transportation charges, an equitable distribution of the burden. The method last suggested is pursued in substance also by the state of New York. In its essence the laws of the states are the same in this respect, as is shown in *Mountain Timber Co. v. Washington*, 243 U. S. 219, ante, 260, 37 Sup. Ct. Rep. 260. It is misleading to speak of the new obligation of the employer to contribute to compensation for injuries to workmen as an increase of the "employer's liability." It is not a liability for a violation of a duty. It is a direct—a primary—obligation in the nature of a tax. And the right* of the employee is as free from any suggestion of wrong done to him as the new right granted by Mothers' Pension Laws.

(F) Federal and state legislation are not in conflict.

The practical difficulty of determining in a particular case, according to presence or absence of railroad fault, whether indemnity is to be sought under the Federal Employers' Liability Act or under a state compensation law, affords, of course, no reason for imputing to Congress the will to deny to the states power to afford relief through such a system. The difficulty and uncertainty is, at worst, no greater than that which now exists in so many cases where it is necessary to determine whether the employee was, at the time of the accident, engaged in interstate or intrastate com-

merce.¹¹ Expedients for minimizing inherent difficulties will doubtless be found by experience. All the difficulties may conceivably be overcome in practice. Or they may prove so great as to lead Congress to repeal the Federal Employers' Liability Act and leave to the states (which alone can deal comprehensively with it), the whole subject of indemnity and compensation for injuries to employees, whether engaged in interstate or intrastate commerce, and whether such injuries arise from negligence or without fault of the employer.

We are admonished also by another weighty consideration not to impute to Congress the will to deny to the states this power. The subject of compensation for accidents in industry is one peculiarly appropriate for state legislation. There must, necessarily, be great diversity in the conditions of living and in the needs of the injured and of his dependents, according to whether they reside in one or the other of our states and territories, so widely extended. In a large majority of instances they reside in the state in which the accident occurs. Though the principle that compensation should be made, or relief given, is of universal application, the great diversity of conditions in the different sections of the United States may, in a wise application of the principle, call for differences between states in the amount and method of compensation, the periods in which payment shall be made, and the methods and means by which the funds shall be raised and distributed. The field of compensation for injuries appears to be one in which uniformity is not desirable, or at least not essential to the public welfare.

The contention that Congress has, by legislating on one branch of a subject relative to interstate commerce, pre-empted the whole field, has been made often in this court; and, as the cases above cited show, has been repeatedly rejected in cases where the will of Congress to leave the balance of the field open to state action was far less clear than under the circumstances here considered. Tested by those decisions and by the rules which this court has framed for

¹¹ The number of cases on the October, 1915, term of this court, was 1,069. Of these 93 involved one or more questions arising under the Federal Employers' Liability Act of April 22, 1908. Of these 93 cases, 37 presented the question whether or not the employee was engaged in interstate commerce or intrastate commerce. In 52 of the cases the question was presented whether there was evidence of negligence on the part of defendant. In 24 of the cases the question was also presented whether or not the employee had assumed the risk.

its guidance, I am of opinion, as was said in *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 294, 58 L. ed. 1312, 1319, 34 Sup. Ct. Rep. 829, that "the intent to supersede the exercise of the state police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken." The field covered by Congress was a limited field of the carrier's liability for negligence, not the whole field of the carrier's obligation arising from accidents. I find no justification for imputing to Congress the will to deny to a large class of persons engaged in a necessarily hazardous occupation¹² and otherwise unprovided for, the protection afforded by beneficent statutes enacted in the long-deferred performance of an insistent duty and in a field peculiarly appropriate for state action.

Mr. Justice Clarke concurs in this dissent.

(244 U. S. 170)

ERIE RAILROAD COMPANY, Plff. in Err.
v.

AMY L. WINFIELD.

COMMERCE § 8(6) — EXCLUSIVENESS OF FEDERAL REGULATION—EMPLOYERS' LIABILITY.

1. Congress intended the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, §§ 8657-8665), regulating the liability of an interstate railway carrier in case of the injury or death of an employee when employed in interstate commerce, to be as comprehensive of those instances in which it excludes liability, i. e., where there is no causal negligence for which the carrier is responsible, as of those in which liability is imposed, and in both classes such act is paramount to, and exclusive of, state regulation.

COMMERCE § 27(6) — EMPLOYER'S LIABILITY—WHEN SERVANT IS ENGAGED IN INTERSTATE COMMERCE.

2. An employee of an interstate railway carrier in charge of a switch engine who was killed while leaving the yards after his day's work, which had included employment in both interstate and intrastate commerce, was, at the time of the accident, employed in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, §§ 8657-8665), governing the liability of such carriers for the death or injury of their em-

ployees when employed in interstate commerce.

COMMERCE § 8(6) — CONFLICTING STATE AND FEDERAL REGULATION—EMPLOYER'S LIABILITY—WORKMEN'S COMPENSATION.

3. The operation of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, §§ 8657-8665), governing the liability of interstate railway carriers for the death or injury of their employees while employed in interstate commerce, cannot be interfered with by a state either by putting the carriers and their employees to an election between the provisions of that statute and a state Workmen's Compensation Act, as is attempted by N. J. Laws 1911, chap. 95, or by imputing such an election to them by a statutory presumption.

[No. 353.]

Argued March 1, 1916. Restored to docket for reargument November 13, 1916. Re-argued February 1 and 2, 1917. Decided May 21, 1917.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a judgment which reversed a judgment of the Supreme Court of the state, reversing a judgment of the Court of Common Pleas of Hudson County, which had awarded compensation to a dependent under a state Workmen's Compensation Act. Reversed.

See same case below, 88 N. J. L. 619, 96 Atl. 394.

The facts are stated in the opinion.

Messrs. George S. Hobart and Gilbert Collins for plaintiff in error.

Mr. Harry Lane for defendant in error.

* Mr. Justice Van Devanter delivered the opinion of the court:

This was a proceeding under a New Jersey statute, chap. 95, Laws 1911, against a common carrier by railroad, engaged in both interstate and intrastate commerce, to obtain compensation for the death of one of its employees. The employee was in charge of a switch engine in the carrier's extensive yard at Croxton, New Jersey, and was switching freight cars about in the yard, especially to and from a transfer station. The cars usually contained package freight and many were moved in the course of a day's work. In some the freight was interstate, in others intrastate, and in still others it was of both classes. This was true of the cars moved on the day in question. In concluding his work for that day the employee took his engine to the place where it was to remain for the night and

¹² The experience of the organization [Brotherhood of Locomotive Firemen and Enginemen] shows that more than 60 per cent of all deaths and disabilities are caused by railroad accidents. W. S. Carter, Sen. Doc. 549, p. 137, 64th Cong. 1st Sess.

started to leave the yard. His route lay across some of the tracks, and while passing over one he was struck by an engine and received injuries from which he soon died. No causal negligence was alleged or proved, and both parties assumed there was none. In these circumstances the trial judge, while not doubting that the fatal injury occurred in the course of the deceased's employment, held that he was not then employed in interstate commerce, and that compensation should be made under the state statute to the widow. A judgment in her favor was entered, but was reversed by the supreme court of the state, which concluded that the deceased's employment at the time of the injury was in interstate commerce, and that the case was controlled by the Employers' Liability Act* of Congress, which makes negligence the test of the carrier's liability or obligation. That judgment was in turn reversed by the court of errors and appeals, which, although assuming "that the conclusion of the supreme court as to the character" of the deceased's employment at the time of the injury "was justified by the facts proved," regarded the Federal act as without bearing, because affording no remedy and imposing no liability in the absence of causal negligence. 88 N. J. L. 619, 96 Atl. 394.

The questions presented for decision are these: First, whether the Federal act is regulative of the carrier's liability or obligation in every instance of the injury or death of one of its employees in interstate commerce, or only in those instances where there is causal negligence for which the carrier is responsible. Second, whether the facts proved sustain the conclusion that the deceased was employed in interstate commerce at the time of the injury. Third, whether, by reason of the state statute, the carrier became bound contractually to make compensation in this instance, even though it came within the Federal act.

The first question is fully considered in *New York C. R. Co. v. Winfield*, the opinion in which has been just announced, 244 U. S. 147, 61 L. ed. —, 37 Sup. Ct. Rep. 546, and it suffices here to say that, for the reasons there given, we are of opinion that the Federal act proceeds upon the principle which regards negligence as the basis of the duty to make compensation, and excludes the existence of such a duty in the absence of negligence, and that Congress intended the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed. It establishes a rule or regulation which is intended to operate uniformly in all the states, as respects interstate commerce, and in that field it is both paramount and exclusive.

The second question must be given an affirmative answer. In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 260, 58 L. ed. 591, 596, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C, 159. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so, when he was leaving the yard at the time of the injury, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is, for present purposes, of no importance.

The third question requires some notice of the New Jersey statute. It consists of two parts. One conforms to the principle which regards negligence as the basis of liability, and excludes liability in the absence of negligence. In its details, however, that part differs materially from the Federal act. The other conforms to a different principle which rejects negligence as a basis of liability and requires compensation to be made by the employer wherever the injury or death of the employee is an incident of the service in which he is employed. This part is described as "elective," and is not to be applied unless the employer and the employee shall have agreed, expressly or impliedly, to be bound thereby and to surrender "their rights to any other method, form, or amount of compensation or determination thereof." Respecting the mode of manifesting such an agreement or the contrary, it is provided that every contract of hiring "shall be presumed to have been made" with reference to this part of the statute, and, unless the contract or a notice from one party to the other contain "an express statement in writing" to the contrary, it "shall be presumed" that the parties "have agreed to be bound" by this part of the statute. There was no express agreement in this instance and there is no basis for regarding the carrier as in any way bound by this part of the statute, save as it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary. But such a presumption cannot be indulged here, and this for the reason that by the Federal act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of state laws. It is beyond the power of any state to interfere with the operation of that act, either by

putting the carrier and their employees to an election between its provisions and those of a state statute, or by imputing such an election to them by means of a statutory presumption. The third question, therefore, must be answered in the negative.

It follows that the Court of Errors and Appeals erred in failing to give controlling effect to the Federal act.

Judgment reversed.

Mr. Justice Brandeis and Mr. Justice Clarke dissent.

(24 U. S. 174)

FRANKLIN K. LANE, Secretary of the Interior, Plff. in Err.,
v.

SVAN HOGLUND.

MANDAMUS  85—TO SECRETARY OF INTERIOR — MINISTERIAL DUTY—"PENDING CONTEST OR PROTEST."

A report by a forest officer recommending the cancelation of a homestead entry for nonresidence and lack of cultivation is not a "pending contest or protest," within the meaning of the Act of March 3, 1891 (26 Stat. at L. 1099, chap. 561, Comp. Stat. 1916, § 5113), § 7, and hence does not relieve the Secretary of the Interior, as head of the Land Department, of the plain duty, under that section, enforceable by mandamus, to cause a patent to be issued to a homestead entryman where two years have elapsed since the date of the receiver's receipt upon the final entry, and there is "no pending contest or protest against the validity of such entry."

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 184-188.]

[No. 365.]

Argued April 11, 1917. Decided May 21, 1917.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which, reversing a judgment of the Supreme Court of the District, granted a writ of mandamus against the Secretary of the Interior to compel the issuance of a patent to a homestead entryman. Affirmed.

See same case below, 44 App. D. C. 310.

The facts are stated in the opinion.

Assistant Attorney General Kearful and Mr. S. W. Williams for plaintiff in error.

Messrs. Francis W. Clements and B. E. Hinton for defendant in error.

*Mr. Justice Van Devanter delivered the opinion of the court:

This is a petition for a writ of mandamus against the Secretary of the Interior. In the court of first instance the writ was re-

fused, but the court of appeals directed that it be granted (44 App. D. C. 310), and our jurisdiction arises out of the fact that the construction of a statute of the United States and the duty of the Secretary of the Interior thereunder are drawn in question. The statute is the following provision in § 7 of the Act of March 3, 1891, chap. 561, 26 Stat. at L. 1095, 1099, Comp. Stat. 1916, §§ 5116, 5113:

"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled* to a patent conveying the land by him entered, and the same shall be issued to him."

What is meant by a "pending contest of protest" is the question under the statute. The facts are not in dispute and are these:

In 1902 Svan Hoglund settled upon and made preliminary entry under the homestead law of a tract of public land in the Eureka land district of California. In 1905 the land was included within a national forest reserve by a proclamation of the President (34 Stat. at L. 3001), which contained the following excepting clause:

"Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; Provided, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made."

In due time thereafter, and after due notice by publication of his purpose so to do, Hoglund submitted final proof of compliance with the homestead law and of his right to obtain the title. The proof was accepted as satisfactory by the local officers, and on August 6, 1907, a receiver's receipt and a register's certificate upon final entry were regularly issued to him.

May 29, 1909, a report from a deputy forest supervisor recommending the cancelation of the entry "on account of nonresidence and lack of cultivation" was received at the General Land Office. The report indicated that the entryman was a single man, and had a three-room house, a small barn, and some fencing on the land; that

he had 3 acres plowed and under cultivation; that the land had much valuable timber thereon, but none had been cut except for improvements, and that the entryman had established actual residence on the tract in June, 1902, but had really lived thereon only at unnamed periods, "going away to work for wages four or five months at a time." No action upon this report was taken until April 19, 1910. On that day, almost three years after the date of the receiver's receipt, the Commissioner of the General Land Office ordered a proceeding in the local land office to determine whether the entryman had established and maintained a residence upon the land. Notice of this was given to him—apparently it was his first information that his entry was called in question—and a hearing was had. The local officers and the Commissioner of the General Land Office in turn found the facts in his favor, but the Secretary of the Interior found them the other way and ruled that the entry was not confirmed or protected by the provision in § 7 of the Act of March 3, 1891, *supra*. 42 Land Dec. 405; 43 Land Dec. 538 and 540.

The Secretary directed that the entry be canceled and the present petition was then filed. It prayed for a writ of mandamus commanding the Secretary to recall the order for the cancellation of the entry, to reinstate the entry upon the records, and to cause a patent to be issued to the entryman.

For present purposes no importance attaches to the creation of the forest reserve after the primary and before the final entry. The entryman was free, under the terms of the President's proclamation, to proceed with the steps essential to obtain a final entry and ultimately the full title, and to such a final entry the statute—the provision in § 7—has the same application as if the land were without instead of within the reserve.

The statute makes it very plain that if, at the expiration of two years from the date of the receiver's final receipt, there is no "pending contest or protest" against the entry, its validity no longer may be called in question; in the words of the act, "the entryman shall be entitled to a patent . . . and the same shall be issued to him." The purpose to fix his right and to command its recognition is obvious. What, then, is the "pending contest or protest" which is to exclude a subsisting entry from this statute of limitation and repose? Is it some proceeding which is begun, ordered, or set in motion in the interest of another claimant or of the public, to test or determine the validity of the entry? Or may it be a mere report, letter, or other com-

munication, confidential or otherwise, which has not been and may never be acted upon, which may be neither known nor accessible to the entryman, or which may be so general, vague, or intemperate in its statements as not in itself to merit attention? Independently of the occasion for the enactment and of the practice of the Land Department, there hardly could be any difference of opinion about the answer. And when these are understood we think there is no room whatever for a difference; in short, the reference is to a proceeding against the entry, and not to some communications which, at most, is only suggestive of the propriety of such a proceeding, and may never become the basis of one.

As applied to public land affairs the term "contest" has been long employed to designate a proceeding by an adverse or intending claimant, conducted in his own interest, against the entry of another, and the term "protest" has been commonly used to designate any complaint or objection, whether by a public agent or a private citizen, which is intended to be and is made the basis of some action or proceeding in the public right against an existing entry. This explains the use in the statute of both terms in the disjunctive, and accords with the instructions of May 8, 1891 (12 Land Dec. 450), wherein each term is spoken of as meaning a "proceeding" under the Rules of Practice to cancel or defeat an entry, and wherein it is said that "when there are no proceedings initiated within that time [the two years] by the government or individuals, the entryman shall be entitled to patent." The same view is shown in the supplemental instructions of July 1, 1891 (13 Land Dec. 1), wherein the Secretary said to the Commissioner: "You will, therefore, approve for patent all entries against which no proceedings were begun within the period of two years from the date of the final certificate, but where proceedings have been, or shall be, begun within the specified period, the entry will be held to have been taken out of the operation of this statute, and such cases will proceed to final judgment as heretofore."

Subject to some exceptions and qualifications which need not be specially noticed, this continued to be the view and practice of the Land Department for many years, and in conformity therewith many thousands of entries were carried to patent or otherwise, as their particular facts caused them to fall upon one side of the line or the other. But in the case of *Re Traganza*, 40 Land Dec. 300, decided November 17, 1911, a sharp departure was taken from the earlier view, and it was held that the statute has "no reference to proceedings by

the United States, or its officers or agents," against such entries, and does "not affect the conduct or action of the Land Department in taking up and disposing of final proof of entrymen after the lapse of two years mentioned in the act." That view, however, did not long have the approval of the Department. In the case of *Re Harris*, 42 Land Dec. 611, decided December 13, 1913, the subject was reconsidered, attention being given to the occasion for the enactment and to its prior administration, and the conclusion was reached that the earlier view, long maintained, was right and that the practice thereunder should be restored. In that case, as in this, a forest officer reported that the claimant had not established or maintained a residence upon the land, and no action was taken on the report until after the expiration of the two-year period. But in that case the entry was held to be confirmed under the statute, while here the ruling was the other way. Of the situation which prompted the enactment of the statute it was said in the decision of that case:

"The records of this Department disclose that, during several years preceding 1891, a very large number of entries were suspended by the General Land Office on vague and indefinite suggestions of fraud or noncompliance with law, to await investigation by special agents of that bureau. These suspensions were so numerous and the force available for investigation was so insufficient as to create a practical blockade in the issuance of patents, to the serious prejudice of bona fide claimants under the public land laws. In many instances, the charge or suggestion upon which the suspension was ordered had no foundation of fact other than the proximity of the land to other tracts embraced in entries alleged to be fraudulent or otherwise illegal. The reports of this Department to the public land committees of the Senate and House of Representatives, concerning this legislation, and the debates of those bodies thereon, leave no doubt of the purpose of Congress that said proviso should correct the hardship of this situation and provide against a repetition thereof."

And it was also said:

"Passed, primarily, to rectify a past and to prevent future abuses of the departmental power to suspend entries, the proviso is robbed of its essential purpose and practically repealed by the decision in the *Tranzanza Case*. . . .

"Upon mature consideration, the Department is convinced that a contest or protest, to defeat the confirmatory effect of the proviso, must be a proceeding sufficient, in itself, to place the entryman on his defense,

or to require of him a showing of material fact, when served with notice thereof."

* That decision was followed in *Re Judicak*,¹⁸¹ 43 Land Dec. 246; *Re Crowther*, 43 Land Dec. 262; *Instructions*, 43 Land Dec. 294 and 322.

Looking, then, at the statute in the light of all that bears upon its purpose and meaning, we think it certainly and unmistakably lays upon the Secretary of the Interior, as the head of the Land Department, a plain duty to cause a patent to be issued to a homestead entryman whenever it appears, as concededly it did in this instance, that two years have elapsed since the issue of the receiver's receipt upon the final entry, and that during that period no proceeding has been initiated or order made which calls in question the validity of the entry. In the exercise of its discretion Congress has said, in substance, by this statute, that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time, it shall be passed to patent as a matter of course. Thus in a case like this, where, according to the conceded facts, no proceeding was begun within the prescribed period, there is no room for the exercise of discretion or judgment, but, on the contrary, a plain duty to see that the entryman receives a patent.

True, this court always is reluctant to award or sustain a writ of mandamus against an executive officer, and yet cases sometimes arise when it is constrained by settled principles of law and the exigency of the particular situation to do so. *Kendall v. United States*, 12 Pet. 524, 9 L. ed. 1181; *United States v. Schurz*, 102 U. S. 378, 26 L. ed. 167; *Roberts v. United States*, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 376; *Garfield v. United States*, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; *Ballinger v. United States*, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338. And see *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33. This, we think, is such a case. As quite apposite we excerpt the following from the unanimous opinion in *Roberts v. United States*, 176 U. S. 221, 231, 44 L. ed. 443, 447, 20 Sup. Ct. Rep. 376:

* "Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be

granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would, on that account, be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

We therefore conclude that the Court of Appeals rightly directed that the writ be granted.

Judgment affirmed.

(244 U. S. 111)

UNITED STATES

v.

BESSIE WILDCAT et al. 1

INDIANS ⇨13—CONCLUSIVENESS OF DECREE OF DAWES COMMISSION—ENROLMENT OF INDIANS.

1. The question of fact whether a Creek Indian was living on April 1, 1899, the decision of which was committed to the Dawes Commission by the Curtis Act of June 28,

1 Death of David Knight, one of the respondents herein, suggested, and appearance of C. C. Taylor, the duly appointed, qualified, and acting guardian of the person and estate of Wiley Knight, a minor and sole heir of David Knight, as a party respondent herein, filed and entered April 9, 1917, on motion of Solicitor General Davis, on behalf of counsel for said respondent.

1898 (30 Stat. at L. 495, chap. 517), and the Creek Agreement of March 1, 1901 (31 Stat. at L. 861, chap. 676), § 28, authorizing such Commission to make investigation and determine the names of those entitled to be on the rolls of citizenship and to participate in the division of the tribal lands, cannot be retried in the courts, when not impeached for fraud or mistake, where the decision of the Commission to place the name of such Indian on the roll of Creek citizens by blood has been followed by the action of the Interior Department, confirming the allotment, and ordering the patents conveying the lands, which were in fact issued.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30.]

INDIANS ⇨13—SUFFICIENCY—MISTAKE — PLACING INDIAN ON TRIBAL ROLL.

2. The enrolment of a Creek Indian by the Dawes Commission upon the roll of Creek citizens by blood cannot be said to have been arbitrarily done, and without evidence of the fact that such Indian was living on April 1, 1899, so as to establish that mistake of law or fact which is essential to the impeachment of the action of the Commission, where there is evidence showing the practice of the Commission to make inquiries and investigations and to ascertain the facts as to the persons enrolled, and that no person was enrolled without information that was deemed satisfactory at that time.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30.]

INDIANS ⇨13—ALLOTMENTS—CONTROL OF INTERIOR DEPARTMENT — SUMMARILY ERASING NAME FROM CITIZENSHIP ROLL.

3. The Secretary of the Interior could not, without notice to the heirs, strike from the approved roll of Creek citizens by blood, on the ground of death before April 1, 1899, the name of an Indian to whom an allotment had been made and certificate therefor issued and allotment patents executed and approved.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30.]

INDIANS ⇨13—ALLOTMENTS—PATENT TO DECEASED GRANTEE.

4. The fact that an Indian allottee was dead at the time allotment patents were issued in his name did not prevent the title from vesting in his heirs under the provision of the Creek Agreement of March 1, 1901 (31 Stat. at L. 861, chap. 676), § 28, that, if any citizen has died since April 1, 1899, or may thereafter have died before receiving his allotment and distributive share, the lands and money to which he would be entitled if living shall descend to his heirs according to the Creek laws of descent and distribution, and be allotted and distributed to them accordingly.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30.]

INDIANS ⇨13—ALLOTMENTS—ENROLMENT OF INDIANS NOT MAKING SELECTION.

5. Members of the Creek Nation who, for any reason, refused to make selection of their allotments, could be placed upon

the allotment roll by the Dawes Commission under the Creek Agreement of March 1, 1901 (31 Stat. at L. 861, chap. 676), § 3, providing that "all lands of the said tribe except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in the manner following: there shall be allotted to each citizen 160 acres of land—boundaries to conform to the government survey—which may be selected by him so as to include improvements which belong to him."

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30.]

[No. 741.]

Argued April 11, 12, and 13, 1917. Decided May 21, 1917.

ON A CERTIFICATE from and WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Eighth Circuit, bringing up for review a decree of the District Court for the Eastern District of Oklahoma, dismissing the bill in a suit by the United States to cancel an Indian allotment certificate and the patents for his allotment. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General **Kearful**, Solicitor General Davis, and Mr. S. W. Williams for the United States.

Messrs. **Joseph C. Stone**, **John J. Shea**, **Charles B. Stuart**, **A. C. Cruce**, **George S. Ramsey**, **Malcolm E. Rosser**, **Edgar A. de Meules**, **Villard Martin**, **John Devereux**, **J. E. Wyand**, **K. B. Turner**, **J. B. Furry**, **E. C. Motter**, **P. J. Carey**, **W. C. Franklin**, **Burdette Blue**, **Thomas F. Shea**, **William A. Collier**, **Hazen Green**, **E. J. Van Court**, **Charles A. Moon**, **Francis Stewart**, **M. E. Turner**, for **Bessie Wildcat et al.**

Messrs. **A. A. Davidson**, **Preston C. West**, and **James A. Veasey** for **Bissett et al.**

Messrs. **R. C. Allen**, **James C. Davis**, **Grant Foreman**, **James D. Simms**, as amici curiæ.

Mr. Justice **Day** delivered the opinion of the court:

This action was begun by the United States, in behalf of the Creek Tribe of Indians, in the district court of the United States for the eastern district of Oklahoma, against **Bessie Wildcat** and others, heirs of **Barney Thlocco**, a full-blood Creek Indian, to obtain cancelation of the allotment certificate and deeds for his allotment of 160 acres. The bill of complaint alleges that **Thlocco** was a Creek Indian by blood; that he died at about the beginning of the year 1899 and prior to April 1, 1899, and that

he was not entitled to be enrolled as a citizen of the Creek Nation, or to receive an allotment of any part of its lands under the acts of Congress; that on or about May 24, 1901, the Commission to the Five Civilized Tribes caused his name to be placed on the roll of Creek citizens by blood which that Commission was then preparing; that thereafter, on June 30, 1902, the Commission issued a certificate of allotment in **Thlocco's** name, and homestead and allotment patents purporting to convey the land allotted were executed by the principal chief of the Creek Nation on March 11, 1903, and approved by the Secretary of the Interior on April 3, 1903; that thereafter, on December 13, 1906, the Secretary of the Interior, by executive order, caused **Thlocco's** name to be stricken from the roll of citizens by blood of the Creek Nation, and he is not an enrolled citizen by blood or otherwise of the Creek Nation, and is not now and has never been entitled to an allotment of land therein because he has never been a lawfully enrolled citizen thereof, and because he died prior to April 1, 1899; and that the patents have never been delivered to **Thlocco** or to any other person, but are in the possession of complainant through its officers and agents. The bill alleges that these instruments and proceedings constitute a cloud upon the Creek Nation's title to the land and that the existence of this cloud hinders and delays complainant in the performance of the duty imposed on it by law to allot and otherwise dispose of the lands and to wind up the affairs of the Creek Nation, and prays that the allotment certificate and patents be declared void and of no effect as instruments of conveyance; that the defendants be decreed to have no right, title, interest, or estate in and to the land; that the title to the land be quieted in complainant and the Creek Nation; that whatever cloud is cast upon the title to the land by reason of the matters aforesaid be decreed to be dissolved and the land decreed to be a part of the public and unallotted tribal land of the Creek Nation, subject to disposition by complainant in accordance with law; that the enrolment of **Barney Thlocco** be canceled, and that he, or any person claiming by, through, or under him, including the defendants, be decreed not to be entitled to participate in the disposition of the lands, moneys, or other property of the Creek Nation, and that the defendants be forever enjoined from asserting any claim of title to, or interest in, the tract of land hereinbefore described, adverse to the complainant and the Creek Nation. It is alleged that no hearing was held or investigation made by the Commission; and no evidence of any kind was obtained or had

*115 by it on the question of Thlocco's right to be enrolled; that no notice was given to the Creek Nation that his name was about to be enrolled; that there was no controversy, contest, or adverse proceeding of any kind before the Commission in this respect; and that the Commission, in causing Thlocco's name to be placed on the roll of Creek citizens by blood, acted arbitrarily and summarily, and without knowledge, information, or belief that he was living or dead on April 1, 1899, and acted on a mere arbitrary and erroneous assumption wholly unsupported by evidence or information that he was living on that date and entitled to be enrolled.

The answer avers that Thlocco was living April 1, 1899, and denies that the Commission acted arbitrarily and without evidence in placing his name on the roll and allotting the lands to him, and alleges that the Commission, in causing both these acts to be done, was not guilty of any gross mistake of fact or of law, but acted upon evidence satisfactory to it, and sufficient in law and in fact. It further alleges that the Dawes Commission was vested with jurisdiction to determine what persons were entitled to enrolment as citizens of the nation, and entitled to allotment out of the tribal lands, and that its decision in that regard having been approved by the Secretary of the Interior, "said enrolment, allotment, and patent cannot be canceled, nor can the issue of fact upon which the Commission placed the name of Barney Thlocco upon the approved Creek Roll be tried again; and these defendants say that this court is without authority of law to reopen or retry the question of fact sought to be put in issue by the United States."

Other defendants claimed an interest in part of the same property under a subsequent allotment, and intervened for the same relief as was asked by the United States.

*116 Upon the trial of the case, the government offered to show by witnesses and circumstances that Thlocco in fact died in January, 1899. Upon objection to this evidence by the defendants, the trial court ruled that the question whether Thlocco was living on April 1, 1899, was one of the questions which the law submitted to the Dawes Commission, and that its decision, placing Thlocco's name on the tribal roll, could only be attacked upon the ground of fraud, error of law, or gross mistake of fact, or upon the ground that the Commission acted arbitrarily and wholly without evidence; that it was not open to the government, for the purpose of attacking the allotment certificate and deeds to Thlocco, to retry the ques-

tion of fact as to whether he was living April 1, 1899.

At the conclusion of the trial the government renewed its offer of proof, to which objections were sustained on the ground just stated. A decree was then entered dismissing the bill for the reason that the government had failed to show that the Commission, in enrolling Thlocco, acted arbitrarily and without evidence. Appeal was then taken to the circuit court of appeals for the eighth circuit, which court certified certain questions of law to this court. Subsequently a writ of certiorari was issued, bringing the whole case here. Judicial Code, § 239 [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1916, § 1216].

The government in the brief filed in its behalf reduces the questions necessary to decide the merits of this appeal to two: First, should the evidence offered by the government to show that Thlocco died prior to April 1, 1899, have been admitted? Second, should the judgment of the district court be reversed because the enrolment of Thlocco and the allotment to him were made arbitrarily and without evidence as to whether he was living or dead on April 1, 1899?

As to the first question, an understanding of certain legislation is necessary to its answer. By the Act of Congress of June 10, 1896 (29 Stat. at L. 339, chap. 398), the Commission to the Five Civilized Tribes, more commonly known as the Dawes Commission, was authorized to hear and determine applications for citizenship in any of the Five Civilized Tribes. By that act the rolls of citizenship of those tribes as they then existed were confirmed and the Commission commanded in determining applications for citizenship to "give due force and effect to the rolls, usages, and customs of each of said nations or tribes." It was provided by the Act of June 7, 1897 (30 Stat. at L. 84, chap. 3), that the term "rolls of citizenship" should mean "the last authenticated rolls of each tribe which have been approved by the council of the nations, and the descendants of those appearing on such rolls," and certain others specified who had been lawfully added to the rolls. By the Curtis Act of June 28, 1898 (30 Stat. at L. 495, 502, chap. 517), the Commission was authorized and directed to make correct rolls of the citizens by blood of the Creek Tribe, eliminating from the tribal rolls such names as might have been placed thereon by fraud or without authority of law, enrolling such only as might have lawful right thereto, and their descendants born since such rolls were made. It was provided that the Commission should make such rolls descriptive of the persons thereon,

so that they might be identified thereby, and the Commission was authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls, with the right of access to all rolls and records of the several tribes, and with authority to administer oaths, examine witnesses, and send for persons and papers. The rolls so made, when approved by the Secretary of the Interior, were to be final, and the persons whose names were found thereon, with their descendants thereafter born to them, with such persons as might intermarry according to tribal laws, were alone to constitute the several tribes which they represented. By § 28 of the Creek Agreement of March 1, 1901 (31 Stat. at L. 861, 870, chap. 676), it was provided that all citizens who were living on the 1st day of April, 1899, entitled to be enrolled under the above provisions of the Curtis Act, should be placed upon the rolls to be made by the Dawes Commission under that act, and provision was made for allotment to the heirs where any such citizen had died since that time. "The rolls so made by said Commission," the act continues, "when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons." This agreement was ratified by the Creek Council May 25, 1901 (32 Stat. at L. 1971).

The legislation which we have outlined indicates the purpose of Congress to make provision for the partition of the lands belonging to the Creek Nation among the members of the tribe, and to that end it authorized the Dawes Commission to make investigation and determine the names of such as were entitled to be on the rolls of citizenship and to participate in the division of the tribal lands. This purpose, indicated in the Curtis Act of 1898, was emphasized by the so-called Creek Agreement of 1901, subsequently ratified by the tribe. In that act the Commission was authorized to investigate the subject, and its action, when approved by the Secretary of the Interior, was declared to be final. There was thus constituted a quasi judicial tribunal whose judgments within the limits of its jurisdiction were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress, by this legislation, evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the

partition of the tribal lands. It was to the interest of all concerned that the beneficiaries of this division should be ascertained. To this end the Commission was established and endowed with authority to hear and determine the matter.

A correct conclusion was not necessary to the finality and binding character of its decisions. It may be that the Commission, in acting upon the many cases before it, made mistakes which are now impossible of correction. This might easily be so, for the Commission passed upon the rights of thousands claiming membership in the tribe and ascertained the rights of others who did not appear before it, upon the merits of whose standing the Commission had to pass with the best information which it could obtain.

When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think it was the intention of the act that the matter, upon the approval of the Secretary, should be finally concluded and the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake.

We cannot agree that the case is within the principles decided in *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108, and kindred cases, in which it has been held that, in the absence of a subject-matter of jurisdiction, an adjudication that there was such is not conclusive, and that a judgment based upon action without its proper subject being in existence is void. In *Scott v. McNeal* it was held that a probate court had no jurisdiction to appoint an administrator of a living person and to sell property in administration proceedings after finding that he was in fact dead. In that case it was held that a sale of the property of a living person by order of the probate court, without notice to him, necessarily deprived him of due process of law by selling his property without notice and by order of a court which had no jurisdiction over him in any manner. The notice in such cases to his next of kin, the court held, was not notice to him, and to make an order undertaking to deprive such person of his property would be to take it by a judgment to which the living person was not a party or privy; and it was held that jurisdiction did not arise from the mere finding of the court that the person whose property was thus taken was in fact deceased. In the present case the government had jurisdiction over these lands. It had the authority to partition them among the members of the tribe. *Shulthis v. Mc-*

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 Dougal, 95 C. C. A. 615, 170 Fed. 529, 534; McDougal v. McKay, 237 U. S. 372, 383, 59 L. ed. 1001, 1005, 35 Sup. Ct. Rep. 605.

*For this purpose it determined to divide the lands among those living on April 1, 1899, and constituted a tribunal to investigate the question of membership and consequent right to share in the division. We think the decision of such tribunal, when not impeached for fraud or mistake, conclusive of the question of membership in the tribe, when followed, as was the case here, by the action of the Interior Department confirming the allotment and ordering the patents conveying the lands, which were in fact issued. If decisions of this character may be subject to annulment in the manner in which the government seeks to attack and set aside this one, many titles supposed to be secure would be divested many years after patents issued, upon showing that the decision was a mistaken one. The rule is that such decisions are presumably based upon proper showing, and that they must stand until overcome by full and convincing proof sufficient, within the recognized principles of equity jurisdiction in cases of this character, to invalidate them. Maxwell Land-Grant Case, 121 U. S. 325, 379, 381, 30 L. ed. 949, 958, 959, 7 Sup. Ct. Rep. 1015; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131.

As to the second contention, that the Commission acted arbitrarily and without evidence of the fact that Thlocco was living on April 1, 1899, there is no attack upon the finding of the Commission for fraud, and this record shows an earnest attempt to conform the rolls to the requirements of the law.

Thlocco's name appeared on the Tribal Rolls of 1890 and 1895 and on a census card made by a clerk of the Commission in 1897.

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 An enrolling clerk with the Dawes Commission testified that he entered the name of Barney Thlocco upon the census card on May 24, 1901; that at that time there were a great many names on the old rolls unaccounted for, and the party went to Okmulgee to get them to come out and get them enrolled; that a great many were brought in; *that Thlocco was one of those who were unaccounted for at that time, and the witness could not say whether his name was taken from the old census roll or whether someone appeared and asked for his enrolment; that after Thlocco's name was listed there was some investigation upon the question as to whether or not he was living or dead on April 1, 1899, but the Commission would have to be satisfied or have information of some kind that he was

living on that date; that the Commission knew that Thlocco was dead in 1901, and it apparently was satisfied that he was living on April 1, 1899; that they would ask town kings and town warriors when they came in and anybody else if they knew this or that about the applicants; that because of a discrepancy between the ages of Thlocco on the census cards they must have had some information other than the old census card; that the invariable custom and practice was never to fill out one of the cards until they had some information from some source with reference to the question as to whether the applicant was living or whether he had died prior to April 1, 1899; that the Commission never arbitrarily listed any name; that no name was listed solely because it was on the Roll of 1895, but some particular individual evidence was required outside of that roll; that before the new rolls were sent to Washington the clerks and the chairman of the Commission would get together and go over every one of them.

The clerk who made out the census card in 1897 testified that, as chief clerk of the Commission, he helped in the enrolment; that a notation on the census card, "died in 1900," was in his handwriting, but that he did not know who had given him the information or what use was made of the notation, except that it was intended that when the Commission came to pass on that name for final record on the roll, an inquiry should be made as to when Thlocco²¹ died or whether he was dead, and get the proper affidavit*and death proof; that the²¹ Commission did not arbitrarily enroll any Creek citizen without evidence, and that in every single case if the applicant did not appear, someone who was regarded as reliable appeared for him and gave evidence until the Commissioner was satisfied that he belonged on the roll; that whenever any question was raised by the Creek Nation or its attorney with reference to the right to enrolment, or for any reason as to whether the applicant was living or dead, there was generally testimony taken in those cases; that with reference to those people whose names up to March, 1901, had not been accounted for, there were lists of those made and sent to the various town kings and various inquiries were made that way and report came back; that sometimes the party addressed came in and gave verbal testimony, and if it seemed clear to the Commission it was probably not reduced to writing; that if there was any question with reference to the matter it probably was reduced to writing; that the Commission had to be satisfied from the records; that the Commission never passed upon a card until it was completed; that the information may

have been picked up piecemeal over a year or two, but the Commission was satisfied that the party was entitled to enrolment, and the records were made up for the purpose of the information of the Commission, and to show such information as was necessary to enable the Commission to reach a decision.

One of the enrolling clerks at Okmulgee testified that if information was present that a name was entitled to go on the rolls, the roll was completed at Okmulgee; that if the Commission did not have this information they did not complete it; that the fact that Barney Thlocco's card was completed at Okmulgee indicated that the party who wrote the card was satisfied that Thlocco was living on April 1, 1899, and satisfied from evidence; that there was in all cases some evidence as to whether the citizen* was living or dead on April 1, 1899, before the rolls were recommended to the Secretary of the Interior.

The acting chairman of the Dawes Commission testified that they did not, to his knowledge, ever enroll any man without taking some evidence, information, or eliciting knowledge from some source other than the tribal rolls that he was entitled to be enrolled, and it was never permitted to be done; that the purpose was to find out whether a man was entitled to enrolment, and one of the factors in that determination was whether he died prior or subsequent to April 1, 1899; that he always ascertained that fact before he enrolled the applicant, and always satisfied his mind on that subject by evidence outside of the roll; that every name sent in to the Department of the Interior as a name to be enrolled and which had been enrolled as a member of the Creek Tribe had been investigated by some member of the Commission at some place and by evidence outside of the rolls, and a determination had been reached that that person was entitled to enrolment; that he undoubtedly satisfied himself from an examination of Thlocco's card whether Thlocco was living on April 1, 1899; that in securing information the Commission had the assistance of the best men in the tribes as well as its own field parties; that when he would take the card he would have the card and the clerk would have the schedule, and he went over it several times with the clerks, and would find out from the clerk all the information the clerk had with reference to that card several times.

It is true, as set forth in the certificate upon which this case was originally sent here, in view of § 28 of the original Creek Agreement, providing that no person except as therein provided should be added to the rolls of citizenship of the tribe after the

date of the agreement, and no person whomsoever should be added to the rolls after the ratification of the agreement, which was ratified on May 25, 1901, that the tribe assembled at Okmulgee,* its capital, some days before that date, for the purpose of considering and acting upon the agreement, and that there was great activity some time before the ratification upon the part of the Dawes Commission and its officers and clerks to complete the enrolment of the tribe; and it is shown that Thlocco's enrolment card was made out at Okmulgee on the 24th day of May, 1901,—the last day before the ratification of the agreement. It is also true that, in the testimony as adduced in this record, there was, as naturally would be the case, a lack of recollection as to the details which attended the enrolment of Thlocco. But there is evidence to which we have already alluded, showing the practice of the Commission to make inquiries and investigations and to ascertain the facts as to the persons enrolled, and that no person was enrolled without information that was deemed satisfactory at that time. The Commission had before it the tribal rolls of 1890 and 1895. The latter roll was made out some six years before the action of the Commission, and in the absence of proof of Thlocco's death or some circumstances to give rise to the conclusion that he was not still living, the Commission might well indulge the presumption that he was still alive. *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 316, 46 L. ed. 922, 929, 22 Sup. Ct. Rep. 662.

It is true that the methods followed by the Commission may not have been the most satisfactory possible of determining who were entitled to enrolment as living persons on April 1, 1899, but it must be remembered that there were many persons whose right to enrolment was being considered, and the Commission in good faith made an honest endeavor to keep the names of persons off the rolls who were not entitled to appear as members of the tribe upon the date fixed by Congress. We think the testimony very far from showing such arbitrary action on the part of the Commission in placing Thlocco's name on the rolls as would establish that mistake of law or fact* which is essential to the impeachment of the action of the Commission. This action was brought fourteen years after the enrolment of Thlocco, and the allotment to him, based on such enrolment, should not be disturbed except for good and sufficient reasons.

It is not contended by the government that the subsequent action of the Secretary in striking Thlocco's name from the rolls had the legal effect to accomplish that purpose. Such is the contention of the inter-

veners. The testimony shows that Thlocco was enrolled by the Commission on May 24, 1901, that the allotment was made and the certificate therefor issued on June 30, 1902, and that patents were recorded in the office of the Commission on April 11, 1903, the allotment certificate issued in the name of Thlocco. On August 25, 1904, the Commission transmitted to the Secretary of the Interior a communication from the Creek attorney in the nature of a motion to reopen the matter. On September 16, 1904, the Secretary of the Interior ordered further investigation, and directed that notice be given to the heirs of Thlocco of the hearing. The heirs of Thlocco were not found, and no notice was given them of the proposed hearing. On October 10, 1906, the Commission reported that the testimony showed that Thlocco died before April 1, 1899, and recommended that his name be stricken from the roll. On December 13, 1906, the Secretary directed that Thlocco's name be stricken from the roll, and requested the Attorney General to take action to set aside the allotment deeds. We think this action entirely ineffectual to annul the previous action of the government in placing Thlocco's name upon the roll and issuing in his name the certificate and patents as we have stated. Such action could not be legally taken without notice to the heirs, and was void and of no effect. *Garfield v. United States*, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; *Knapp v. Alexander-Edgar Lumber Co.* 237 U. S. 162, 169, 59 L. ed. 894, 899, 35 Sup. Ct. Rep. 515. In *United States ex rel. Lowe v. Fisher*, 223 U. S. 95, 56 L. ed. 364, 32 Sup. Ct. Rep. 196, the Secretary of the Interior, in striking names from the roll of Cherokee citizens, acted after notice and opportunity to be heard.

The fact that Thlocco was dead at the time deeds were issued in his name would not prevent the title from vesting in his heirs. Section 28 of the Act of March 1, 1901 (31 Stat. at L. 861, 870, chap. 676), provides that "if any such citizen has died since that time [April 1, 1899] or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly." The effect of this provision is to vest title in the heirs by operation of law. *Skelton v. Dill*, 235 U. S. 206, 207, 208, 59 L. ed. 198, 199, 35 Sup. Ct. Rep. 60.

As to the contention that the lands were not selected by Thlocco, and that he was one of those arbitrarily placed upon the

rolls, we think it was within the authority of the Commission to enroll members of the tribe who, for any reason, refused to make selections; for the statute (§ 3, 31 Stat. at L. 861, 862, chap. 676) provides that "all lands of the said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the government survey—which may be selected by him so as to include improvements which belong to him." While citizens were thus permitted to make their selections for the purpose of retaining improvements, it seems clear that in case any citizen failed to avail himself of this right, it was permissible for the Commission to make the allotment.

We think the district court rightly ruled that the government had not offered evidence competent to impeach the validity of the Commission's action and thus to invalidate the title subsequently conveyed by the patent to Thlocco with the approval of the Interior Department.

It follows that the decree of the District Court, dismissing the bill, should be affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

(24 U. S. 127)

BALTRUS S. YANKAUS, Plff. in Err.,

v.

MOSES FELTENSTEIN and Abraham
Rosenstein.

COURTS ~~394~~(22)—ERROR TO STATE COURT
—SCOPE OF REVIEW—REMAND OF CAUSE
BY FEDERAL COURT.

A judgment of a state court, entered after that court had set aside the removal of the cause to a Federal district court, and a subsequent order denying a motion to set aside such judgment, and an order of an appellate state court, affirming such judgment and order, are not open to review in the Federal Supreme Court by writ of error, where the Federal district court, having first made an order enjoining, until further notice, further proceedings in the state courts, afterwards remanded the cause to the state court on the ground that the requisite jurisdictional amount was not involved. Such writ of error is practically an attempt to review, contrary to U. S. Judicial Code, § 28 (Act March 3, 1911, c. 231, 36 Stat. [Comp. St. 1916, § 1010]) the order of a Federal district court, remanding the cause as having been improperly removed.

[No. 407.]

Argued and submitted April 10, 1917. Decided May 21, 1917.

IN ERROR to the City Court of New York City, in the State of New York, to review a judgment of that court, entered in a suit which had been removed to a Federal District Court, and to review a further order denying a motion to set aside such judgment, and an order of the Appellate Term of the Supreme Court of the State, which affirmed both order and judgment. Affirmed.

The facts are stated in the opinion.

Messrs. Jesse C. Adkins, Roger Foster, and Frank J. Felbel for plaintiff in error.

Mr. Jacob W. Hartman for defendants in error.

*Mr. Justice Day delivered the opinion of the court:

This a writ of error, bringing into review a judgment of the city court of the city of New York and an order of that court denying a motion to set aside this judgment, and an order of the appellate term of the supreme court of the state of New York, which affirmed the order and judgment.

The action was brought in the city court by Feltenstein and Rosenstein, hereinafter called the plaintiffs, to recover a contingent counsel fee of \$500 from Yankaus, hereinafter called the defendant, and for loans of \$200 and \$100 respectively,—in all, the sum of \$800. Summons and complaint were served on October 11, 1915. On October 16, 1915, the defendant filed in the office of the clerk of the city court petition and bond for the removal of the cause to the United States district court for the southern district of New York. The bond was approved by a judge of the city court. Notice of the intention to file petition and bond was served on the plaintiffs on October 15, 1915. The ground for removal was diversity of citizenship, and it was averred that the petitioner had a counterclaim exceeding the sum of \$3,000, exclusive of interest and costs, and that therefore the matter and amount in dispute in the case exceeded that sum. On October 20, 1915, a certified copy of the record was filed in the office of the clerk of the United States district court for the southern district of New York, and an answer was filed setting up the invalidity of the agreements upon which plaintiffs' cause of action was based and asserting a counterclaim.

On October 16, 1915, plaintiffs moved in the city court for an order setting aside the bond and the removal of the cause to the United States district court, and directing that the city court retain jurisdiction. This motion came on to be heard

before a judge of the city court on October 20, 1915, and resulted in an order setting aside the removal and determining that the action was not entitled to be removed. This decision was made upon the basis that the counterclaim could not be considered in determining the amount in dispute, in so far as to give the Federal court jurisdiction. Judgment was entered on October 26, 1915, for plaintiffs. From this order and judgment appeal was taken to the supreme court, appellate term. Thereupon, the defendant moved in the United States district court for the southern district of New York for an order restraining the plaintiffs from proceeding to the enforcement of the judgment. The matter was heard before Judge Iacombe, sitting as district judge, and on November 4, 1915, he issued an order restraining the plaintiffs until further order, made on proper notice and motion to remand, from in any way proceeding with or prosecuting their cause of action in the city court, or from collecting anything under any judgment entered therein. Subsequently plaintiffs moved in the United States district court for the southern district of New York for an order remanding the case to the state court. This motion came on for hearing before Judge Hough, who granted the motion to remand, and an order remanding the cause to the city court was made on the 15th day of November, 1915. The defendant afterward moved in the city court to set aside the judgment rendered while it was alleged the suit was pending in the United States court, which motion was denied.

Appeal was thereupon taken to the supreme court, appellate term, and the judgment and the order setting aside the removal and declaring that the case was still in the city court were both affirmed. Motion was made by the plaintiffs to dismiss the appeal upon the ground *that the order denying the defendant's motion to vacate the judgment had become academic by the affirmance of the order setting aside the removal. The appeal was dismissed by the appellate term. Defendant thereupon applied to the appellate term for leave to appeal to the appellate division from the order affirming the order of the city court, setting aside the removal of the action, and from the judgment entered by the plaintiffs while the action was in the Federal court, and also from the dismissal of the appeal from the order refusing to vacate this judgment. Both motions were denied. Defendant then applied to a justice of the appellate division, first department, for an order permitting him to take appeals, and these applications were denied. In these applications the defendant set forth that he had

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been denied rights asserted by him under the Constitution and statutes of the United States. Afterwards a writ of error was allowed to this court.

As we view this case, we think the judgment of the court below must be affirmed, as this proceeding is practically an attempt to review an order remanding a cause attempted to be removed to the district court of the United States. Section 28 of the Judicial Code [36 Stat. at L. 1095, chap. 231, Comp. Stat. 1916, § 1010] provides that "whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed." After the filing of the transcript in the United States district court the matter came on for hearing before Judge Lacombe, and it was ordered that until the further order of the court the plaintiff should be enjoined and restrained from proceeding in the city court, or from collecting in any manner any judgment entered therein. Accompanying this order Judge Lacombe wrote the following memorandum:

"Jurisdiction is too doubtful to warrant this court in retaining the cause. *Crane Co. v. Guanica Centrale*, 132 Fed. 713. Plaintiff's proper course would have been to make a motion to remand. This he may now do. When such motion is made and granted the cause may proceed there; it is now here. Plaintiffs in the meanwhile may be enjoined (until remand is made) from proceeding further in the state court."

We think the effect of this order, read in the light of the opinion, simply manifested the purpose of the court to prevent proceedings while the question of the jurisdiction of the United States court was pending, and did not amount to a decision that that court had jurisdiction. It is true that an order of injunction was granted; but it is apparent from a reading of Judge Lacombe's memorandum that his purpose was merely to enable the district court to hold the case until it decided the question of its jurisdiction. Afterwards the motion came up in the United States district court, in which an opinion was delivered by Judge Hough, wherein he said:

"When this matter was argued the record on removal was not in court. If it had been the motion would not have been held until now. The opinion of Judge Lacombe in *Crane Co. v. Guanica Centrale*, 132 Fed. 713, merely states what for many previous years

had been the practice of this court,—i. e., doubtful cases were always remanded.

"Rulings of this nature are admittedly unsatisfactory. Counsel and parties are entitled to a clear-cut statement of the law if it is possible to make one; and it would seem as if the removal acts were sufficiently old by this time to enable a court to select what appeared to be the best of conflicting rules.

"Since no case (irrespective of amount²⁰ involved) can*be removed over which the²¹ United States court might not have had original jurisdiction, it has always seemed to me illogical to consider a counterclaim in ascertaining the propriety of removal or remand.

"In the state of New York there is no compulsion on a defendant to set up a counterclaim. It is always optional with the party possessing it to reserve his affirmative demand for an independent suit.

"Imagine this action brought originally in this court; the defendant would only have been obliged to appear and move on the pleadings to dismiss the complaint without prejudice. Such a motion would have been granted as of course.

"Thus it appears that an action of the most trifling nature may (under defendant's contention) be removed to this court at the option of defendant if he can assert a counterclaim of sufficient size. That this was never the intent of the statute I am clear. Considering, however, the confusion of decisions, and (so far as I know) the failure of late years to observe the difference between the Act of 1875 [18 Stat. at L. 470, chap. 137] and that of 1888 [25 Stat. at L. 433, chap. 866, Comp. Stat. 1916, § 991(1)], I should have felt impelled to consider and classify decisions were it not for the consideration next to be stated. If it be true that, by a preponderance of rulings, the affirmative claims set up in an answer are to be considered in determining jurisdiction, it is at least necessary that somewhere and in some shape the defendant who sets up counterclaims shall plead them in a manner which enables his opponent to criticize them, modify them, or expunge them, as may be proper under the rules of good pleading.

"In this case, and in any similar case under the Act of 1888, there is no answer. The only knowledge that to this moment plaintiff has regarding defendant's counterclaim is continued in the petition for removal,—the language of which petition sets forth no reason whatever for the recovery by the defendant from the plaintiff²² of any*sum of money at all. The petition²³ says in substance that the defendant has a counterclaim, without stating what it is.

Whatever may be the preferred rule, when in a proper and formal manner the amount in controversy between the parties is made to appear and shown to exceed \$3,000, exclusive of interest and costs, I feel justified in holding, and do hold, that it is impossible to show that such controversial amount exists in any such manner as this defendant has attempted."

For the reasons stated, the case was remanded to the city court. We think these orders, with the accompanying memoranda and opinion, taken together, show that the district court denied its jurisdiction, and remanded the cause to the city court. In this attitude of the case, the judgment of the state court must stand, as the effect of the orders of the district court was to hold the attempted removal unauthorized. This court has more than once held that such an order is not subject to review, directly or indirectly, but is final and conclusive. *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 580-583, 40 L. ed. 536, 542, 543, 16 Sup. Ct. Rep. 389; *McLaughlin Bros. v. Hallowell*, 228 U. S. 278, 286, 57 L. ed. 835, 839, 33 Sup. Ct. Rep. 465; *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440, 447, 60 L. ed. 1084, 1096, 36 Sup. Ct. Rep. 637.

Nor are we able to find anything in the conduct of the plaintiffs estopping them from contesting the jurisdiction of the Federal court, or amounting to a waiver of their right to the benefit of the judgment remanding the case from the district court.

It follows that the judgment of the City Court of the City of New York must be affirmed.

Mr. Justice Pitney concurs in the result.

(244 U. S. 134)

JOSEPHINE B. LEWIS, Executrix of the
Estate of James Lewis, Deceased, Appt.,
v.

UNITED STATES.

PUBLIC LANDS ⇐22—IMPLIED REPEAL OF
ACT CREATING OFFICE.

1. The specific appropriation in the Sundry Civil Appropriation Act of March 4, 1909 (35 Stat. at L. 945, chap. 299), to enable the Secretary of the Interior to complete the unfinished drafting and field-note writing pertaining to surveys in the states of Minnesota, North Dakota, and Louisiana, "caused by the discontinuance of the offices of surveyors general in those states," is tantamount to a direct repeal of the Act of March 3, 1831 (4 Stat. at L. 492, chap. 116), creating the office of surveyor general of Louisiana, and had the effect of abolishing that office.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 29.]

OFFICERS ⇐100(2)—COMPENSATION—FEES.

2. The surveyor general of Louisiana may not claim as his personal property fees exacted by him under the authority of the Act of March 3, 1831 (4 Stat. at L. 492, chap. 116), § 5, for furnishing copies of plats of surveys and transcripts from the records of his office, since the prohibition of U. S. Rev. Stat. § 1765, Comp. Stat. 1916, § 3234, declaring that "no officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation," cannot be regarded as inapplicable on the theory that these fees were emoluments "fixed by law" by reason of the Act of April 21, 1806 (2 Stat. at L. 391, chap. 39), § 9, giving such fees to the principal deputy surveyors for the territory of Orleans, and of the Act of March 3, 1831 (4 Stat. at L. 492, chap. 116), providing that the surveyor general of Louisiana shall have the same authority as such principal deputy surveyors.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 154.]

[No. 197.]

Submitted April 23, 1917. Decided May 21,
1917.

APPEAL from the Court of Claims to review a judgment dismissing a petition seeking to recover salary and fees alleged to be due to the Surveyor General of Louisiana. Affirmed.

See same case below, 50 Ct. Cl. 226.

Statement by Mr. Justice Day:

This suit was instituted by James Lewis, and revived upon his death by Josephine B. Lewis, as executrix, to recover the sum of \$2,000 salary claimed to be due him from the United States as surveyor general of Louisiana for the fiscal year beginning July 1, 1909, and ending June 30, 1910, and to recover the further sum of \$2,287.80, claimed to belong to him as perquisites of this office and paid over his protest into the Treasury of the United States between May 1, 1907, and June 30, 1909, at the direction of his superior officer, the Commissioner of the General Land Office,—a total of \$4,287.80, for which he prayed judgment.* The court of claims found for the United States on both items and dismissed claimant's petition (50 Ct. Cl. 226), and it is from this judgment that the appeal has been taken to this court.

From the findings of fact made by the

court of claims, the following appears: On or about January 18, 1905, James Lewis, who had previously held the office, was re-appointed and recommissioned surveyor general of Louisiana, and under this commission he administered the duties of the office continuously until July 15, 1909, on which date he was deprived of the possession and custody of the records and other property of the office by John H. Batchelor, a clerk detailed from the General Land Office of the United States and acting under directions from the Commissioner of the General Land Office, as will hereafter more fully appear.

On December 7, 1908, Lewis received a letter from the Commissioner of the General Land Office, dated December 5, 1908, in which the Commissioner informed him that it was proposed to discontinue the office of surveyor general for the district of Louisiana on June 30, 1909, and on or about May 13, 1909, he received a letter from the Commissioner, dated May 11, 1909, reading in part as follows:

"As the office of the surveyor general of Louisiana will be permanently closed and discontinued on July 1, 1909, the records thereof, excepting such as may be required for use in this office, will be turned over to the state of Louisiana when proper provision has been made by the legislature for their safe-keeping and providing for free access to them by the authorities of the United States, as provided by §§ 2218, 2220, and 2221, Revised Statutes (Comp. Stat. 1916, §§ 4451, 4453, 4454).

"As no provision has been made by the legislature for the reception of the records under the conditions above stated, it will become necessary to appoint a custodian of them on July 1, at a salary of \$1,000 per annum, who will retain them in his custody until the required law has been provided. . . ."

On or about June 19, 1909, Lewis received from the Commissioner a letter, as follows:

"As you have been verbally informed that Congress omitted to include an appropriation for the maintenance of your office, you are aware that it will be necessary to discontinue it after June 30 next.

"You are now advised that Mr. John H. Batchelor, of this office, has been detailed to visit your office and supervise the transfer of its records to the state building at Baton Rouge, Louisiana; also to select such of the records and government property as it is thought best should be moved to this city for use in this office. You are directed to furnish him all facilities for carrying out this purpose and give him such assistance as he may need.

"It is assumed that you have already prepared an inventory of the records and property, which will be verified by Mr. Batchelor.

"The state authorities having failed to provide by legislation for the custody and care of the records which by law are to be turned over to them, it will be necessary, pending the enactment of suitable provision for a place for the records, to give the same in charge of a custodian. Mr. Arthur Gascon, of your office, has been selected for this office, and he will receipt to Mr. Batchelor for the records by schedule.

"Property which is not a part of the records, such as furniture not belonging to the Treasury Department, and stationery, including surveying instruments, drafting instruments, etc., will be examined by Mr. Batchelor, and that which is serviceable and can be transported profitably to this city will be boxed up for transmission. The remainder will be stored and advertised for sale at auction, either under Mr. Gascon or other officer, or turned over to the local land office.

* "Mr. Gascon will be instructed separately."

Pursuant to the plan outlined in this letter, on June 19, 1909, Batchelor, a clerk detailed from the General Land Office, acting under instructions from the Commissioner, dated June 17, 1909, arrived at the surveyor general's office in New Orleans, Louisiana, and assumed supervision of the closing of that office and the disposition of the records and other property therein, caused inventories of said records and other property to be made, and, on July 15, 1909, the same having been completed, took said records and property out of the possession and custody of Lewis and gave to him a formal receipt therefor. Thereafter, on the same day, Batchelor, acting under his instructions, turned over the records and other property of the office to Arthur Gascon, formerly chief clerk in the office of the surveyor general, as custodian thereof, Gascon having been appointed custodian thereof by the Secretary of the Interior on June 16, 1909, to take effect July 1, 1909, the appointment being in the following language:

"Arthur Gascon, of Louisiana, is hereby appointed custodian of the documents and records pertaining to the office of the surveyor general of Louisiana upon the discontinuance of that office, at a salary of \$1,000 per annum, to take effect upon July 1, 1909.

"Salary payable from the appropriation for completing field notes, etc., of surveys in Minnesota, North Dakota, and Louisiana.

"By transfer from chief clerk, office of surveyor general of Louisiana."

On January 9, 1915, the President issued the following order:

The Secretary of the Interior.

Sir:—

*132 The action of the Interior Department in discontinuing the office of the United States surveyor general for the district of Louisiana from and after June 30, 1909, as shown by the letters of the Commissioner of the General Land Office to James Lewis, surveyor general of Louisiana, dated December 5, 1908, and May 11, 1909, and the appointment by the Secretary of the Interior, under date of June 16, 1909, of Arthur Gascon as custodian of the records of the office of the surveyor general of Louisiana, to take effect July 1, 1909, copies of which letters and appointment are hereto attached, is hereby ratified and confirmed.

Woodrow Wilson, President.

The records of the surveying district of Louisiana were not completed on June 30, 1909, or on July 15, 1909, and the state of Louisiana did not provide by law for the reception and safe-keeping as public records of the field notes, maps, records, and other papers appertaining to land titles in said state, which belonged to the office of United States surveyor general of Louisiana, and for the free access to the same of the authorities of the United States, until June 10, 1910, on which day the governor of the state approved an act of the general assembly known as Act No. 6 of the Session Acts of the general assembly of the state of Louisiana for the year 1910, and passed for that purpose. Acting under authority which was vested in him for that purpose by this act of the general assembly, Fred J. Grace, register of the state land office of Louisiana, on June 30, 1910, formally receipted to Gascon, custodian as aforesaid for the records of the United States surveyor general's office of Louisiana, for the plats, field notes, books, papers, etc., constituting the records of said office, and on that day Gascon, for and in behalf of the United States, formally delivered the said records to the state of Louisiana in the person of its duly authorized representative, Fred J. Grace.

*133 For the period beginning July 1, 1909, and ending June 30, 1910, both inclusive, Lewis received no salary or compensation from the United States as surveyor general of Louisiana.

*During Lewis's period of service as surveyor general of Louisiana he furnished copies of plats of surveys and transcripts from the records of his office to various individuals requiring them, and asked and received therefor from such individuals fees,

as compensation for the service rendered in furnishing such copies and transcripts, in amounts equal to or less than those authorized in said § 5 of the Act of Congress approved March 3, 1831 (4 Stat. at L. 492, chap. 116) entitled, "An Act to Create the Office of Surveyor of the Public Lands for the State of Louisiana." Some of such copies and transcripts were certified by him under the seal of his office, and for such certifications he received from the individuals requiring the same fees at the rate of \$1 for each certificate and seal. From the time Lewis assumed the authority, powers, and duties of his office up to and including April 30, 1907, he retained as his personal property the fees received by him, construing said § 5 of the Act of March 3, 1831, as conferring upon him this right, in addition to and separate from his salary as surveyor general.

From the time the office of surveyor general for Louisiana was established up to the time Lewis last entered upon its duties, the incumbents of the office rendered similar services to individuals and received and retained fees for such services as their personal property, and in this construction of the Act of March 3, 1831, up to and including April 30, 1907, the Commissioner of the General Land Office and the Secretary of the Interior acquiesced.

Upon April 15, 1907, the Commissioner of the General Land Office issued a circular order to Lewis, requiring him to desist from retaining these fees as his personal property, and requiring him, when application should be made by individuals for exemplified copies of plats or other records in his office, to first furnish the applicant with a memorandum of the exact cost thereof at the rates*established by law for registers and receivers for like services, and to require said applicant to deposit the amount indicated in a United States depository to the credit of the Treasurer of the United States, and directing Lewis, after that should have been done, to furnish the copies and transcripts ordered. *140

Lewis protested against this order in a letter to the Commissioner dated May 3, 1907, in which he informed the Commissioner that his office had hitherto based its charges for copies from its records upon § 5 of the Act of March 3, 1831; that the rates established by law for registers and receivers for furnishing such copies were not applicable to his office; and that the fees for furnishing such copies had been construed by the surveyor general of Louisiana as perquisites allowed to him, as appeared from the correspondence of his office with the General Land Office as far back as 1860. To this letter the Commissioner

replied, on May 9, 1907, that the Act of March 3, 1831, being unrepealed, Lewis should continue to charge the fees established under the act, to the extent of which direction the circular order of April 15, 1907, stood modified as far as Lewis's office was concerned, but that all fees of whatever nature received from parties desiring copies of the records must be covered into the Treasury, and the practice of receiving them as personal property be discontinued.

Upon receipt of this letter, Lewis addressed a second letter of protest to the Commissioner. The Commissioner replied, on May 31, 1907, that his order of April 15, 1907, was considered to be in the interest of good administration and must be strictly observed.

Under this order of April 15, 1907, there was deposited in the United States subtreasury at New Orleans, by individuals in payment for copies furnished by the surveyor general's office from May 1, 1907, to June 30, 1909, inclusive, the sum of \$635.65.

On October 19, 1907, the Commissioner issued to Lewis ¹⁴¹a further circular order relative to these fees, modifying the circular order of April 15, 1907, and requiring him thereafter, when application should be made to him by individuals for exemplified copies of plats or other records in his office, to first furnish the applicant with a memorandum of the exact cost thereof, to require the applicant to pay such cost to him, as surveyor general, and upon receipt of the amount to prepare the copies desired, and to deposit the aggregate amount thus received each week to the credit of the Treasurer of the United States on account of "Receipts for furnishing copies of records," and to forward the duplicate certificates of deposit to the office of said Commissioner in Washington.

Upon receipt of this circular order, Lewis wrote another letter of protest to the Commissioner.

Under the circular order of October 19, 1907, Lewis deposited in the United States subtreasury at New Orleans, to the credit of the Treasurer of the United States, between May 1, 1907, and June 30, 1909, inclusive, the sum of \$1,652.15, received by him as fees from individuals.

The sums deposited by individuals or by Lewis, from May 1, 1907, to June 30, 1909, inclusive, aggregate the sum of \$2,287.80, no part of which has ever been received by Lewis from the United States.

Messrs. L. Russell Alden and Edward F. Colladay for the appellant.

Assistant Attorney General Thompson for appellee.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court:

Section 2207 of the Revised Statutes (Comp. Stat. 1916, § 4435) provided for the appointment of a surveyor general for the surveying*district of Louisiana; § 2208 fixed his salary at the sum of \$2,000 a year; § 2217 (Comp. Stat. 1916, § 4450) fixed the term of office at four years from the date of the commission unless the incumbent should resign, die, or be removed from office within that period.

The claimant insists that Lewis was entitled to the salary of the office for the year ending June 10, 1910, notwithstanding the facts found by the court of claims as to the discontinuance of the office, as it was not until that date that the state of Louisiana duly provided for the reception and safe-keeping of the papers and records of the office, which were delivered by the custodian to the state on June 30, 1910.

Sections 2218, 2219, 2221, and 2222 of the Revised Statutes (Comp. Stat. 1916, §§ 4451, 4452, 4454, 4456), provided as follows:

"2218. The Secretary of the Interior shall take all the necessary measures for the completion of the surveys in the several surveying districts for which surveyors general have been, or may be, appointed, at the earliest periods compatible with the purposes contemplated by law; and whenever the surveys and records of any such district are completed, the surveyor general thereof shall be required to deliver over to the secretary of state of the respective states, including such surveys, or to such other officer as may be authorized to receive them, all the field notes, maps, records, and other papers appertaining to land titles within the same; and the office of surveyor general in every such district shall thereafter cease and be discontinued.

"2219. In all cases where, as provided in the preceding section, the field notes, maps, records, and other papers appertaining to land titles in any state are turned over to the authorities of such state, the same authority, powers, and duties in relation to the survey, resurvey, or subdivision of the lands therein, and all matters and things connected therewith, as previously exercised by the surveyor general, whose district included such state, shall*be vested in and*devolved upon, the Commissioner of the General Land Office."

"2221. The field notes, maps, records, and other papers mentioned in section twenty-two hundred and nineteen shall in no case be turned over to the authorities of any state, until such state has provided by law for the reception and safe-keeping of the

same as public records, and for the allowance of free access to the same by the authorities of the United States.

"2222. Every surveyor general, register, and receiver, except where the President sees cause otherwise to determine, is authorized to continue in the uninterrupted discharge of his regular official duties, after the day of expiration of his commission, and until a new commission is issued to him for the same office, or until the day when a successor enters upon the duties of such office; and the existing official bond of any officer so acting shall be deemed good and sufficient, and in force, until the date of the approval of a new bond to be given by him, if recommissioned, or otherwise, for the additional time he may so continue officially to act, pursuant to the authority of this section."

It is the contention of the government that the action of the Secretary of the Interior with the approval of the President had the effect to discontinue the office as of July 1, 1909, and that in fact the office of surveyor general was discontinued after June 30, 1909. In the Sundry Civil Appropriation Act of March 4, 1909 (35 Stat. at L. 945, 987, chap. 299), it was provided:

"To enable the Secretary of the Interior to complete the unfinished drafting and field note writing pertaining to surveys in the states of Minnesota, North Dakota, and Louisiana, caused by the discontinuance of the offices of the surveyors general in those states, six thousand five hundred dollars."

And in the appropriation bill for that year Congress* made no provision, such as had been customary in former years, for salaries of these officials.

The court of claims held that this act was effectual to abolish the office of surveyor general for Louisiana. We deem that a correct conclusion. It is true that repeals by implication are not favored. The repugnancy between the later act upon the same subject and the former legislation must be such that the first act cannot stand and be capable of execution consistently with the terms of the later enactment. As we view it, such conflict does appear in this instance.

It must be assumed that Congress was familiar with the action of the executive department undertaking to terminate the office, and when Congress acted upon the assumption that the office was abolished, and provided for the unfinished work pertaining to the surveys, "caused by the discontinuance" of the office, such action was tantamount to a direct repeal of the act creating the office and had the effect to abolish it.

As to the part of Lewis's claim which is for fees, it is alleged in his petition, and found to be a fact by the court of claims,

that during the entire period of his service as surveyor general he furnished copies of plats of surveys and transcripts from the records of his office to various individuals requiring them, receiving therefor compensation as authorized by § 5 of the Act of Congress of March 3, 1831 (4 Stat. at L. 492, chap. 116), which is as follows:

"The surveyor general . . . shall be allowed an annual salary of two thousand dollars . . . and that the fees heretofore authorized by law for examining and recording surveys be, and the same are hereby, abolished; . . . and for every copy of a plat of survey, there shall be paid twenty-five cents, and for any transcript from the records of said office, there shall be paid at the rate of twenty-five cents for every hundred words by the individuals requiring the same."

*It had been the custom of Lewis and his predecessors in office to retain these fees as their personal property; but by virtue of an order from the Commissioner of the General Land Office, the amounts realized from these fees between May 1, 1907, and June 30, 1909, being \$2,287.80, were paid into the Treasury of the United States. It is appellants' contention that this amount is now due and owing Lewis's estate, under the terms of § 5 of the Act of March 3, 1831, above quoted, interpreted in the light of established custom.

Section 1765 of the Revised Statutes (Comp. Stat. 1916, § 3234) provides:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

Claimant contends that this section shows no intention to interfere with the enjoyment of any emoluments already fixed by law, as the additional compensation, the receipt of which it prohibits, is compensation additional to "salary, pay or emoluments . . . fixed by law or regulations." To establish that these fees were emoluments fixed by law, the claimant points to the Act of April 21, 1806 (2 Stat. at L. 391, chap. 39), by § 9 of which it is provided:

"The surveyor of the public lands, south of Tennessee, be, and he is hereby directed to appoint a principal deputy for each of the two land districts of the territory of Orleans . . . and each of the said principal deputies shall receive an annual compensation of five hundred dollars, and in

*146 addition thereto, the following fees, that is to say: for examining and recording the surveys executed by any of the deputies, at the rate of twenty-five cents for every mile of the boundary line of such survey; and for a certified copy of any plat of a survey in the office, twenty-five cents."

This, read in connection with the Act of March 3, 1831, is the foundation of this claim. The Act of 1831 provides that the surveyor general of the state of Louisiana shall have the same authority, and perform the same duties, as are vested in and required of the surveyor of the lands of the United States, south of the state of Tennessee, or of the principal deputy surveyors in the said state.

We are of opinion that § 1765 of the Revised Statutes (Comp. Stat. 1916, § 3234), above quoted, prevents the allowance of the claim for fees. This section is general in its application, and fixes the compensation of officers of the United States at the salary established by law, unless the additional compensation is authorized and explicitly appropriated for. No such law or appropriation is shown in this case. The Act of March 3, 1831, made no disposition of the fees. After May, 1907, the Department required them to be paid into the Treasury. The Court of Claims correctly ruled that § 1765 (Comp. Stat. 1916, § 3234) controlled this part of the claim of appellant.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

(244 U. S. 100)

E. I. DU PONT DE NEMOURS POWDER COMPANY and Du Pont Fabrikoid Company, Petitioners,

v.

WALTER E. MASLAND et al.

INJUNCTION  56—AGAINST DISCLOSURE OF TRADE SECRETS.

Defendant in a suit to prevent the use or disclosure of secret trade processes, the knowledge of which was acquired by him while in the plaintiffs' employ, may be enjoined from disclosing any of such alleged processes to experts or witnesses produced during the taking of proofs,—excepting defendant's counsel,—it being understood that if, in the opinion of the trial judge, it should become necessary to reveal the secrets to others, it will rest in his discretion to determine whether, to whom, and under what precautions the revelations should be made.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 110.]

[No. 210.]

Argued May 4, 1917. Decided May 21, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree which reversed a decree of the District Court for the Eastern District of Pennsylvania, enjoining defendant in a suit to prevent the use or disclosure of trade secrets, from disclosing such secrets to experts or witnesses produced during the taking of proof. Reversed and remanded for further proceedings.

See same case below, 140 C. C. A. 229, 224 Fed. 689.

The facts are stated in the opinion.

Messrs. Edwin J. Prindle, Warren H. Small, John P. Laffey, and Kenneth S. Neal for petitioners.

Messrs. George Wharton Pepper, John G. Johnson, and Frank Smith for respondents.

*Mr. Justice Holmes delivered the opinion.^{*101} of the court:

This is a bill to prevent the defendant Walter E. Masland from using or disclosing secret processes the knowledge of which was acquired by the defendant while in the plaintiffs' employ. The defendant admits that he intends to manufacture artificial leather, to which some of the plaintiffs' alleged secret processes relate, but denies that he intends to use any inventions, trade secrets, or secret processes of the plaintiffs that he may have learned in any confidential relation, prefacing his denial, however, with the averment that many of the things claimed by the plaintiffs are well known to the trade. A preliminary injunction was refused at first. 216 Fed. 271. But before the final hearing the defendant proposed to employ^{*102} one or more experts and to make such disclosures to them as the preparation of the defense might require. Thereupon the district court issued a preliminary injunction against disclosing any of the plaintiffs' alleged processes to experts or witnesses during the taking of proofs, but excepting counsel, with leave to move to dissolve the injunction if occasion to consult experts arose. Later a motion to dissolve was denied and the hearing was continued for a decision by the appellate court. 222 Fed. 340. The circuit court of appeals reversed the decree. 140 C. C. A. 229, 224 Fed. 689. Before any further order was entered the writ of certiorari was granted by this court.

The case has been considered as presenting a conflict between a right of property and a right to make a full defense; and it is said that if the disclosure is forbidden to one who denies that there is a trade secret, the merits of his defense are adjudged against him before he has a chance to be

heard or to prove his case. We approach the question somewhat differently. The word "property" as applied to trademarks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them. These have given place to hostility, and the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations. If there is any disadvantage in the fact that he knew the plaintiffs' secrets, he must take the burden with the good.

*The injunction asked by the plaintiffs forbade only the disclosure of processes claimed by them, including the disclosure to experts or witnesses produced during the taking of proofs, but excepting the defendant's counsel. Some broader and ambiguous words that crept into the decree, seemingly by mistake, may be taken as stricken out and left on one side. This injunction would not prevent the defendant from directing questions that should bring out whatever public facts were nearest to the alleged secrets. Indeed, it is hard to see why it does not leave the plaintiffs' rights somewhat illusory. No very clear ground as yet has been shown for going further. But the judge who tries the case will know the secrets, and if, in his opinion and discretion, it should be advisable and necessary to take in others, nothing will prevent his doing so. It will be understood that if, in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made.

Decree reversed and case remanded for further proceedings in conformity with this opinion.

(244 U. S. 103)

NEVADA-CALIFORNIA-OREGON RAILWAY, Plff. in Err.,
v.

JOSEPH BURRUS.

COURTS —394(25)—ERROR TO STATE COURT
—FEDERAL QUESTION—HOW AND WHEN
RAISED.

The refusal of the highest state court

to interfere with the discretionary judgment of the trial court in refusing to permit the answer, in a suit for the breach of a carrier's contract to furnish a special interstate train, to be amended during the trial so as to set up that no tariff rate for special trains had been filed, and that, therefore, the contract was illegal, is not the denial of a Federal right which the Federal Supreme Court can review on writ of error, where this was the first time that the point had been presented in proper form under the state practice, although some months had elapsed since the beginning of the suit, and demurrers and other defenses had been interposed without suggesting this one, and it is clear that the state court's decision was not rendered in a spirit of evasion, for the purpose of defeating the claim of Federal right.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1077.]

[No. 237.]

Submitted April 30, 1917. Decided May 21, 1917.

IN ERROR to the Supreme Court of the State of Nevada to review a judgment which affirmed, after reducing damages, a judgment of the District Court of Washoe County, in that state, in favor of plaintiff in an action for the alleged breach of a carrier's contract to furnish a special train. Dismissed for want of jurisdiction.

See same case below, 38 Nev. 156, L.R.A. —, —, 145 Pac. 926, 8 N. C. C. A. 777.

The facts are stated in the opinion.

Mr. James Glynn for plaintiff in error.
Messrs. Sardis Summerfield and John E. Raker for defendant in error.

*Mr. Justice Holmes delivered the opinion of the court:

This is an action for breach of a contract to furnish plaintiff (defendant in error) a special train to carry him from Reno, Nevada, to Doyle, California, where his son was ill, and to bring the two back from that place. The plaintiff got a judgment, and the only question before us is whether any rights of the defendant under the Act to Regulate Commerce have been infringed. The ground on which such an infraction is alleged is that the trial court, after the trial had been going on for more than a day, refused to allow the answer to be amended so as to set up that no tariff rate for special trains had been filed by the defendant and that therefore the contract was illegal. The defendant had mentioned the point at the beginning of the trial, but this was the first time that it was presented in proper form under the state practice, although some months had elapsed since the beginning of the suit, and demurrers and

other defenses had been interposed without suggesting this one. The supreme court of the state declined to overrule the discretionary judgment of the court below. 38 Nev. 156, L.R.A.—, —, 145 Pac. 926, 8 N. C. C. A. 777.

Upon the question whether a claim of immunity under a statute of the United States has been asserted in the proper manner under the state system of pleading and practice "the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion, for the purpose of defeating the claim of Federal right." *Atlantic Coast Line R. Co. v. Mims*, 242 U. S. 532, 535, 61 L. ed. 476, 37 Sup. Ct. Rep. 188. The most that could be said in this case was that the supreme court was influenced in its judgment by the fact that the railroad, after treating the plaintiff very badly, was trying to escape liability by an afterthought upon a debatable point of law,—not at all by the fact that the law involved was Federal. The plaintiff had tried the case relying upon the presumption which was sufficient as the pleading stood. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. 1022, L.R.A.1917A, 265, 36 Sup. Ct. Rep. 555. The court reasonably might decline to put him to procuring other evidence from a distance, on the last day of the trial, upon a new issue presented after his evidence was in. We perceive no reason why this court should interfere with the practice of the state.

Writ of error dismissed.

The CHIEF JUSTICE and Mr. Justice Clarke dissent.

(244 U. S. 106)

J. SAM ROWLAND, William F. McKnight, and Thomas E. Wood, Railroad Commissioners of the State of Arkansas, Appts.,
v.

SIDNEY E. BOYLE, as Executrix of the Will of Wilbur F. Boyle, Deceased, and the St. Louis & San Francisco Railroad Company.

CARRIERS ⇨12(2)—PRESUMPTIONS—STATE REGULATION OF RATES.

1. In establishing local rates to be charged by an interstate carrier, a state must be assumed to intend to confine its action within the limits set by the Federal Constitution, and not to seek an unjust advantage from the difficulty of dividing expense and income between intrastate and interstate business.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 8, 15-20.]

EVIDENCE ⇨318(3) — IN RATE CASES — HEARSAY EVIDENCE.

2. The figures introduced by an inter-

state carrier in evidence on the issue whether rates fixed by a state for intrastate traffic are confiscatory will not, on appeal, be held to have been inadmissible as hearsay, where the carrier adopted the only practicable mode of presenting its results, and exhibited its work sheets and data to the adverse parties, and where the returns were made by the employees in the course of their business, and if the adverse parties had desired to question any of the data they could have called for further verification.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1195.]

CARRIERS ⇨12(7) — SUFFICIENCY — RATE REGULATION.

3. Results obtained from investigations of an interstate carrier during the months of November and December as a test period afford a basis for argument as to constant conditions upon the issue whether the rates fixed by the Arkansas Railroad Commission for intrastate traffic are confiscatory.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 15-20.]

APPEAL AND ERROR ⇨1027 — IN RATE CASES—ERRORS NOT CHANGING RESULT.

4. A decree enjoining the enforcement of intrastate rates fixed by a state for an interstate carrier as being confiscatory will not be disturbed on appeal because of errors which would not change the result.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033.]

APPEAL AND ERROR ⇨1026—IN RATE CASES—FAILURE TO ALLOW FOR SUPPOSED INCREASE IN TRAVEL.

5. Failure to allow for the increase of travel that will follow the reduction in rates does not require the reversal of a decree enjoining the enforcement of state regulation of the rates for intrastate traffic on an interstate carrier as confiscatory, where the record makes such supposed increase at best a guess.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4029, 4030.]

[No. 252.]

Argued February 24 and 25, 1916. Restored to docket for reargument June 12, 1916. Reargued May 1 and 2, 1917. Decided May 21, 1917.

APPEAL from the District Court of the United States for the Eastern District of Arkansas, to review a decree enjoining the enforcement of rates fixed by the State Railway Commission for intrastate traffic on an interstate carrier. Affirmed.

See same case below, P.U.R.1916A, 49, 222 Fed. 539.

The facts are stated in the opinion.

Messrs. Joseph M. Hill and S. P. Freeling for appellants.

Messrs. S. T. Bledsoe, John M. Moore, and W. F. Evans for appellees.

* Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, originally brought by Wilbur Boyle as a stockholder in the railroad company, now one of the appellees, to prevent it from paying, and the Railroad Commission of Arkansas from enforcing, freight rates established by the latter, and a 2-cent passenger rate fixed by a statute of 1907, on the ground that both were confiscatory. A temporary injunction was issued, freight rates were adopted higher than those established by the State Commission, and the 3-cent passenger rate previously in force was restored, a bond being given for keeping accounts and refunding the difference if the final decision should uphold the action of the state. Later by agreement the experiment of a 2½-cent passenger rate was tried for eighteen months, and the final hearing of the cause was postponed to await the decision of *Allen v. St. Louis, I. M. & S. R. Co.* 230 U. S. 553, 57 L. ed. 1625, 33 Sup. Ct. Rep. 1030, in which the same rates were before the court. That decision was rendered on June 16, 1913, and forthwith after that and the others reported in 230 U. S., there was a conference of railroad managers and officials, engineers and others competent to aid, for the purpose of devising formulas for the division of expenses, etc., between local and interstate business in accord with the views of this court, as a step toward determining the constitutionality of this and other rates sought to be imposed by the states. The railroad company then made a laborious attempt to apply the formulas thus reached, and, as a result, the injunction was made perpetual, subject to a change of circumstances, after a careful discussion by the district court. *P.U.R.* 1916A, 49, 222 Fed. 539.

The value of the railroad property for the years 1910-1913 was admitted. The question in dispute is the usual one of the division of expense and income between state and interstate business. The decision below explains in greater detail than it is necessary to repeat the method of investigation adopted by the railroad. For the months of November and December, 1913, it caused the most minute and specific reports to be made of all the facts that, by the formulas prepared, would throw light upon the problem to be solved. Such an investigation is too expensive to be kept up for more than a limited time, but evidence was offered to show that the figures for the two months reflected the previous years as to the material proportions, so far as was possible to judge from the returns previously required by the state.

In establishing local rates a state must be assumed to intend to confine its action

within the limits set by the Constitution, and not to seek an unjust advantage from the difficulties of dividing income and expense to which we have referred, but in this case the appellants have contented themselves with a purely negative attitude. There is made even a preliminary objection that the evidence is hearsay. We have not observed that the objection was taken when the evidence was introduced, and if not, it would be too late. *Diaz v. United States*, 223 U. S. 442, 450, 56 L. ed. 500, 503, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138. But it is enough to say that the railroad adopted the only practicable mode of presenting its results, that it exhibited its work sheets and data to the appellants, that the returns were made by the employees in the course of their business, and that if the appellants had desired to question any of the data they could have called for further verification. It seems to us that technical rules are* satisfied, and that justice plainly requires this objection to be set aside.

We hardly can avoid approaching the discussion of the merits in the light of a few facts indicating that the probabilities are on the railroad's side. Weight naturally attaches to the opinion of the judge who heard the case. Apart from that, it is not to be forgotten that this same Commission, with others, recognizing the incongruity between the local passenger rates and those in force between different states, applied to the Interstate Commerce Commission to have the latter changed; that the Commission found that the 3-cent rate was not shown to be unreasonable, and that it dismissed their petition, reminding them that the adjustment properly should come not from the United States, but from themselves. *Corporation Commission v. Atchison, T. & S. F. R. Co.* 31 Inters. Com. Rep. 532. The average haul in Arkansas is shorter than the average of the road, the density of traffic is less, and the maintenance of the road is more expensive. We are aware that there is some contradiction upon this last point, but we have no doubt of the fact that the cost is greater in Arkansas than the average cost of the line.

We do not propose to follow the arguments that have been addressed to us into the elaborate tables of figures. We are satisfied in the main with the discussion that they received below, and shall refer only to one or two details that seem to need mention, without discussing the merits or demerits of the formulas. We are of opinion that the railroad has shown successfully the state rates to be confiscatory, and that even if some errors are detected, they are not enough to change the result. We

*110 agree with the district judge that the two months of investigation afforded a basis for argument as to constant conditions. We agree that it is proved that the local expenses are proportionally very much greater than the interstate. *In fixing the exact rates it may be that mistakes were made. Perhaps the most important doubt is raised by the fact that the railroad apportioned the cost of maintaining tracks and track structures, so far as not definitely assignable, between freight and passenger service, on the basis of engine ton miles (the weight of the engine in working order, multiplied by the distance it moves in the one service or the other). This criterion, although upheld by the court below, is not regarded as certainly the best by the Interstate Commerce Commission. Western Passenger Fares, 37 Inters. Com. Rep. 1, 13. It gave for the test period 51.19 per cent to freight and 49.31 to passenger, whereas the Commission's figures gave a larger percentage to freight. The result of a difference of eleven per cent would be to convert the deficit alleged by the railroad and found by the court below in intrastate returns into a profit of less than 1 per cent upon the agreed valuation. But the extent of the error, if any, is doubtful, and neither that nor any other possible errors would turn the scale.

The railroad, after getting the actual returns at the 3-cent and 2½-cent passenger rate and the freight rates allowed by the court, deducted the sums necessary to bring the revenue down to what it would have been had the state rates been followed. It is objected that this does not allow for the increase of travel that would follow the deduction. The railroad replies and the court below found that the increase is mainly at the expense of interstate revenue when the combined local rates are less than the interstate one. Whether this exhausts the matter or not, we are of opinion that upon this record the supposed increase is too conjectural properly to affect our conclusion. The direct effect of the reduction is plain, —the remote one is at best a guess.

*111 Light is thrown upon the position of the state by the decision of the Interstate Commerce Commission in *Memphis v. Chicago, R. I. & P. R. Co.* 39 Inters. Com. Rep. 256, 265: "The present unduly low rates within Arkansas are due at least in part to the attempt by the Railroad Commission of Arkansas to protect Arkansas shippers and build up Arkansas jobbing centers." In that case it was intimated that the carriers would be required to remove discriminations resulting from the unduly low rates, as was done in the *Shreveport Case*. *Houston E. & W. T. R. Co. v. United States*, 234

U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833. Upon the whole matter we are of opinion that the decree below was right and it is affirmed.

Decree affirmed.

(244 U. S. 72)

FRANK P. CHESBROUGH, Plff. in Err.,

v.

FRANK T. WOODWORTH.

APPEAL AND ERROR ⇨1006(2)—REVIEW OF FACTS—CONCURRENCE OF TWO COURTS.

1. A judgment enforcing the personal liability of directors of a national bank to a purchaser of stock in such bank in reliance upon false reports of the bank's financial condition to the Comptroller of the Currency, attested by them, and upon the declaration of dividends out of capital, assented to by them, will not be reversed by the Federal Supreme Court on the facts, where there is substantial evidence to support the conclusion twice reached by the circuit court of appeals that verdicts against the directors had sufficient evidence to sustain them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3951.]

COURTS ⇨294—JURISDICTION — FEDERAL QUESTION.

2. A Federal question is involved, giving a Federal district court jurisdiction, under U. S. Rev. Stat. § 5198, Comp. Stat. 1916, § 9759, and the Act of August 13, 1888 (25 Stat. at L. 436, chap. 866), § 4, without regard to citizenship, in an action to enforce the personal liability of directors in a national bank, under U. S. Rev. Stat. § 5239, Comp. Stat. 1916, § 9831, for the damages suffered by one who has purchased capital stock in such bank in reliance upon false reports of the bank's financial condition to the Comptroller of the Currency, attested by them, and upon the declaration of dividends out of capital instead of out of net profits, assented to by them.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 836.]

BANKS AND BANKING ⇨253—NATIONAL BANKS—LIABILITY OF DIRECTORS—FALSE REPORTS.

3. Directors in a national bank, who, with knowledge of their falsity, attested reports of the bank's financial condition, made to the Comptroller of the Currency, as required by U. S. Rev. Stat. § 5211, Comp. Stat. 1916, § 9774, and as called for by him, are made personally liable to one who has sustained a loss by reason of his purchase of stock in the bank in reliance on such false reports, by § 5239 (Comp. Stat. 1916, § 9831), which provides that in case the directors knowingly violate or knowingly permit the violation of any of the provisions of the National Bank Act, "every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other

person, shall have sustained in consequence of such violation."

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 944-949.]

BANKS AND BANKING ⇨ 253—**NATIONAL BANKS—LIABILITY OF DIRECTORS—FALSE REPORTS—DAMAGES PERSONAL TO ONE SUFFERING LOSS.**

4. The damages recoverable from the directors of a national bank in a suit brought under U. S. Rev. Stat. § 5239, Comp. Stat. 1916, § 9831, by one who has sustained a loss by reason of their having knowingly participated in, or assented to, a violation of the National Bank Act, are personal to the plaintiff. He sues in his own right, not for the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 944-949.]

BANK AND BANKING ⇨ 254 — **NATIONAL BANKS—LIABILITY OF DIRECTORS—FALSE REPORTS—NEGLIGENCE—KNOWLEDGE.**

5. A direct showing of negligence is not involved in an action brought under U. S. Rev. Stat. § 5239, Comp. Stat. 1916, § 9831, against directors of a national bank by one who has suffered loss by reason of his purchase of stock in the bank in reliance on reports of the bank's financial condition, made by them, with knowledge of their falsity, to the Comptroller of the Currency, as required by § 5211 (Comp. Stat. 1916, § 9774), and as called for by him; the sole primary issue is whether defendants caused or permitted to be made a statement of the bank's condition, upon which statement plaintiff relied, to his injury, and which statement defendants knew was materially false.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 950-957.]

BANKS AND BANKING ⇨ 254—**EVIDENCE—RELEVANCY—HISTORY OF BANK'S LOANS—PERSONAL LIABILITY OF DIRECTORS—FALSE REPORTS—KNOWLEDGE.**

6. The detailed history of the entire transactions surrounding certain "bad" loans made by a national bank is admissible in evidence in an action brought under U. S. Rev. Stat. § 5239, Comp. Stat. 1916, § 9831, against directors of a national bank by one who has suffered loss by reason of his purchase of stock in the bank in reliance on reports of the bank's financial condition, made by them, with knowledge of their falsity, to the Comptroller of the Currency, as tending to show whether the loans were in fact bad and whether the defendants knew that fact.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 950-957.]

BANKS AND BANKING ⇨ 254—**PARTIES—DEFENDANTS—JOINDER—ENFORCING PERSONAL LIABILITY OF BANK DIRECTOR.**

7. One director in a national bank may be made the sole defendant, or others may be joined with him, in an action brought under U. S. Rev. Stat. § 5239, Comp. Stat. 1916, § 9831, which provides that, in case the directors knowingly violate or knowingly permit a violation of the National Bank Act, "every director who participated in or assented to the same shall be held liable in his personal and individual capa-

city for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 950-957.]

[No. 179.]

Argued April 19 and 20, 1917. Decided May 21, 1917.

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which, on a second writ of error, affirmed, after a remission of a portion of the damages, a judgment of the District Court for the Eastern District of Michigan, holding certain directors in a national bank liable in damages to one who had purchased stock in the bank in reliance upon false reports of the bank's financial condition, attested by such directors. Affirmed.

See same case below on first writ of error, 116 C. C. A. 465, 195 Fed. 875; on second writ of error, 137 C. C. A. 482, 221 Fed. 912.

The facts are stated in the opinion.

Mr. Thomas A. E. Weadock for plaintiff in error.

Messrs. Edward S. Clark and John C. Weadock for defendant in error.

*Mr. Justice McKenna delivered the opinion of the court:

Action in ten counts charging plaintiff in error and one Joseph W. McGraw with violating the National Bank Act, and alleging damages resulting to defendant in error therefrom.

In description of the parties we shall designate them respectively as plaintiff and defendants.

In all the counts defendant Chesbrough and McGraw are alleged to have been at certain dates directors of the Old Second National Bank, a national banking corporation organized and doing business under the National Bank Act of 1864 [13 Stat. at L. 99, chap. 106, Comp. Stat. 1916, § 495], and the amendments thereto, and having its office in the city of Bay City, Michigan.

The following violations of the act are charged: (1) Signing, attesting, and permitting and assenting to the publication of, a report of the conditions of the bank required to be made by U. S. Rev. Stat. § 5211, Comp. Stat. 1916, § 9774, of such act, which report was false. (2, 3, 4, 5.) The Comptroller of the Currency having made a requisition upon the bank for a report of the resources and liabilities of the bank upon a day specified, as required by the act, the defendants permitted and assented to a viola-

74 tion of the act by signing, attesting, and permitting and assenting to the publication of, a false*report of the resources and liabilities of the bank and its condition at the close of business of such day. (6, 7, 8.) Violation of the act in that defendants and each of them permitted and assented to the declaration of the semiannual dividend, being payable December 1, 1902, knowing that it would necessarily be paid out of the capital stock of the bank, and not out of net profits, and knowing that losses had therefore been sustained equal to or exceeding the undivided profits then on hand, and that the sums so declared as dividends exceeded the profits then on hand, after deducting therefrom losses and bad debts. (9) Defendants knowingly violated and permitted and assented to the violation of the act (U. S. Rev. Stat. § 5200, Comp. Stat. 1916, § 9761) in that they knowingly participated in, permitted, and assented to the creation of, certain liabilities to the bank, and knowingly permitted and assented to the continuance of the liabilities and the carrying of the same among the loans and discounts of the bank after defendants and each of them had knowledge of the nature and character of the liabilities, and that they had been created and were being carried in violation of the act. The liabilities are set out. (10) Violations of the act (U. S. Rev. Stat. §§ 5199, 5200, 5204, 5211, 5239, Comp. Stat. 1916, §§ 9760, 9761, 9766, 9774, 9831), being portions of a general design and conspiracy on the part of the defendants to deceive the public, including plaintiff, for the purpose of giving the stock of the bank a fictitious market value and enabling each of the defendants and his relatives and friends to dispose of certain shares of the stock then and there held by them at a price exceeding the value of the stock.

In each count damage is alleged to have been caused to plaintiff, he having purchased stock upon the faith of the action of defendants. The total amount of damage is alleged to be \$35,000.

Plaintiff in error Chesbrough (the case is here on his writ of error, McGraw not having joined) filed a demurrer to the declaration, which was overruled. He then filed 12 several pleas, one of which alleged that he was not guilty of the wrongs and injuries complained of, and gave notice that under the latter he would "insist [upon] and give in evidence" certain matters of defense.

The case was tried to a jury. The 3d, 6th, 7th, 8th, 9th, and part of the 10th counts were withdrawn from their consideration. A verdict was returned for plaintiff in the sum of \$22,662.98, upon which judgment was entered. It was affirmed by

the court of appeals. 137 C. C. A. 482, 221 Fed. 912.

This case had once before been to the circuit court of appeals, where its facts were reviewed, and we may refer to the report of the case for them. 116 C. C. A. 465, 195 Fed. 875.

It there appears that in October, 1902, the bank reported a capital of \$200,000, a surplus of \$75,000, and undivided profits of \$27,000. Its total loans and discounts were about \$100,000.

On October 3, 1902, the bank held as loans (so considered by the court and the Comptroller of the Currency) the paper of the Maltby Lumber Company to the amount of \$402,000, which had accumulated under the personal direction of the then president and practical manager of the bank. The Comptroller required that the loan be reduced to the permitted 10 per cent. The Comptroller's letter was presented to the board. Inquiry during the next few weeks developed the general character of the Maltby paper and that most of it was not drawn against any real debt, and in fact represented no liability, except Mrs. Maltby's. Its net worth, shown by a statement of Maltby, who was called before the board, was about \$188,000, but there were many suspicious circumstances about the inventory, and it did not appear how much of this primary liability to the bank was included among the debts. There was subsequently liquidation of the Maltby Company's affairs, and as it proceeded the bank charged off successive amounts of the Maltby paper. In this way the total loss charged off prior to the trial of the cause (first trial) was \$223,000.* A comparatively small amount remained uncollected and not charged off. A generally similar situation existed as to another line of paper, of one Brotherton, upon which \$47,000 had been written off as worthless before April, 1909. The shares of stock were \$100 par value, and the writing off of these two items caused a loss in book value of \$135 per share.

The defendants had been two of the directors for many years, during which time reports to the Comptroller were frequently made and published, as required by the statute, and as called for by him, and continuously until 1904 the entire Maltby line was carried at its face in the "loans and discounts," and was reported as part of the bank's assets. Plaintiff, at various dates from March to December, 1903, bought the bank stock at its supposed market value, averaging about \$151 per share, and aggregating \$15,000 par and \$23,400 purchase price.

The case went to trial to a jury. Certain

counts were withdrawn, and upon those submitted a verdict was returned and judgment entered upon it for the amounts plaintiff had paid for his stock, less its then book value, after deducting its pro rata share of the actual loss written off on account of the Maltby and Brotherton paper, with interest,—an average total of \$167 per share.

The following were the rulings of the court:

(1) The general demurrer was rightly overruled. The making and publishing of the reports are not merely for the information of the Comptroller, but are to guide the public, and he who buys stock in a bank in reliance upon the reports has a right of action under § 5239, Rev. Stat. (Comp. Stat. 1916, § 9831), against any officer or director who, knowing its falsity, authorizes such report. "The one suffering such damages is within the statutory description 'any other person.'" The conclusion was deduced from *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638, and *Yates v. Utica Bank*, 206 U. S. 181, 51 L. ed. 1015, 27 Sup. Ct. Rep. 646, and other cases in the state and Federal courts.

(2) The damages in such a case are personal to the plaintiff. He sues in his own right, not for the association.

(3) Such action involves no direct showing of negligence; the sole primary issue is whether defendants caused or permitted to be made a statement of the bank's condition upon which statement plaintiff relied to his injury, and which statement defendants knew was materially false. And in the trial of this issue the detailed history of the entire transaction is admissible as tending to show whether the loans were in fact bad, and whether defendants knew that fact. This scienter is the material condition, and plaintiff can select one of the directors as sole defendant, or join others with him.

(4) Considering the evidence, the court concluded that it justified a finding of liability against the defendants, but not to the extent of the judgment. The court was of opinion that the basis of loss to the bank, that is, the amount which should have been charged off, was taken in the verdict and judgment at the sum of \$223,000, and should not have been greater than \$135,000, excluding entirely, as not sustained by the evidence, the Brotherton debts. The court, therefore, reversed the judgment and remanded the case for a new trial.

Plaintiff moved to modify the opinion and judgment in such manner as to permit him to remit such part of it as the court thought was not supported by the evidence,

and that, as modified, the judgment be affirmed. The motion was denied.

The second trial resulted again, as we have said, in a verdict and judgment for plaintiff. In reaching them a basis beyond \$135,000 was taken, and the circuit court of appeals held this was error, but gave to plaintiff permission to file within thirty days from the filing of the opinion in the trial court a written election to reduce the judgment by the sum in which it exceeded the \$135,000 basis.

This was done, and judgment entered accordingly.

*The case on the facts involves two simple propositions,—the scienter of defendant when he attested the report to the Comptroller and the circumstances under which two dividends were declared. Upon these propositions twice have juries held against defendant and twice has the circuit court of appeals held that there was sufficient evidence to sustain their verdicts, modifying only as to certain items of damages. In consideration of our reviewing power, and without reciting the testimony, it is enough to say that the findings on these propositions have substantial evidence to support them.

But it is urged that the plaintiff brought this action under § 5239, Rev. Stat. (Comp. Stat. 1916, § 9831), in the circuit court of the United States for the eastern district of Michigan, in which all of the parties resided, and that not that court, but the state court, had jurisdiction.

The cited section provides for a forfeiture of the franchise of a national bank if its directors knowingly violate or knowingly permit the violation of any of the provisions of the National Bank Act, and further provides that in case of such violation "every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

This section was considered in *Yates v. Jones Nat. Bank*, 206 U. S. 158, 179, 51 L. ed. 1002, 1014, 27 Sup. Ct. Rep. 638, and it was held that the rule expressed by it is exclusive and precludes a common-law liability for fraud and deceit. To the same effect are *Thomas v. Taylor*, 224 U. S. 73, 56 L. ed. 673, 32 Sup. Ct. Rep. 403, and *Jones Nat. Bank v. Yates*, 240 U. S. 541, 60 L. ed. 788, 36 Sup. Ct. Rep. 429. Necessarily a Federal question is involved and there was jurisdiction in the courts below. § 5198, Rev. Stat. (Comp. Stat. 1916, § 9759); § 4 of the Act of August 13, 1888, 25 Stat. at L. 436, chap. 866. *Herrmann v. Edwards*, 238 U. S. 107, 59 L. ed. 1224, 35

Sup. Ct. Rep. 839, is not opposed to this view. It was there held only that the Federal cause of action should be, in the absence of diverse* citizenship, stated in the bill to give the Federal court jurisdiction, — a condition that is complied with by the declaration in the present case.

Defendant attempts to distinguish the present case from the cases cited above, and, in 77 assignments of error, concentrated into 18 points, urges the contentions we have noted, and contentions based on the rulings of the trial court in the admission and rejection of evidence and charges to the jury and the rulings of the circuit court of appeals, and attempts to support them by an elaborate and minute argument. Indeed, the whole case is reviewed and all of the deductions made by the lower tribunals from the evidence combated and the contentions reviewed which were disposed of by the circuit court of appeals, in whose decision we concur. To answer it in detail would extend this opinion to repellent length. It is enough to say of them that they show no reversible error.

Judgment affirmed.

(244 U. S. 79)

FRANK T. WOODWORTH, Plff. in Err.,
v.

FRANK P. CHESBROUGH.

APPEAL AND ERROR  14(4) — RIGHT TO MAINTAIN CROSS WRIT—HOW WAIVED OR LOST — REMISSION OF EXCESSIVE DAMAGES.

A party who escaped the reversal of a judgment in his favor and the remanding of the cause for a new trial by availing himself of the permission granted by a Federal circuit court of appeals to file a remission from the judgment below of the amount by which that court thought the judgment excessive may not maintain a cross writ of error from the Federal Supreme Court, notwithstanding a clause in the remittitur that it was intended to be without prejudice to him in the prosecution by him of a cross writ of error or proceedings in the Supreme Court if the defeated party should proceed in that court to review the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 57.]

[No. 180.]

Argued April 19 and 20, 1917. Decided May 21, 1917.

CROSS WRIT of Error to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which, on a second writ of error, affirmed, after remission of part of the damages, a judgment of the District Court for the Eastern District of Michigan, holding national bank

directors liable in damages to one who purchased stock in the bank in reliance on false reports of the bank's financial condition, attested by the directors. Dismissed.

See same case below on first writ of error, 116 C. C. A. 465, 195 Fed. 875; on second writ of error, 137 C. C. A. 482, 221 Fed. 912.

The facts are stated in the opinion.

Messrs. Edward S. Clark, John C. Weadock, and H. M. Gillett for plaintiff in error.

Mr. Thomas A. E. Weadock for defendant in error.

* Mr. Justice McKenna delivered the opinion of the court:

This is a cross writ of error taken by Frank T. Woodworth, defendant in error in No. 179 [244 U. S. 72, 61 L. ed. —, 37 Sup. Ct. Rep. 579], and is presented on the record in that case.

As stated in the opinion in No. 179, the circuit court of appeals reversed the judgment obtained by Woodworth against Chesbrough on the ground that certain amounts computed in the judgment were not sustained by the evidence, and therefore remanded the case for a new trial. Thereupon Woodworth moved to modify the opinion and judgment in such manner as to permit him to remit such part of it as the court thought was not supported by the evidence, and that the judgment, as modified, be affirmed. The motion was denied.

A new trial was had, again resulting in a verdict and judgment for Woodworth. The court of appeals again decided that it was excessive, but gave Woodworth permission to file a remission of the excess. This he did.

The remittitur recited that plaintiff remits from the judgment the sum of \$7,708.56, leaving the amount of the judgment to be \$16,005.44. It was stated that it was done in compliance with the opinion of the circuit court of appeals "for the sole purpose of obtaining an entry of final judgment herein, and of securing the affirmance of that part of the judgment which is not so remitted, and is intended to be without prejudice to plaintiff in any cross*proceeding hereafter prosecuted by him before the Supreme Court of the United States, which cross proceeding follows and continues to be in connection with any proceeding prosecuted in that court by defendant for the purpose of reviewing said judgment of the circuit court of appeals."

The court of appeals then rendered the following judgment:

"This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern

district of Michigan, northern division, and was argued by counsel.

"The court having filed its opinion, and defendant in error, Woodworth, having thereupon filed in this court a certified copy of a remittitur filed by him in the court below, whereby it appears that the judgment complained of herein has been reduced by the sum of seven thousand seven hundred eight dollars and fifty-six cents (\$7,708.56) so that it now stands in the court below as a judgment for sixteen thousand five dollars and forty-four cents (\$16,005.44) and costs, entered as of November 22, 1913, and bearing interest from the date at 5 per cent.

"It is now here ordered and adjudged by this court that the judgment of the said district court in this cause, as so reduced, and as so standing after such reduction, be, and the same is hereby, affirmed; but that plaintiff in error, Chesbrough, recover the costs of this court.

"The remittitur so filed having contained the clause stating that it was intended to be without prejudice to plaintiff below (Woodworth) in the prosecution by him of a cross writ of error or proceeding in the Supreme Court if defendant below should proceed in that court to review this judgment, and this court being unwilling to embarrass the party, Woodworth, in his attempt to preserve any right of review to which he may be so contingently entitled, approval of such remittitur, as a sufficient compliance with the opinion on file, is not withheld because of the presence therein of such attempted reservation; but such approval is not to be taken to imply that such right of review can thereafter exist, or that such attempted reservation has any effect to make the remittitur other than absolute and unconditional."

In assertion of the right attempted to be reserved Woodworth prosecutes this writ of error.

A motion is made to dismiss the writ of error, and we think it should be granted. Woodworth is in the somewhat anomalous position of having secured a judgment against Chesbrough, and yet seeking to retract the condition upon which it was obtained. This he cannot do. *Koenigsberger v. Richmond Silver Min. Co.* 158 U. S. 41, 52, 39 L. ed. 889, 893, 15 Sup. Ct. Rep. 751. He encounters, besides, another obstacle: If the remittitur be disregarded, the judgment entered upon it must be disregarded and the original judgment of the Circuit Court of Appeals restored; which, not being final, cannot be reviewed.

Dismissed.

UNITED STATES and Interstate Commerce Commission, Appts.,

v.
ILLINOIS CENTRAL RAILROAD COMPANY.

COMMERCE — 92 — JUDICIAL REVIEW OF ACTION — ENJOINING ORDER FIXING HEARING.

The jurisdiction of the Federal district courts, under the Acts of June 18, 1910 (36 Stat. at L. 539, chap. 309), § 1, and October 22, 1913 (38 Stat. at L. 208, 219, chap. 32, Comp. Stat. 1916, §§ 992, 993), of "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission," does not extend to a suit to set aside an order of such Commission, fixing a future day and place for the hearing of certain complaints made to it by certain coal companies seeking damages for the alleged failure of certain interstate carriers to furnish coal cars on demand, and to enjoin proceedings upon such complaints. The action of the Commission was not an "order" within the meaning of the statutes, but was a mere incident in the proceeding.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 142.]

[No. 310.]

Argued April 13 and 16, 1917. Decided May 21, 1917.

APPEAL from the District Court of the United States for the Eastern District of Illinois to review a decree which set aside an order of the Interstate Commerce Commission, fixing a hearing of certain complaints made to it by shippers, and enjoined proceedings upon such complaints. Reversed and remanded, with direction to dismiss the petition.

The facts are stated in the opinion.

Assistant Attorney General **Underwood** and Mr. **Blackburn Esterline** for the United States.

Mr. **Joseph W. Folk** for the Interstate Commerce Commission.

Messrs. **Robert V. Fletcher** and **Blewett Lee** for appellee.

*Mr. Justice **McKenna** delivered the opinion of the court:

Appeal from a decree canceling an order of the Interstate Commerce Commission fixing a hearing of certain complaints made to it by certain coal companies for damages for alleged failure to furnish cars upon demand, and enjoining proceedings upon the complaints.

The decree was granted, three judges sitting, upon the petition of appellee, herein referred to as the railroad company.

The railroad company is an intrastate and interstate carrier of freight and pas-

sengers, and, among other commodities, transports coal on its line, which, during the years 1911, 1912, and 1913, was shipped in interstate commerce by producers thereof on through rates established by the railroad company.

Certain coal companies, shippers over the lines of the railroad company, filed petitions before the Interstate Commerce Commission, asking that damages be assessed against the railroad company for an alleged failure to supply a sufficient number of coal cars for their respective shipping needs.

* 84 The petitions were received by the Commission and were by it treated as substantially presenting but a single complaint, were so numbered as to indicate the fact, and were thereafter in all proceedings treated and disposed of together by one report and order.

The railroad company filed an answer to each complaint in which it denied the jurisdiction of the Commission to award damages for failure to furnish coal cars, and averred that, in actions of such character, exclusive jurisdiction is in the courts. In due course a hearing was had by the Commission, and the railroad company objected to any further proceeding before it on the ground of want of jurisdiction, at least as to so much of the complaints of the coal companies as dealt only with damages, and moved that so much of the complaints as dealt with the demand for damages be dismissed.

At the argument of the motion counsel for the coal companies expressly declared that so much of the complaints as charged any undue and unlawful discrimination by the railroad company in the distribution of its cars was dismissed, and it was stipulated that the complaints should be considered as so amended as to omit such charges. Thereafter the matter proceeded upon the sole issue of damages for alleged failure to furnish cars upon demand.

On January 30, 1915, four members of the Commission filed a report holding that the Commission had jurisdiction to consider the complaints and award whatever damages might be proved. Three members dissented. The reports are attached to the petition.

A petition for rehearing was made and denied, and on August 18, 1915, the Commission entered its order assigning the cause for further hearing upon the issue of reparation. The following is the order entered:

* 85 "No. 6128—Vulcan Coal & Mining Company v. Illinois Central Railroad Company. No. 6128, Sub-No. 1—St. Louis-Coulterville Coal Company v. Illinois Central Railroad Company. No. 6128, Sub-No. 2—Groem

Coal Company v. Illinois Central Railroad Company.

"The above-entitled cases are assigned for hearing October 1, 1915, 10 o'clock A. M., at Hotel Jefferson, St. Louis, Mo., before Examiner Wilson.

"By the Commission."

In the appellee's petition in the district court it alleged that the hearing would be proceeded with unless restrained, that the railroad company would be compelled to attend such hearing, would be put to great expense, and that in all probability an order of reparation would be made; that the railroad company would be forced to defend at great trouble and expense three separate and several suits at law, based on such awards, all which would depend upon the same facts and principles of law, thereby subjecting the railroad company to a multiplicity of suits; and that if reparation should be awarded, it would be placed at great disadvantage in defending suits based on the awards, since the Commission's finding of the ultimate facts is by statute made prima facie correct, and no opportunity is given for a judicial review of the strength and competency of the evidence upon which such a finding rests.

A subpoena against the United States was prayed, and an order annulling the order of the Commission, and, pending the hearing, restraint of the Commission and its members from action.

The United States, appearing by its counsel, moved to dismiss the petition on the grounds that—(1) The action of the Commission did not constitute an order within the meaning of § 1 of the act entitled "An Act to Create a Commerce Court," and that the court, therefore, was without jurisdiction to enjoin or annul or suspend the same in whole or in part. (2) The petition is an attempt in advance of any action or order of the Commission to enjoin it from acting and proceeding on a complaint brought and pending before it. (3) The Act to Regulate Commerce makes an order for the payment of money only prima facie evidence, cuts off no other defense, takes no question from court or jury, nor in any wise denies due process of law; that "such an order is merely a rule of evidence, and notice of a hearing at which such an order may be entered is not an order within the meaning of § 1 of the act entitled 'An Act to Create a Commerce Court,' etc., approved June 18, 1910 [36 Stat. at L. 539, chap. 309], and the court has no jurisdiction to enjoin, set aside, annul, or suspend the same in whole or in part."

The motion to dismiss was denied and the United States, without waiving it, moved to dismiss the petition on the ground that it

was without equity and did not state a cause of action.

It was decreed that the Commission had no jurisdiction to hear and determine the complaints of the coal companies, that its order be canceled, and it be permanently enjoined from further proceeding with the hearing of the complaints.

The Interstate Commerce Commission appeared in the suit and also moved to dismiss the petition on the grounds—(1) That the order of the Commission was merely a notice of a hearing, and not a reviewable order. (2) That the principal office of the Commission is in Washington, and suit to enjoin any of its proceedings must be brought in the District of Columbia, and not in the eastern district of Illinois. (4) That irreparable injury was not shown.

After certain admissions and denials of the petition, the Commission asserted its jurisdiction.

In support of the decree the contention of the railroad company is that the Interstate Commerce Commission has no jurisdiction to award damages for failure to furnish cars, and that this was the only issue submitted to the Commission and the only issue decided by it. The Commission having no jurisdiction, the further contention is that the railroad company can restrain its order because it will subject the company to the trouble and expense of the hearing, the probability of an order of reparation against it, and a multiplicity of suits, in which suits it will be confronted by the order of reparation as evidence, without opportunity for judicial review of the strength and competency of the evidence.

The contentions and the recited consequences of the order of the Commission are met by opposing ones. The United States asserts that the action of the Commission fixing a day for the hearing of the complaints of the coal companies is not an order within the meaning of § 1 of the Act of June 18, 1910, creating the commerce court (36 Stat. at L. 539, chap. 309), and the subsequent Act of October 22, 1913, abolishing that court and transferring the jurisdiction conferred upon it to the several district courts of the United States (38 Stat. at L. 208, 219, chap. 32, Comp. Stat. 1916, §§ 992, 993). It is only by virtue of those acts, it is said, that the United States can be sued, and it is provided by them that the United States can only be sued in "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Commission makes the same contention and some others, and both it and the United States insist that the action of the Commission was not an order within the meaning

of the cited provision. *Procter & G. Co. v. United States*, 225 U. S. 282, 293, 56 L. ed. 1091, 1095, 32 Sup. Ct. Rep. 761, is adduced as authority for the insistence.

The Procter & Gamble Company was the owner of 500 railroad tank cars used for the transportation of its products over the lines of certain railroads, and the company filed a complaint before the Interstate Commerce Commission, complaining of demurrage rules of the railroad companies, which had been approved by the Commission, as unjust and oppressive, and alleging that to enforce them would create preferences and discriminations forbidden by the Interstate Commerce Act. The complaint was not sustained and an award of relief was denied.

Thereupon the Procter & Gamble Company filed a petition in the commerce court in which the company repeated its accusations against the demurrage rules and charged also that the order of the Commission, dismissing its complaint, was null and void and beyond the power of the Commission, in that it sustained the validity of the rules.

The commerce court held that it had jurisdiction of the cause, and that, for the purpose of jurisdiction, the refusal of the Commission to afford the relief prayed for was the exact equivalent of an order granting affirmative relief, and, as a corollary of this power, it was further decided that there was jurisdiction to award pecuniary relief for demurrage if any was illegally exacted. On the merits the court decided against the Procter & Gamble Company.

This court reversed the ruling and held that the commerce court had no jurisdiction, as the order of the Commission neither compelled "the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission." The reasoning of the court explored the whole act and omitted no circumstance which could bear on its construction and its efficacy for the purpose for which it was enacted. Considering the first and second subdivisions of § 207 [36 Stat. at L. 1148, chap. 231, Comp. Stat. 1916, § 993], which deals with the jurisdiction of the commerce court, it was said that the first "provides for the enforcement of orders; that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission;" and that the second, "dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by the first paragraph." In other words, by the co-operation of the two paragraphs, authority is given, on

the one hand, to enforce compliance with the orders of the Commission, if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order." Other provisions of the act were said to be as convincing.

It will thus be observed, as said by counsel for the Commission: "The power of a court 'to stay the enforcement of an illegal order' is, in a sense, reciprocal to its power to enforce compliance with an order of the Commission, 'if lawful.' . . . And just as the district court would have been powerless, in the instant case, to compel the appellee to attend the hearing with respect to which the notice had been given, so also was it without lawful authority to annul that notice or to enjoin the Commission from proceeding in the premises." And again, as other counsel say, the alleged order was nothing more than notice of a hearing which the railroad company might attend or not, as it saw fit.

The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion,—in effect, and, it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in *Procter & G. Co. v. United States*,—one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree.

It is not necessary to pass upon the other contentions of appellants.

Decree reversed and cause remanded, with directions to grant the motions to dismiss the petition.

(244 U. S. 90)

ANDREW WEST, Appt.,
v.

EDWARD RUTLEDGE TIMBER COMPANY and Northern Pacific Railway Company.

PUBLIC LANDS ~~82~~81(1)—RAILROAD LAND GRANTS—SELECTION IN LIEU OF LANDS RELINQUISHED TO UNITED STATES — MOUNT RANIER NATIONAL PARK.

1. The Northern Pacific Railway Company, the successor through foreclosure to the Northern Pacific Railroad Company, could avail itself of the right subsequently granted by the Act of March 2, 1899 (30 Stat. at L. 993, chap. 377, Comp. Stat. 1916, § 5223), to the original company to select certain public lands in lieu of an equal quantity within the Mount Ranier National Park, to be relinquished to the United States.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 250.]

PUBLIC LANDS ~~82~~82 — RAILROAD LAND GRANT — SELECTION IN LIEU OF LANDS RELINQUISHED TO UNITED STATES — CLASSIFICATION AS NONMINERAL.

2. The report of the deputy surveyor who made the survey that the lands, if cleared, would be suitable for grazing, but, at the time of the report, were more valuable for their timber, is, when accepted by the Land Department as a description of the lands as nonmineral, a "classification" of such lands as nonmineral, within the meaning of the Act of March 2, 1899 (30 Stat. at L. 993, chap. 377, Comp. Stat. 1916, § 5223), giving the Northern Pacific Railroad Company the right to select in lieu of lands to be relinquished to the United States pursuant to that act "an equal quantity of nonmineral public lands so classified as nonmineral at the time of actual government survey."

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 236, 253-256.]

PUBLIC LANDS ~~82~~82 — RAILROAD LAND GRANT—SELECTION IN LIEU OF LANDS RELINQUISHED TO THE UNITED STATES — CERTAINTY OF DESIGNATION.

3. The designation by section number, township, and range of a quarter section of unsurveyed public land selected by a railroad company pursuant to the Act of March 2, 1899 (30 Stat. at L. 993, chap. 377, Comp. Stat. 1916, § 5223), in lieu of an equal quantity within the Mount Ranier National Park, to be relinquished to the United States, satisfied the requirement of that act that "in case the land so selected at the time of selection be unsurveyed, the list filed by the company shall describe such tract in such manner as to designate the same with a reasonable degree of certainty," where such designation had the aid of an adjoining survey, and could be readily located from such survey.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 236, 253-256.]

[No. 276.]

Argued May 7 and 8, 1917. Decided May 21, 1917.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the District Court for the District of Idaho, dismissing the bill in a suit to establish a trust in land selected by the Northern Pacific Railway Company in lieu of land within the Mount Ranier National Park, relinquished to the United States, and to compel a conveyance thereof and to quiet title. Affirmed.

See same case below, 136 C. C. A. 556, 221 Fed. 30.

Statement by Mr. Justice McKenna:

*Suit by appellant West (he was plaintiff in the court below and we shall so refer to him) against appellees, the Edward Rutledge

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Timber Company and the Northern Pacific Railway Company (to be referred to as the timber company and railway company, respectively), to have plaintiff declared the owner of certain described lands, the railway company and the timber company decreed to hold title thereto in trust for him, to compel a conveyance to him, and to have his title to the lands quieted.

Plaintiff alleged himself qualified to locate and settle upon the lands, they being then unsurveyed and vacant, unoccupied and unreserved lands belonging to the United States, as to which no claim of right or title to or interest in them had been made by any person, nor was there any evidence whatsoever upon the lands or any part thereof, or in the United States land office for the district (Cœur d'Alene Land District), or in the General Land Office in Washington, showing any claim, right, title, or interest in any other person, nor were there any marks, blazes, notices, or any other evidence of the location, selection, claim, or possession marked or traced upon the ground, or upon or near the same, nor had the boundaries thereof been traced or located by reference to any natural objects or monuments of any kind or character.

That on July 17, 1905, the official plat of the survey of the lands was filed in the local land office in Cœur d'Alene City, Idaho, and on that day the lands became open to entry under the homestead laws of the United States, and on that day plaintiff duly made application to enter them under the homestead laws, which application was rejected by the local land office, and, on May 10, 1910, the order of rejection was approved by the secretary of the Interior and the case finally closed.

That on June 21, 1901, the railway company filed in the General Land Office its selection list No. 61, which contained the following pretended description, to wit, "the southeast quarter of section 20, township 44 north, range 3 E., B. M."

That the description was wholly imaginary, and that no lands in the state of Idaho or elsewhere were or could be so designated or described, for the reason that, at the time of filing the list, no such survey had been made or attempted. That neither the railway company nor the timber company knew or pretended to know what lands were referred to, or knew that, in the event of a survey, the description would be applied to the lands occupied by plaintiff. That the description was wholly insufficient to locate the lands or any part or parcel thereof, rendering the list and selection of the railway company wholly void and of no effect whatsoever.

That on October 10, 1910, a patent to the lands was issued to the railway company.

That (this on information and belief) the railway company conveyed the lands to the timber company, and that company now claims to have the legal title to the same.

That neither the railway company nor the timber company, nor any agent or employee of either, has ever been in possession of the lands, but plaintiff, ever since May 15, 1903, has been and now is in possession thereof; that neither the railway company nor the timber company has ever complied with the laws of the United States so as to entitle either of them to claim any interest in or right to the lands as against plaintiff.

That the decision of the local land office and the successive approval thereof by the Commissioner of the General Land Office and the Secretary of the Interior were and are wrongful, unlawful, and based upon an erroneous construction of the law, and upon a statement of facts concerning which there was and is no conflict.

That at the time the patent was issued to the railway company plaintiff was and now is the owner of the lands, and the issue of the patent to the railway company was contrary to and without authority of law, and in violation of plaintiff's rights; that the railway company was without any right or authority at law to select or claim the lands or any part thereof, and that the Act of Congress of March 2, 1899 [30 Stat. at L. 993, chap. 377, Comp. Stat. 1916, § 5223], upon and by virtue of which the railway company based its right to select and claim the lands, is unconstitutional and void, and confers no right whatsoever upon the railway company to select or claim the lands or any part thereof against plaintiff.

The answer of the timber company admitted certain allegations of the bill of complaint, but denied that the lands were vacant and open to settlement, or that they were unclaimed or unsegregated or not marked or traced by boundaries, and alleged that the fact of their appropriation and segregation appeared on the records of the local land office and of the General Land Office, and that the boundaries and lines of survey were duly and plainly traced and marked out upon the lands and located by monuments long prior to the time of plaintiff's settlement thereon, and that plaintiff had full knowledge thereof and did not enter upon the lands in good faith, but only in the hope that the claim of the timber company and railway company might be defeated on technical grounds.

That on June 21, 1901, the railway company made selection of the lands under the provisions of the act of Congress entitled, "An Act to Set Aside a Portion of Certain

Lands in the State of Washington Now Known as the Mount Ranier National Park," approved March 2, 1899 (30 Stat. at L. 993, chap. 377, Comp. Stat. 1916, § 5223), in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of the act. That such selection was duly made in accordance with the conditions of the act and the rules and regulations of the Land Department, and described*as required by the act, and the selection was in all respects regular.

That on July 17, 1905, the official township plat was filed in the local land office, and the railway company, in accordance with the provisions of § 4 of the act of Congress, filed a new selection list which conformed to the provisions of the act and the rules and regulations of the Land Department.

That at the time plaintiff made his alleged settlement upon the lands they had been surveyed and the lines of survey traced, and all other conditions are alleged to have been satisfied.

The timber company prayed that it be dismissed with costs.

The answer of the railway company was substantially the same as that of the timber company.

To the issues thus framed the evidence was addressed, upon which a decree was entered for defendants dismissing the bill, neither party to recover costs or disbursements from the other. 210 Fed. 189. It was affirmed by the circuit court of appeals. 136 C. C. A. 556, 221 Fed. 30.

Messrs. S. M. Stockslager, A. H. Kenyon, and Seabury Merritt for appellant.

Messrs. Charles Donnelly, Stiles W. Burr, Charles W. Bunn, and James B. Kerr for appellees.

Mr. Justice McKenna, after making the above statement, delivered the opinion of the court:

The controversy in the case turns on the construction and application of the act of Congress. Because of it the land offices, local and general, rejected plaintiff's application to enter the lands as a homestead. By virtue of it the railway and its grantee, the timber company, assert title. Its primary purpose was to set aside certain public lands as a national park, to be known as the Mount Ranier National Park. An obstacle to the purpose was a grant of the desired lands to the Northern Pacific Railroad Company and their relinquishment had to be provided for. This was done (§ 3) by authorizing the company to select an equal quantity of public lands elsewhere, or, more specifi-

ally, within any state into or through which the railroad ran. There was a qualification of the character of the lands to be selected. They were to be "nonmineral public lands, so classified as nonmineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection." [30 Stat. at L. 994, chap. 377, Comp. Stat. 1916, § 5225.]

It was provided (§ 4) that upon the filing by the railroad company of the selection at the local land office, and payment of fees prescribed by law in analogous cases, and the approval by the Secretary of the Interior, he should cause a patent to issue to the company, conveying to it the lands so selected; that "in case the land so selected at the time of selection be unsurveyed, the list filed by the company shall describe such tract in such manner as to designate the same with a reasonable degree of certainty;" and that, within thirty days after the tract shall have been surveyed and the plats thereof filed, a new selection shall be filed by the company, describing the tract according to such survey. And, further, that in case the tract as originally selected and described in the list filed in the local land office shall not precisely conform to the lines of the official survey, the company shall be permitted to describe such tract anew, so as to work such conformity.

Construing the act by its words there would seem to be no difficulty in determining its meaning. It would seem to be simple in purpose and clear in provision to accomplish the purpose. But plaintiff raises various questions upon it. He asserts: (1) That the grant was to the Northern Pacific Railroad Company and could not be availed of by its successor through foreclosure, the Northern Pacific Railway Company. (2) That the lands were classified as mineral under the Act of Congress of February 26, 1895 [28 Stat. at L. 683, chap. 131], and the classification approved by the Secretary of the Interior March, 1901, and the surveyor having failed to make any classification of the lands in terms as nonmineral, they were not subject to selection. (3) That if the first and second contentions be untenable, the lands were not described "with a reasonable certainty" so as to bar the rights of settlers in good faith, without actual or constructive notice.

(1) The argument advanced to support this proposition is that by the foreclosure proceedings the Northern Pacific Railroad Company ceased to exist, and if everything

it had or had an interest in did not go out of existence with it, at least its rights under the Act of 1899 did, and yet counsel say plaintiff has nothing to do "with the question whether the conveyance of the lands to the United States under the provisions of the act conveyed a valid title." It would be somewhat anomalous indeed if the act conveyed to the United States a valid title, but did not convey to the railroad anything substantial that could be transferred by sale under the decree of a court to the successor of that company. We might ask the question, Where in the world were the rights conveyed to the railroad company left—and if left at all, by whom were they to be enforced or availed of?

We agree with the district court that, as a mere matter of construction, the contention of plaintiff must be rejected. In July, 1896 (*Northern P. R. Co. v. Boyd*, 228 U. S. 482, 490, 57 L. ed. 931, 934, 33 Sup. Ct. Rep. 554; *Northern P. R. Co. v. United States*, 101 C. C. A. 117, 176 Fed. 706), three years prior to the act of Congress, the railway company had become successor to the railroad company, its vendor through the foreclosure proceedings of the lands the government desired, and yet the latter company was designated in the act as the company to select the lands in compensation for those desired and taken by the government for the Mount Ranier National Park. It may be, as said by the district court, a matter of speculation why the railroad company rather than the railway company was named as grantee, but it is certain it was done in recognition of rights, and not in mere jugglery to obtain lands for the National Park and convey nothing to either company in return,—nothing to the railroad company because, according to the contention, it had gone out of existence; nothing to the railway company because, according to the contention, it had not succeeded to the rights of the railroad company. On the contrary, we must assume that the act was passed and the railroad company selected to consummate the exchange either by itself or by its successor, the railway company, or by both. And this was done, and the two companies and the trustees of the railway company's mortgage joined in a deed of reconveyance to the United States. And this purpose of the act and what was done under it was recognized by the Land Department. *Davenport v. Northern P. R. Co.* 32 Land Dec. 28; *Ferguson v. Northern P. R. Co.* 33 Land Dec. 634; *Idaho v. Northern P. R. Co.* 37 Land Dec. 135, 138. See also *Delany v. Northern P. R. Co.* 45 Land Dec. 6. It is pertinently said by counsel for the

railway company: "The government itself is satisfied with its title; and certainly it cannot, while retaining that title, deny to those from whom it was obtained the lands offered in exchange."

(2) As we have seen, the right was to select "an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual survey." The lands are in fact nonmineral, but the contention is that they were not so classified at the time of actual survey.* The deputy surveyor who made the survey reported that the lands, if cleared, would be suitable for grazing, but at the time of the report were more valuable for their timber. This, it is contended, is not a classification of the lands as nonmineral; that it was not a classification, but an omission to classify,—negative, not affirmative; inferential, not positive,—and therefore not a compliance with the statute. We cannot concur. The report was accepted by the Department as a description of the lands as nonmineral. They could be made suitable for grazing, was the report; pending that time they were more valuable for their timber. There was positive description of their character; words excluding some other character were not necessary. Classification is characterization through the selection of some quality or feature, and therefore lands may be classified as pasture (grazing), timber, arable, or mineral. It is determined by surface indications. Minerals may be hidden under any surface, but a surveyor is not expected to explore for them, that he may include or exclude reference to them in his reports. Such character is exceptional, besides, and considered by the Land Office as absent if not noted.¹

The contention that the lands were classified as mineral under the Act of February 26, 1895, is answered by the admission made at the trial that the records do not show it.

(3) The act of Congress authorized the selection of an unsurveyed tract, but required it to be described "in such manner as to designate the same with a reasonable degree of certainty," and it was provided that, when surveyed, a new list was to be filed, describing the tract "according to such survey."

The lands, we have seen, were designated by sectional* number, township, and range, and it is contended that such designation—"terms of future survey," as counsel term

¹ *Davenport v. Northern P. R. Co.* 32 Land Dec. 28; *Bedal v. St. Paul, M. & M. R. Co.* 29 Land Dec. 254; *Idaho v. Northern P. R. Co.* 37 Land Dec. 135; *Re St. Paul, M. & M. R. Co.* 34 Land Dec. 211; *Re Northern P. R. Co.* 40 Land Dec. 64.

it—was not a description “with a reasonable degree of certainty.”

This seems to have been the only contention submitted to the court of appeals, and upon careful consideration the court decided against the contention upon the Act of 1899, and, in analogy, upon other acts of Congress in relation to the public lands, and also upon the rules and decisions of the Land Department. It is not necessary to repeat the reasoning of the court. What was a description having “a reasonable degree of certainty” was to be determined by the circumstances. It was in the nature of a question of fact and had tests for decision, as the court of appeals pointed out. It had the aid of an adjoining survey, and the lands could be readily located from such survey. It was pointed out that the act of Congress did not require exactness; it contemplated a subsequent readjustment. “The filing of the first list is in a sense preliminary to obtaining the patent. It initiates the right, and not as much particularity and exactness is ordinarily required as where final stages are to be observed in clearing up and completing the transaction. In fact, by contemplation of the statute, the new selection is required to conform with the established survey and thus to correct the description in the primary selection. By reasonable intentment, therefore, we are impressed that the description contained in the railway company’s list No. 61, under the conditions prevailing of the survey of township 45 to the north and the proximity of the land in question thereto, designated the land with a reasonable degree of certainty, and must be held sufficient as a matter of law.” For the premises from which this excerpt is the conclusion we refer to the opinion.

*100 The court of appeals said that the question of the sufficiency of the description was “the single question*urged” for its decision, and counsel for defendants contend that no other question is open to our review, and cite *Montana R. Co. v. Warren*, 137 U. S. 348, 351, 34 L. ed. 681, 682, 11 Sup. Ct. Rep. 96. Plaintiff replies that the principle of that case applies only to questions of procedure, and not to questions of jurisdiction or the foundation of the right; adducing *Rosen v. United States*, 161 U. S. 29, 40 L. ed. 606, 16 Sup. Ct. Rep. 434, 10 Am. Crim. Rep. 251; *Old Jordan Min. & Mill. Co. v. Société Anonyme des Mines*, 164 U. S. 261, 41 L. ed. 427, 17 Sup. Ct. Rep. 113; *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94, 58 L. ed. 521, 34 Sup. Ct. Rep. 229. See also *Magruder v. Drury*, 235 U. S. 106, 113, 59 L. ed. 151, 153, 35 Sup. Ct. Rep. 77.

The distinction between questions seems to be artificial. The essential circumstance

would seem to be that a review is sought of that which was not decided, not submitted at all, or withdrawn from submission, and which, if it had been submitted, might have been decided in favor of the appealing party.

However, in deference to the earnestness of counsel, we have considered the questions. Affirmed.

(244 U. S. 49)

TOLEDO RAILWAYS & LIGHT COMPANY, Plff. in Err.,
v.

WALTER L. HILL and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased.

CORPORATIONS ⇨665(4) — AS WAIVER OF OBJECTION TO JURISDICTION — SUIT AGAINST FOREIGN CORPORATION.

1. The objection that a foreign corporation was not doing business in the state so as to be amenable to service of process there was not waived by filing an answer to the merits after a motion to vacate the service of process had been overruled by a Federal district court to which the cause had been removed, where the answer did not waive, but in terms reiterated, the plea to the jurisdiction, and the court treated the subject as not open for consideration, regarding the previous ruling on the motion to vacate as conclusive.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2571.]

CORPORATIONS ⇨642(1)—WRIT AND PROCESS—SERVICE ON FOREIGN CORPORATION —“DOING BUSINESS.”

2. A provision in the mortgage bonds of a foreign street railway corporation and in the annexed coupons for a place of payment in the city of New York, and the payment of coupons at that place, is not the doing of business within the state so as to render the corporation amenable to service of process there in an action upon the bonds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520, 2521.

For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

CORPORATIONS ⇨668(7)—WRIT AND PROCESS—SERVICE ON FOREIGN CORPORATION —RESIDENT OFFICER.

3. The resident director and vice president of a foreign corporation may not be served with process in an action against such corporation, where it is not doing business within the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2613.]

CORPORATIONS ⇨665(3)—WRIT AND PROCESS — SERVICE ON FOREIGN CORPORATE MORTGAGOR—RESIDENT TRUSTEE.

4. The property of a foreign corporation cannot be said to have been transferred metaphysically speaking, from the state of its incorporation to the state of New York, to be used as the basis of jurisdiction in the latter state in a suit upon the company’s mortgage bonds, merely because the trustee under the mortgage was a New York

corporation, in which the title to the mortgaged property for the purpose of the trust was vested.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2571, 2573, 2600.]

[No. 200.]

Argued April 23, 1917. Decided May 21, 1917.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment enforcing the liability of a foreign corporation upon its mortgage bonds. Reversed and remanded, with directions to dismiss the complaint for want of jurisdiction.

The facts are stated in the opinion.

Messrs. Robert Burns and Charles A. Frucauff for plaintiff in error.

Messrs. Howard S. Gans, Paul M. Herzog, and Arthur S. Levy for defendants in error.

*Mr. Chief Justice White delivered the opinion of the court:

Availing themselves to be citizens of the United States, the one residing in the city of New York and the other in Boston, Massachusetts, the defendants in error in April, 1914, sued in the supreme court of the state of New York to recover from the plaintiff in error the principal and interest of certain bonds issued by the plaintiff in error, alleged to be a corporation created by the laws of Ohio. The summons was served upon a director and vice president of the corporation, residing in the city of New York. The corporation, appearing specially for that purpose, on the ground of diversity of citizenship, removed the cause to the district court of the United States for the southern district of New York, and, on the filing of the record in that court, again solely appearing for such purpose, moved to vacate the service of summons on the ground that the corporation was created by the laws of the state of Ohio, and was solely engaged in carrying on its business at Toledo in that state; that is, in the operation of street railways and the furnishing of electrical energy for light and other purposes. The motion to vacate expressly alleged that the corporation was prosecuting no business in the state of New York, and that the person upon whom the summons was served, although concededly an officer of the corporation, had no authority whatever to transact business for or represent the corporation in the state of New York. On the papers, affidavits, and documents submitted, the motion to vacate was refused and an answer was subsequently

filed by the corporation setting up various defenses to the merits and besides reasserting the challenge to the jurisdiction. At the trial, presided over by a different judge from the one who had heard and adversely disposed of the challenge to the jurisdiction, the court, treating the ruling on that subject as conclusive, declined, therefore, to entertain the request of the corporation to consider the matter as urged in the answer. After this ruling the corporation refused to take part in the trial on the merits except to the extent that by way of objections to evidence, requests for rulings and instructions to the jury, it restated and reurged its previous contention as to jurisdiction. There was a verdict and judgment for the plaintiffs, and this direct writ of error to review alone the ruling as to jurisdiction was prosecuted, the record containing the certificate of the trial judge, as required by the statute.

Upon the theory that, as there was diversity of citizenship, the challenge to the jurisdiction involved merely authority over the person, it is insisted that even if the objection be conceded to have been well taken, it was subject to be waived and was waived below, and therefore is not open. This must be first disposed of. The contention rests upon the proposition that because, after the motion to vacate had been overruled, an answer to the merits was filed, therefore the right to assail the jurisdiction was waived. But this disregards the fact that the answer did not waive, but in terms reiterated, the plea to the jurisdiction. It further disregards the fact that the court treated the subject as not open for consideration*because of the previous ruling on the motion to vacate. Moreover, as it has been settled that the right to review by direct writ of error a question of jurisdiction may not be availed of until after final judgment (*McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118), it follows that the contention must be either that there is no right to review at all, or that it can only be enjoyed by waiving all defense as to the merits and submitting to an adverse judgment. The contention, however, has been conclusively adversely disposed of. *St. Louis Southwestern R. Co. v. Alexander*, 227 U. S. 218, 57 L. ed. 486, 33 Sup. Ct. Rep. 245, Ann. Cas. 1915B, 77.

Leaving aside the capacity of the person upon whom the summons was served, which we shall hereafter consider, the facts upon which the question of jurisdiction depends are briefly these: The corporation was created by the laws of the state of Ohio, had its principal establishment and business at Toledo, and carried on no business in the

state of New York unless the contrary conclusion results from the following statement: In 1901 the corporation issued its bonds and secured the same by mortgage. The trustee under the mortgage was the United States Mortgage & Trust Company of the City of New York, and the bonds were delivered to that company, to be certified in accordance with the provisions of the deed. The bonds were subject to registry and became due and were payable on July 1, 1909, "at the fiscal office of said company in the city of New York," and the semiannual interest coupons were also payable "at the fiscal office of said company in the city of New York." Prior to 1909, when the company defaulted in the payment of the principal and interest on its bonds, the interest coupons were paid at the office of a commercial firm in New York representing the company for such purpose, but that representation wholly ceased after the default, and from that date until this suit was brought, about five years later, the company had no office for any purpose in the state of New York, and transacted no business therein.

*The reason which controlled the court below, and the sole contention here relied upon, therefore, was and is that the provision for the payment of the bonds and coupons at an office in the city of New York constituted a doing of business in New York so as to afford jurisdiction there; and that such result continued to operate years after the office for such purpose had ceased to exist, upon the ground that, for the purpose of jurisdiction over the corporation, it must be conclusively presumed to have continued to maintain an office in the city of New York for the purpose stated. But we think from either point of view the contention is without merit: the first, because the mere provision for a place of payment in the city of New York of the bonds and the coupons annexed to them, at their maturity, and their payment at such place, was in no true sense the carrying on by the corporation in New York of the business which it was chartered to carry on, however much it may have been an agreement by the corporation to pay in New York an obligation resulting from the carrying on by it of its business in the state of Ohio. And this view necessarily disposes of the proposition in the second aspect, since the indulging in the fiction of the existence of an office for the payment of coupons could not produce an effect greater than that which could be produced by the real existence of the office.

So far as concerns the capacity of the person upon whom the summons was served irrespective of the doing of business by the

corporation in the state, we do not expressly notice the various contentions by which, under such a view, jurisdiction is sought to be supported, but content ourselves with saying that we think they are all plainly without merit.

Although what we have said in substance meets and disposes of all the contentions relied upon to sustain the jurisdiction, we have not expressly noticed them all because of their obvious want of merit,—a situation which is illustrated by the mere statement* of a contention made that, as the trustee under the mortgage was a New York corporation in whom the title to the mortgaged property for the purposes of the trust was vested, therefore all the property of the corporation must be metaphysically considered to have been translated from the state of Ohio to the state of New York, and used as a basis of jurisdiction in such latter state.

Reversed and remanded with directions to dismiss the complaint for want of jurisdiction.

(244 U. S. 54)

STANLEY MEISUKAS, Plff. in Err.,

v.

GREENOUGH RED ASH COAL COMPANY.

CORPORATIONS ¶665(4) — WAIVER OF OBJECTION TO JURISDICTION — SUIT AGAINST FOREIGN CORPORATION.

1. The right of a foreign corporation to challenge the jurisdiction was not lost by a special appearance for the sole purpose of objecting to the jurisdiction by a motion to vacate the service of summons, nor by the postponement, at plaintiff's request, of the hearing on the motion, conditioned upon the reservation to the corporation of the right to plead to the merits if, upon the hearing, jurisdiction was found to exist, nor because the order for the continuance directed the plaintiff to amend so as to fully disclose citizenship before the day set for the hearing of the motion.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2571.]

COURTS ¶340—PRACTICE — CONFORMITY ACT—CHALLENGING JURISDICTION BY MOTION TO QUASH—DEMURRER.

2. Jurisdiction of a Federal district court over a foreign corporation not doing business within the state may, notwithstanding the Conformity Act (U. S. Rev. Stat. § 914, Comp. Stat. 1916, § 1537), be challenged by a motion to quash, although, under the local practice, the question can only be raised by demurrer.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 900.]

[No. 229.]

Argued May 2, 1917. Decided May 21, 1917.

IN ERROR to the District Court of the United States for the Eastern District of New York to review a judgment dismissing, for lack of jurisdiction, an action against a foreign corporation not doing business in the state. Affirmed.

The facts are stated in the opinion.

Messrs. Jesse C. Adkins, Alvin C. Cass, Baltrus S. Yankaus, and Frank J. Felbel for plaintiff in error.

Messrs. Charles W. Pierson and Clifton P. Williamson for defendant in error.

* ¹² **Mr. Chief Justice White** delivered the opinion of the court:

Alleging himself to be a citizen of New York and a resident in the eastern district, the plaintiff in error sued below to recover from the defendant in error the amount of damages alleged to have been by him suffered as the result of an explosion of dynamite while he, the plaintiff, was engaged as a servant of the defendant in working in a coal mine belonging to and operated by it near Shamokin, Pennsylvania. The defendant was alleged to be a corporation created under the laws of the state of Pennsylvania and a resident of that state, having its principal place of business at Shamokin. It was alleged, however, as a basis for jurisdiction, that the corporation carried on business in the state of New York and had property therein. The summons was personally served upon the president of the corporation who was found in the borough of Manhattan, in the southern district.

Upon the complaint and summons and an affidavit of its president, the corporation, appearing specially "for the sole and single purpose of objecting to the jurisdiction of this court over the defendant in this action," moved "to set aside and declare null, void, and of no effect the attempted service of the summons," upon the ground that the corporation had no property in the state of

¹² **New York** and transacted no business therein, and although its* president was personally served while temporarily in the southern district of New York, he was there engaged in the transaction of no business for or on account of the corporation, and had no authority so to do. A hearing was ordered on the motion. At the hour fixed for the hearing, at the request of the plaintiff, it was continued, the court, however, in express terms subjecting the continuance to the condition that the defendant should not lose his right to plead to the merits if, on the hearing on the question of jurisdiction, on the postponed day, au-

thority to entertain the cause was sustained. In addition the plaintiff was ordered within six days to file an amended complaint "showing whether the plaintiff is an alien or a citizen of the United States, and if a citizen, whether native born or naturalized, and the date and place of such naturalization, if any." The amended complaint was filed, showing the plaintiff to be an alien, and subsequently on the hearing on the motion to quash the summons an affidavit for the purpose of supporting the jurisdiction was filed on behalf of the plaintiff. It is true, however, to say that this affidavit did not rebut the facts as to the nondoing of business and the absence of property of the corporation in the state of New York, and the want of authority on the part of its president, upon whom the summons had been served, to represent the corporation or transact any business in New York in its behalf. The summons was quashed and the suit dismissed, and the direct appeal which is before us on the question of jurisdiction was then taken.

Despite some apparent contention to the contrary there is no room for any controversy concerning the facts upon which the court below based its action; that is, the nondoing of business by the corporation in New York and the absence of authority in its president to represent it there. Indeed, the argument freely admits this and proceeds upon the theory that, although the facts clearly* establish the correctness of the ruling below if they are considered, yet they are not subject to be so considered because the challenge to the jurisdiction was waived by the proceedings which were taken to question it. Generically this would seem to rest upon the proposition that because there was a special appearance on the face of the summons and complaint, challenging the jurisdiction, thereby the right to so challenge was waived. But the contrary has been so long established and is so elementary that the proposition need be no further noticed.

Although this be true, the argument further is that the right to be heard on the challenge to the jurisdiction was lost because of the postponement of the hearing on that subject which was granted. This, however, in a different form but embodies the error involved in the proposition just disposed of. But, aside from this, as the continuance was granted at the request of the plaintiff, and for the purpose of enabling him to be fully heard on the subject of jurisdiction, no further reference to the proposition is required. Again, it is urged that because, as a condition of the continuance the court reserved the right of the defendant to plead to the merits if, on the

hearing, jurisdiction was found to exist, therefore the question of jurisdiction was waived,—a conclusion which is again too obviously wrong to require more than statement to refute it. Moreover, it is insisted that as the order directing the plaintiff to amend so as to fully disclose citizenship before the day for the hearing on the motion as to jurisdiction was an exercise of jurisdiction resulting from some suggestion of the defendant, therefore the question of jurisdiction was not open. But this disregards the fact that the order in question was expressly made by the court, doubtless in the discharge of its duty to see to it that, from no point of view, was its jurisdiction abused.

Finally, it is said that as, under the local law, the right to challenge the summons and the jurisdiction resting on it could only have been raised by demurrer, therefore under the Conformity Act (§ 914, Rev. Stat. Comp. Stat. 1916, § 1537) the motion to quash the summons could not be entertained, and, on the contrary, should have been disregarded. We do not stop to discuss the proposition since it is too clear for discussion that its want of merit is foreclosed by previous decisions of this court which have recognized and upheld the practice of challenging the jurisdiction under circumstances like those here present by way of motion to quash instead of by demurrer. *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; *St. Louis Southwestern R. Co. v. Alexander*, 227 U. S. 218, 57 L. ed. 486, 33 Sup. Ct. Rep. 245, Ann. Cas. 1915B, 77. Affirmed.

(244 U. S. 58)

AMERICAN EXPRESS COMPANY, Plf.
in Err.,
v.
UNITED STATES HORSE SHOE COMPANY.

CARRIERS ⇌ 218(7)—LIMITING LIABILITY—
AGREED VALUE.

1. A limitation of liability to an agreed value on which the rate was based was effected by a contract for interstate express carriage, although the shipper made no declaration of value, as the contract of shipment contemplated, where other clauses in the contract are susceptible of no other explanation than that they were intended to fix a primary value to control as the basis for fixing the rates and as a rule of limitation of liability if the shipper did not, by making another and increased value, become liable for a higher rate and possess the right to a greater recovery, and

where the rate as charged clearly rested upon the company's tariff as applied to the shipment and the statement as to primary value so fixed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 946.]

CARRIERS ⇌ 218(7)—LIMITING LIABILITY—
AGREED VALUE—FAILURE TO POST RATES.

2. The omission to post the rate sheets of an express company on file with the Interstate Commerce Commission does not invalidate a limitation of the express company's liability by its contract of interstate shipment to an agreed value made to adjust the rate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 946.]

CARRIERS ⇌ 218(7)—LIMITING LIABILITY—
AGREED VALUE.

3. A limitation of the carrier's liability for an interstate shipment of live stock, where the shipper has made no declaration of value, to a primary valuation upon which the rate was based, is not repugnant to the declaration in the carrier's rate sheets on file with the Interstate Commerce Commission that the rate schedules dealing with merchandise, which expressly provide that the primary limitations of value fixed shall be the measure of the charge and liability unless another and higher valuation be declared, must not be applied to live stock. To hold otherwise would cause this clause to accomplish the result which it was obviously intended to prevent, i. e., the control or modification of the charges contained in live-stock clauses by the provisions as to merchandise charges.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 946.]

CARRIERS ⇌ 218(7)—LIMITING LIABILITY—
AGREED VALUE—SHIPPER'S FAILURE TO
READ SHIPPING CONTRACT.

4. The effect of a contract for interstate carriage, made and signed by the shipper, limiting the liability of the carrier to an agreed value, made to adjust the rate, may not be avoided, where it is valid from the point of view of the established rate sheets on file with the Interstate Commerce Commission, by the suggestion that, by neglect or inattention, the contract which was entered into was not read by the shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 946.]

[No. 243.]

Argued April 30, 1917. Decided May 21,
1917.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Erie County, in that state, in favor of a shipper for the full amount of the damage to an interstate shipment, notwithstanding the attempt by the carrier to limit its liability to an

agreed valuation on which the rate was based. Reversed and remanded for further proceedings.

See same case below, 250 Pa. 527, 95 Atl. 706.

The facts are stated in the opinion.

Messrs. Charles F. Patterson and Francis R. Harbison for plaintiff in error.

Mr. W. Pitt Gifford for defendant in error.

*50 *Mr. Chief Justice White delivered the opinion of the court:

The subject-matter of this suit is the liability, if any, of the plaintiff in error, the Express Company, for the failure to safely deliver a colt which was intrusted to it by the agent of the defendant in error at Milwaukee, Wisconsin, for transportation to Erie, Pennsylvania, and, if there was any liability, the amount thereof. The controversy is here to review the action of the court below in affirming a judgment of the trial court, rendered on a verdict of a jury finding that there was liability, and fixing the amount at \$1,916.70. 250 Pa. 527, 95 Atl. 706. Jurisdiction to review rests upon the interstate commerce character of the shipment, involving various alleged misconstructions of the Act to Regulate Commerce and consequent deprivation of Federal rights asserted to have arisen from the course of the trial in the court of first instance, as also from the action of the court below in affirming. These contentions in the courts below concerned both the existence of liability, and, if any, the amount. As the result, however, of the conclusion of both courts as to the fact of negligence, and the absence of any ground for clear conviction of error on the subject (Great Northern R. Co. v. Knapp, 240 U. S. 464, 466, 60 L. ed. 745, 751, 36 Sup. Ct. Rep. 399; Baltimore & O. R. Co. v. Whitacre, 242 U. S. 169, 61 L. ed. 228, 37 Sup. Ct. Rep. 33), as well as because of the limitations resulting from the errors assigned and relied upon, the question of liability may be put out of view, thus reducing the case to a question of the amount, and that turns on whether there was a limitation of liability and the right to make it.

The printed form of contract (express receipt) which was declared on and made a part of the complaint contained a caption under a title "Notice to Shippers," directing their attention to the fact that they must value their property to be shipped, and that the charges for transportation and the sum of recovery in case of loss would be based upon valuation. The contract itself was entitled, "Limited Liability Livestock Contract." Its first clause described the carriage which was to be provided for with

appropriate blanks to enable the insertion of the live stock which it covered and the rate to be paid for the service, with a proviso that the charge was based upon valuation fixed by the shipper. The second clause stated a demand by the shipper for rates to be charged for the carriage, and that he was offered "by said Express Company alternative rates proportioned to the value of such animals, such value to be fixed and declared by the shipper, and according to the following tariff of charges, viz.:" This was followed by clause 3, which contained enumerations of various classes of animals, fixing a primary valuation for each class; for instance: "For . . . horses . . . \$100." * "For . . . colts . . . \$50." *61 The fourth and fifth clauses provided that after ascertaining the rate to be charged for all classes of animals embraced in clause 3 by applying to those classes the rate provided by the tariff sheets filed according to law with the Interstate Commerce Commission, there should be added to such rate a stated percentage of the amount by which the declared valuation of the shipper exceeded the primary valuation fixed by the terms of clause 3. The fifth clause also concluded with the declaration that the shipper, in order to avail himself of the alternative rates, had declared a value as follows, and contained blanks for the insertion of said valuation.

There was filled in this blank contract, as signed by the parties and as sued on, in the first clause a statement of the animals shipped, a mare and colt, and of the rate, \$75. In the third clause containing the enumeration of classes, in the class as to horses valued at \$100 there was written "\$100," and in the class as to colts valued at \$50 there was written "\$50." There was no filling of the blank at the end of the fifth clause, stating the owner's valuation, and that space, therefore, remained vacant.

There was evidence tending to show that the shipper was experienced in shipping horses and was informed of the right to value, and that the rate as well as the recovery would depend upon valuation. Evidence was also admitted, over objection of the company, tending to show that the shipper was unaware of the valuation clauses and that he signed the contract without reading it. There was further evidence that, on the contrary, the shipper was fully informed by the agent and declared his purpose to fix the primary valuation and not to exceed it. In addition, evidence was tendered by the defendant which was rejected and objection reserved, tending to show that, in consequence of the desire of the shipper not to change the primary valuation, that is, to adopt the same, the figures

written into the clauses of § 3 of \$100 as to the mare and \$50 as the colt were written by the agent inadvertently in the wrong place, intending to write them at the space left vacant for the shipper's valuation at the end of clause 5, and that for the same reason the rate charged was based on the tariff as applied to the primary valuation as stated in the third clause of the contract.

Putting out of view the conflicting tendencies of the proof, and looking at the subject-matter from the point of view of the contract, that it was one intended to limit liability, or, in other words, to fix a rate according to value, at the shipper's election, and to regulate recovery in case of loss correspondingly, would seem too clear for anything but statement. It is true the intimation is conveyed in the argument that the alternative rate depended exclusively upon the making of a valuation by the shipper, and that where this was not done, there was no valuation and no limitation, and a consequent limited rate and unlimited liability. But the suggestion disregards the stating of a value in the different clauses of § 3 which are susceptible of no other explanation than that they were intended as a primary value to control as the basis for fixing the rates and as a rule of limitation if the shipper did not, by making another and increased value, become liable for a higher rate and possess the right to a greater recovery. To adopt the suggestion would require a disregarding of the plain terms of the contract, and would leave no basis upon which to explain the rate fixed, which clearly rested upon the tariff as applied to the articles and the statement as to value fixed in the third clause.

That it was in the power of the carrier under the Act to Regulate Commerce, as amended, to limit liability even in case of negligence by affording the shipper an opportunity to pay a higher rate and secure a higher recovery than the one initially fixed by the carrier, is so conclusively settled as to be beyond controversy. *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; *Missouri, K. & T. R. Co. v. Hariman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380, 8 N. C. C. A. 53; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S.

173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. ed. 853, L.R.A.1915E, 665, P.U.R.1915C, 300, 35 Sup. Ct. Rep. 494; *George N. Pierce Co. v. Wells, F. & Co.* 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. 1022, L.R.A. 1917A, 265, 36 Sup. Ct. Rep. 555; *New York C. & H. R. R. Co. v. Beaham*, 242 U. S. 148, 61 L. ed. 210, 37 Sup. Ct. Rep. 43.

These rulings are decisive unless it be that, for some reason, they are inapplicable, and we briefly consider separately the grounds relied upon as demonstrating that result.

It is said the rate sheets filed with the Interstate Commerce Commission, if they sustained the contract, were not posted, and therefore the contract must be treated as having nothing to rest upon. But the proposition is adversely disposed of by several of the cases above cited. *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 652, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 111, 58 L. ed. 868, 875, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 327, 60 L. ed. 1022, L.R.A.1917A, 265, 36 Sup. Ct. Rep. 555; *New York C. & H. R. R. Co. v. Beaham*, 242 U. S. 148, 151, 61 L. ed. 210, 37 Sup. Ct. Rep. 43.

But it is urged the contract of limitation was void because it is shown to have been illegal; that is, repugnant to the official tariff sheets filed with the Interstate Commerce Commission, which, properly authenticated, were offered in evidence. But, turning to the official tariff sheets as found in the record, it is apparent that the terms of the contract are substantially identical with the statement in the tariff sheets as to the rates concerning the shipment of live stock, and indeed, comparing the two, it is impossible to reach any other conclusion than that the* provisions of the contract were copied from the provisions of tariff sheets. In substance the argument rests upon the assumption which we have already disposed of; that is, that the contract only provided for a limitation in the event of a declaration of value by the shipper, and left no room for such a limitation where the shipper obtained the lowest possible rate by making no valuation, and accepting the primary limit of value stated in the contract by the carrier. The argument as we are now considering it, however, proceeds not solely upon the text of the contract and the tariff sheets concerning the carriage of live stock, but additionally upon the effect produced upon such provisions by clauses in the tariff

sheets relating to the valuation of merchandise. The argument in this: that as in the rate schedules dealings with merchandise valuation it is expressly provided that the primary limitation of value fixed shall be the measure of the charge and liability unless another and higher valuation be declared, such rule ought not to be deduced from the provisions as to live stock valuation where that stipulation is not found in express terms, and hence that, in the absence of an express valuation in a live-stock contract by a shipper, no primary limitation on value is possible, and thus the rule of the lesser the rate the greater the responsibility would necessarily, in the case of live stock, come to pass. Incongruous as this result would be, it is said that it should be applied since, in the rate sheet concerning merchandise, it is declared in ¶ d that "these charges must not be applied to live animals, live birds or live stock (see ¶ g)," that is, the live-stock paragraph. But to give to the clause the import claimed for it would be to cause it to accomplish the very result which it was obviously intended to prevent; that is, the control or modification of the charges contained in live-stock clauses by the provisions as to merchandise charges. Indeed, the complete answer to the proposition is the one which we* have previously pointed out in considering the argument in another form of statement,—that to accede to it would require a plain disregard of the fixing of a primary valuation by the terms of the contract and the sanction of the right to do so, found in the express words of the rate sheets.

Finally, it is said that the right to limit ought not to be recognized in the presence of a controversy and conflicting tendencies of proof as to whether the limitation of liability was called to the attention of the shipper, and, if one aspect be accepted, of the possibility that the contract was signed by the shipper in ignorance of the clause. But here again the contention but overlooks the very foundation upon which the principle settled by the adjudged cases rests and disregards the express ruling in some of them, that the effect of a contract made and signed by a shipper, which is lawful from the point of view of the established rate sheets, may not be avoided by the suggestion that, by neglect or inattention, the contract which was entered into was never read. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. 1022, L.R.A. 1917A, 265, 36 Sup. Ct. Rep. 555; *New York C. & H. R. R. Co. v. Beaham*, 242 U. S. 148, 151, 61 L. ed. 210, 37 Sup. Ct. Rep. 43.

As from what we have said it follows that the shipper should not have been per-

mitted, after obtaining the lowest possible rate based upon a valuation to which his right of recovery in case of loss was limited, to recover, upon the happening of the loss, an amount wholly disproportionate and inconsistent with the rate paid, contrary to the express terms of the contract, it results that the judgment below must be and it is reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

(244 U. S. 66)

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Plff. in Err.,

v.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased.

MASTER AND SERVANT — 265(6)—PRESUMPTION — INFERRING NEGLIGENCE FROM OPENING OF AUTOMATIC COUPLER.

1. Negligence may be inferred from the mere opening of an automatic coupler while a train which was transporting interstate freight was in motion, thereby causing the death of a brakeman, in view of the positive duty imposed by the Federal statutes to furnish safe appliances for the coupling of cars.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 898, 955.]

MASTER AND SERVANT — 284(1) — SUFFICIENCY OF EVIDENCE TO GO TO JURY—EMPLOYERS' LIABILITY—SAFETY APPLIANCES—PECUNIARY LOSS.

2. An action under the Federal Employers' Liability Act* for the death of a minor need not be taken from the jury on the ground that there was no evidence of pecuniary loss resulting to the father, on whose behalf the suit was brought, where, under the local law, a father is entitled to the earnings of his son during minority.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1000.]

[No. 251.]

Argued and submitted April 9, 1917. Decided May 21, 1917.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which, on a second appeal, affirmed a judgment of the District Court of Ramsey County, in that state, in favor of plaintiff in an action for a death, brought under the Federal Employers' Liability Act. Affirmed.

See same case below, on first appeal, 125 Minn. 525, 147 N. W. 430; on second appeal, 130 Minn. 33, 153 N. W. 120.

The facts are stated in the opinion.

Messrs. William H. Bremner and Frederick M. Miner for plaintiff in error.

— For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1916, §§ 8657-8667).

Messrs. Lyle Pettijohn and W. R. Duxbury for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

Basing her cause of action upon the Federal Employers' Liability Act, the defendant in error, as administratrix of the estate of Merlin E. Gotschall, deceased, sued to recover from the railroad company, plaintiff in error, damages resulting from his death, alleged to have been occasioned by the negligence of the company while he was in its employ, engaged in interstate commerce. On this writ of error a reversal is sought of the action of the court below in affirming a judgment entered by the trial court on the verdict of a jury in favor of the plaintiff.

The evidence tended to show the following facts: Gotschall, a minor, twenty years old, at the time in question was head brakeman on an extra freight train running from Albert Lea, Minnesota, to Minneapolis, and transporting interstate commerce merchandise. As the train left Jordan, an intermediate station, Gotschall boarded a car toward the rear end and was proceeding along the tops of the cars toward the locomotive when the train separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes and a sudden jerk, which threw Gotschall off the train and under the wheels.

The jury, under an instruction of the court, was permitted to infer negligence on the part of the company from the fact that the coupler failed to perform its function, there being no other proof of negligence. It is insisted this was error, since, as there was no other evidence of negligence on the part of the company, the instruction of the court was erroneous as, from whatever point of view looked at, it was but an application of the principle designated as *res ipsa loquitur*, a doctrine the unsoundness of which, it is said, plainly results from the decisions in *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, and *Looney v. Metropolitan R. Co.* 200 U. S. 480, 50 L. ed. 564, 26 Sup. Ct. Rep. 303, 19 Am. Neg. Rep. 627. We think the contention is without merit because, conceding in the fullest measure the correctness of the ruling announced in the cases relied upon to the effect that negligence may not be inferred from the mere happening of an accident except under the most exceptional circumstances, we are of opinion such principle is here not controlling in view of the positive duty imposed by the statute upon the railroad to furnish safe appliances for the coupling of cars. St.

Louis, I. M. & S. R. Co. v. Taylor, 210*U. S. 281, 294, 295, 52 L. ed. 1061, 1067, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 575, 55 L. ed. 582, 588, 31 Sup. Ct. Rep. 612; *Delk v. St. Louis & S. F. R. Co.* 220 U. S. 580, 586, 55 L. ed. 590, 595, 31 Sup. Ct. Rep. 617; *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 43, 60 L. ed. 874, 878, 36 Sup. Ct. Rep. 482.

Again it is insisted that error was committed in submitting the case to the jury because there was no evidence of pecuniary loss resulting to Gotschall's father, on whose behalf the suit was brought. But this disregards the undisputed fact that the deceased was a minor, and as, under the Minnesota law, the father was entitled to the earnings of his son during minority, the question is one not of right to recover, but only of the amount of damages which it was proper to award.

Affirmed.

(244 U. S. 68)

OHIO RIVER CONTRACT COMPANY,
Plff. in Err.,
v.

HONORABLE THOMAS R. GORDON,
Judge Jefferson Circuit Court.

COURTS ⇨489(1)—JURISDICTION—PERSONAL INJURY ACTION—ACCIDENT ON GOVERNMENT WORK.

1. A state court is not without jurisdiction of a personal-injury action merely because the parties, at the time of the accident, were engaged in work under a contract with the United States government. [Ed. Note.—For other cases, see Courts, Cent. Dig. § 1326.]

COURTS ⇨489(10)—SERVICE ON FOREIGN CORPORATION — "DOING BUSINESS IN STATE."

2. A foreign corporation engaged in constructing, under a contract with the United States government, a canal on a parcel of land known as the "Canal Reservation," acquired by the United States by purchase or condemnation from the state, with the consent of its legislature, is doing business within the state so as to be amenable to the jurisdiction of the state courts, even conceding that such reservation was within the exclusive jurisdiction of Congress, where, in order to dispose of the material excavated, a line of railway had been built by the corporation, extending beyond the reservation, and connecting with the tracks of a railway company upon whose property within the state all the earth and rocks were dumped.

COURTS ⇨489(10) — JURISDICTION—FOREIGN CORPORATION — PERSONAL INJURY ACTION — ACCIDENT ON GOVERNMENT LAND.

3. The jurisdiction of state courts over a personal-injury action against a foreign

corporation doing business within the state so as to be amenable to service of process there is not defeated because the injury out of which the cause of action arose happened on land over which the Federal government had exclusive jurisdiction.

[No. 594.]

Argued and submitted April 9, 1917. Decided May 21, 1917.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment dismissing the petition for a writ of prohibition directed to the judge of the Circuit Court of Jefferson County, in that state, to restrain further proceedings in a personal-injury action brought against a foreign corporation engaged on work for the Federal government. Affirmed.

See same case below, 170 Ky. 412, 186 S. W. 178.

The facts are stated in the opinion.

Messrs. W. Overton Harris and A. E. Richards for plaintiff in error.

Messrs. Matthew O'Doherty and Morton K. Yonts for defendant in error.

*69 *Mr. Chief Justice White delivered the opinion of the court:

In July, 1914, one Haines sued the Ohio River Contract Company, the plaintiff in error, and Swisher, one of its employees, in the circuit court of Jefferson county, Kentucky, to recover damages resulting from personal injuries alleged to have been occasioned by the negligence of the defendants while Haines was in the employ of the company. The defendant company by appropriate pleadings challenged the power of the court to entertain the suit, both because of the want of jurisdiction over the corporation and over the subject-matter of the suit. Briefly the facts were these:

*02 *The Contract Company was a corporation organized* under the laws of Indiana, and had its principal place of business in that state. At the time in question it was engaged within the geographical limits of the state of Kentucky in constructing, under a contract with the United States government, a canal with locks and dam on the Ohio river on a piece of land known as the Canal Reservation, acquired by the United States by purchase or condemnation from the state of Kentucky with the consent of its legislature. While most of the work under the contract was performed on the land thus acquired, the earth and rocks excavated in the construction of the canal were hauled over railroad tracks laid by the defendant company on land outside of

the Canal Reservation, and, through an arrangement with the Kentucky & Indiana Terminal Railway Company, were dumped on its property in the state of Kentucky. The accident which gave rise to the injuries complained of occurred in the course of the work on the Canal Reservation. In conformity with a statute of Kentucky the company had designated an agent in the state upon whom process might be served in the event suits were brought against it in the state. The summons issued in the cause was served on the designated agent when he was on the land of the United States, but subsequently an alias summons was served on him at his home in Louisville.

Under these facts it was insisted the court was without jurisdiction (a) because when the accident occurred the company and the plaintiff were engaged in work under a contract with the United States government; (b) because the cause of action arose on land acquired by the United States by purchase or condemnation with the consent of the legislature of Kentucky, and therefore, under article 1, § 8, clause 17, of the Constitution of the United States, the jurisdiction of the Federal government was exclusive; (c) because the service of the original summons was void, since it was made upon the land of the United States, ¹where, it was insisted, state process cannot run; and (d) because the service of the alias summons was also void since the company transacted no business in the state, and the person served was not its agent for any purpose in the state, but represented the company only in its work on the reservation. The objections of the company to the jurisdiction were overruled and the case was set down for trial. Thereupon the company, desiring a review of the jurisdictional questions, and in order to avoid the consequences of the rule under the Kentucky practice that the appearance of a party on appeal operates as a waiver of a claim of want of jurisdiction over his person (*Western Life Indemnity Co. v. Rupp*, 235 U. S. 261, 59 L. ed. 220, 35 Sup. Ct. Rep. 37), applied to the court below for a writ of prohibition directed to the trial judge to restrain him from proceeding further in the cause. A temporary restraining order was granted, but, on final hearing, the petition was overruled and the writ of prohibition denied, and upon the theory, which was adequately presented below, that to subject the defendant corporation to the jurisdiction of the state court under the circumstances stated would be a violation of due process, in conflict with the 14th Amendment, this writ of error was prosecuted.

At the present term, on application of

the plaintiff in error, an order was issued to restrain further proceedings in the cause in the courts below pending the decision of the case here.

We at once put out of view the contention that the trial court was without jurisdiction because the parties, at the time of the accident, were engaged in work under a contract with the United States government, since the want of merit in the proposition has been previously established. *Gromer v. Standard Dredging Co.* 224 U. S. 362, 371, 56 L. ed. 801, 32 Sup. Ct. Rep. 499.

The remaining contentions are also, we think, without merit. Conceding, for the sake of the argument only, that the Canal Reservation was within the exclusive legislative jurisdiction of Congress, it is clear from the facts we have stated that the business carried on by the corporation was not confined to the land owned by the United States, since it is admitted that, in order to dispose of the material excavated in the construction of the canal, a line of

railway was built which extended beyond the reservation and connected with the tracks of the Kentucky & Indiana Terminal Railway, upon whose property all of the earth and rocks were dumped. This clearly constituted the doing of business within the state and subjected the corporation to the jurisdiction of the Kentucky courts. Assuming also, for argument's sake only, that the original summons was void because served on the agent designated by the company while he was on the reservation, the subsequent service of the alias summons on the agent at his home in Louisville was valid, since, as we have seen, the company was doing business in the state. And finally, an action for personal injuries being in its nature transitory and susceptible of being brought in any jurisdiction in which the defendant may be impleaded, there is no foundation for the contention that the court had no jurisdiction over the subject-matter of the suit.

Affirmed.

(244 U. S. 383)

MISSISSIPPI RAILROAD COMMISSION
and Ross A. Collins, Attorney General,
Appts.,

v.

MOBILE & OHIO RAILROAD COMPANY,
Appellee.

**RAILROADS — 227—REGULATION OF TRAIN
SERVICE—OUT-OF-POCKET COSTS.**

1. The reasonableness of orders of a State Railroad Commission directing the restoration to service of certain passenger trains cannot be made to turn upon what the Commission estimated was the "out-of-pocket" cost, the immediate cash outlay in wages, and fuel to operate such trains.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 741.]

**CONSTITUTIONAL LAW — 297—DUE PRO-
CESS OF LAW — REGULATION OF TRAIN
SERVICE—CONFISCATION.**

2. Orders of the Mississippi Railroad Commission, made in October, 1914, requiring an interstate railway carrier to restore to service six passenger trains,—two each way daily between Meridian and Waynesboro, a town 52 miles to the south, and one train each way daily between Meridian and Okolona, a town 127 miles to the north,—all in the state of Mississippi, could not be enforced without taking the property of the railway company without due process of law, contrary to U. S. Const. 14th Amend., where the company was operating before the business depression incident to the European war on an extremely narrow margin of profit, and, without being able to meet the growing deficit caused by the shrinkage of business, had resorted to rigid economies of every sort before it had discontinued these six trains, the continued operation of which would have involved a loss of \$10,000 a month, and where the three daily trains to the north of Meridian which still remained in service could not be said to be inadequate to the needs of the comparatively small population to be served, whatever may be said of the service to the south, with but two trains each way in twenty-four hours, the orders of the Commission having been intended to be, in effect, an order for the restoration of the six trains.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 832, 834.]

[No. 256.]

Submitted May 1, 1917. Decided June 4,
1917.

APPEAL from the District Court of the United States for the Southern District of Mississippi to review a decree enjoining the enforcement of orders of the State Railroad Commission requiring a railway carrier to restore certain passenger trains to service. Affirmed.

The facts are stated in the opinion.

Messrs. James N. Flowers and George H. Ethridge for appellants.

Messrs. S. R. Prince and Carl Fox for appellee.

* Mr. Justice Clarke delivered the opinion of the court:

This is a direct appeal from an order of the district court for the southern district of Mississippi, three judges sitting, granting an interlocutory injunction restraining the Mississippi Railroad Commission and the attorney general of that state from enforcing six separate orders entered by the Commission on one citation in one case on October 7, 1914, requiring the appellee to restore to service six passenger trains,—two each way daily between Meridian and Waynesboro, a town 52 miles to the south, and one train each way daily between Meridian and Okolona, a town 127 miles to the north,—all in the state of Mississippi. The trains between Meridian and Okolona which were discontinued were interstate trains; the others were local to the state.

The appellee averred several grounds for the injunction prayed for, but the conclusion which we have reached calls upon us to consider only one of them, viz.:

That the depression of business incident to the European war had so reduced the income of the railroad company that, at the time the order was entered, it was less than its current expenses; that a large loss would be incurred in operating each of the six trains; that without these trains there remained reasonably adequate service, having regard to the population of the territory involved, and that the general financial condition of the company was such that the order, if enforced, would deprive the company of its property without due process of law and of the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States.

The principles of law applicable to the decision of such a case as this record presents are few, and they have become so settled and so familiar by repeated decisions of this court that extended discussion of them would be superfluous. They are these:

A state may regulate the conduct of railways within its borders, either directly or through a body charged with the duty and invested with powers requisite to accomplish such regulation. *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *Prentiss v. Atlantic Coast Line R. Co.* 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48.

Under this power of regulation a state may require carriers to provide reasonable

and adequate facilities to serve not only the local necessities, but the local convenience, of the communities to which they are directly tributary. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585; *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; *Chicago, B. & Q. R. Co. v. Railroad Commission*, 237 U. S. 220, 59 L. ed. 926, P.U.R.1915C, 309, 35 Sup. Ct. Rep. 560; and such regulation may extend in a proper case to requiring the running of trains in addition to those provided by the carrier, even where this may involve some pecuniary loss. *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585; and *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330.

But, while the scope of this power of regulation over carriers is very great and comprehensive, the property which is invested in the railways of the country is nevertheless under the protection of the fundamental guaranties of the Constitution and is entitled to as full protection of the law as any other private property devoted to a public use, and it cannot be taken from its owners without just compensation, or without due process of law. *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, supra; *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 59 L. ed. 735, L.R.A.—, —, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; *Chicago, M. & St. P. R. Co. v. Wisconsin*, 238 U. S. 491, 59 L. ed. 1423, L.R.A.1916A, 1133, P.U.R.1915D, 706, 35 Sup. Ct. Rep. 869.

This power of regulation, if it is exercised in such an arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the public service, passes beyond lawful bounds and is void, because repugnant to the due process of law provision of the 14th Amendment to the Constitution of the United States. *Atlantic Coast Line R. Co.* v. North Carolina Corp. Commission*, supra; *Missouri P. R. Co. v. Nebraska*, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; *Missouri P. R. Co. v. Tucker*, 230 U. S. 340, 57 L. ed. 1507, 35 Sup. Ct. Rep. 961; *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 59 L. ed. 735,

L.R.A.—, —, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1.

Whether a statute enacted by the legislature of a state, or an order passed by a railroad commission, exceeds the bounds which the law thus sets to such authority, is a question of law arising on the facts of each case (*Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90), and the appropriate remedy for determining that question is a bill in equity such as was filed in this case to enjoin its enforcement (*Ibid.*; *Chicago, M. & St. P. R. Co. v. Wisconsin*, 238 U. S. 491, 59 L. ed. 1423, L.R.A.1916A, 1133, P.U.R.1915D, 706, 35 Sup. Ct. Rep. 869).

With these principles in mind we pass to a consideration of the question of law which the facts of this particular case present for our decision.

The case was heard on bill, answer, and testimony which are all before us, and the facts appearing may be summarized as follows:

The Mobile & Ohio Railroad Company is an interstate carrier operating a line of railway from Mobile, Alabama, to St. Louis, Missouri. This evidence is uncontradicted; that the company is not overcapitalized, that it has been wisely and economically managed, and that, nevertheless, its net earnings above the cost of operation, fixed charges, and taxes, and before making any allowance for betterments or for dividends, were only \$85,000 for the year ending June 30, 1914. It never paid a greater dividend than 5 per cent, and this for only a few years in its history; in the month of July, 1914, on its entire system the company earned a surplus over fixed charges and taxes of \$11,000; in the month of August it showed a deficit of \$56,641, and in September the deficit became \$113,627,—this without making any deduction for betterments or improvements or dividends.

*The trains ordered restored were numbered 7, 8, 9, 10, 11, and 12, and they were all put into operation by the defendant railroad company as experiments from time to time within a few years prior to 1914 without any order of the Commission, in the hope of building up passenger business; but the record shows that not one of them at any time paid the cost of operation.

The territory under consideration is sparsely settled and the chief traffic of the company is lumber and cotton, and the resulting general freight due to a marketing of these commodities. The depression in these staples was very great prior to and at the time the case was heard.

The uncontradicted testimony of the auditor of the company shows that the passenger

revenue per train mile, of the trains ordered restored, for the three months next before the passing of the order, was: for July, 65 cents; for August, 64 cents; and for September, 56 cents; that the average passenger revenue per train mile of trains 7, 8, 9, and 10 from October 1st to October 5th (the next day but one before the order was passed), was 36 cents, and that of trains 11 and 12 for the same six days was 25 cents.

The auditor also testifies that as near an approximation as could be arrived at showed the total revenue of the company derived from passenger traffic for the two months ending August 31, 1914, was \$331,102.25, and that the total expenses and taxes allotted to this service amounted to \$339,247.60, making the passenger revenue per train mile .9708, and that the expenses and taxes per train mile amounted to .9944, or a net loss per passenger train mile of .0236.

*334 The secretary of the company testified that on September 30, 1914, the company had a working balance of \$74,885.79, and that there were unpaid vouchers amounting to \$1,027,319, some of which dated as far back as November of the preceding year; that these vouchers did not represent any fixed charges or any interest, and that the normal amount of approved unpaid vouchers was between \$400,000 and \$500,000.

The evidence further shows that, in order to avoid insolvency, the company had reduced expenses in many ways, including even the expense of repairs to locomotives and cars of every description; that the president and vice president had voluntarily submitted to a reduction of 20 per cent in their salaries, and that the salaries of all the other officers had been reduced on a sliding scale up to 10 per cent.

The falling off in earnings for the first seventeen days in October, as compared with the preceding year, was \$165,742, or approximately \$10,000 a day, and the estimated saving to the company of taking off of the six trains involved in this controversy was \$10,000 a month.

The company introduced in evidence sixty-one affidavits from what is claimed to be substantially all of the important business men in the towns which would be most affected by the taking off of the trains, who agree in saying, that while these trains were a convenience to the traveling public, that owing to business conditions then prevailing there was not much travel and would not be until the trade depression was over; that the taking off of the trains would not materially injure the business of the various towns in which they lived, and that if the trains were losing money and the total business of the company was not profitable,

in their judgment the company should be allowed to discontinue them.

The territory between Meridian and Waynesboro is not a productive agricultural section, and in the 52 miles between the two towns there are five "fair sized towns" and five small villages, which, according to the 1910 census, had a population of only 5,456, and there is no evidence that the population had increased up to the time of trial.

The service which remained between Meridian and Waynesboro to the south, after these trains were taken off, consisted of two trains each way each twenty-four hours, and between Meridian and Okolona there remained three trains each way every twenty-four hours. *335

All of the trains which were continued were through interstate trains, which, while the local trains were being run, made very few stops, but when the local trains were taken off, each of these trains made all the stops between Waynesboro, Meridian, and Okolona, with the result that, whereas formerly train No. 4, for example, made seven stops between Meridian and Okolona, under the new schedule it made twenty-two.

The evidence on which the Railroad Commission acted is summarized in the record and it is impressively meager in extent and inadequate in character. It consists of the testimony of two men, wholly without qualifying training or experience, as to the cost of operating such trains, and of a number of men as to the inconvenience which would be caused by the taking off of the trains, chiefly to commercial travelers living in Meridian, desiring to visit the small villages and hamlets on the line. The testimony of the one member of the Commission who appeared as a witness shows that the reasonableness of the order was made to turn on what the Commission estimated was the "out-of-pocket" cost, the immediate cash outlay in wages and fuel, of operating the six trains. But this cannot be accepted as a proper basis for determining such cost. Northern P. R. Co. v. North Dakota, 236 U. S. 585, 594, 596, 59 L. ed. 735, 741, 742, L.R.A.—, —, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1.

Thus summarized this evidence shows that the plaintiff railroad company, an important interstate carrier, was operating before the business depression incident to the war on a margin so narrow that the \$85,000 of profit for the entire preceding year would have been more than swallowed up in nine days by the shrinkage of business of the company as it was when this controversy arose; that, without being able *336 to meet its growing deficit, the company had resorted to rigid economies of every

sort before it discontinued these six trains the continued operation of which would have involved a loss of \$10,000 a month; that the three daily trains each way to the north of Meridian which remained after the taking off of the trains which gave rise to the controversy cannot be said to be inadequate to the needs of the comparatively small population to be served, and that while the service to the south of Meridian—with but two trains each way in twenty-four hours, and these running at hours inconvenient for the transaction of business—cannot be thought a liberal service, yet these orders were intended by the Commission to be in effect one order for the restoration of the six trains; they were thus treated in the court below and must be so treated here. Looking to the extent and productiveness of the business of the company as a whole, the small traveling population to be served, the character and large expense of the service required by this order, and to the serious financial conditions confronting the carrier, with the public loss and inconvenience which its financial failure would entail, we fully agree with the district court in concluding that the order of the Commission at the time and under the circumstances when it was issued was arbitrary and unreasonable and in excess of the lawful powers of the Commission, and that if enforced it would result in such depriving of the railroad company of its property without due process of law as is forbidden by the 14th Amendment to the Constitution of the United States. The order of the District Court granting the injunction must be affirmed.

(244 U. S. 397)

UNITED STATES OF AMERICA EX REL.
THE STATE OF LOUISIANA, Petitioner,

v.

HON. ALECK BOARMAN,¹ Judge United States District Court, Western District of Louisiana.

JUDGMENT ⇨828(3)—RES JUDICATA—TITLE OF STATE.

1. A decision of the highest state court that the state was without such title, legal or beneficial, as would enable it to maintain a suit to set aside as fraudulent a sale and conveyance by a levee board of commissioners, prevents the state from intervening in a subsequent suit brought by the board to set aside the sale and conveyance of the same lands, and from appealing from a de-

¹ Death of Hon. Aleck Boarman suggested, and Hon. George Whitfield Jack, his successor in office, substituted May 3, 1917, as the party respondent herein.

creed which ratified a settlement and dismissed the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1507, 1508, 1515.]

COURTS ⇨356 — APPEAL—IN FEDERAL COURTS—WHO MAY MAINTAIN—STRANGER TO RECORD—EFFECT OF STATE STATUTES.

2. The rule that no one not a party or a privy to the record may appeal from a decree in a suit in equity in the Federal courts is not affected by the local practice, under La. Code Prac. art. 571, to allow appeals by strangers to the record "who may allege that they have been aggrieved by the judgment."

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937.]

LEVEES ⇨11—LEVY BOARD—IMPLIED REPEAL OF AUTHORITY.

3. The authority granted to the board of commissioners of the Tensas Levee District by La. Acts 1886, No. 59, § 3, to sue to set aside a sale and conveyance of land made by the board, was not withdrawn and delegated through the governor of the state to the attorney general by the Act of August 19, 1910, making it the duty of the attorney general of the state, upon the request of the governor, to represent the state or any political agency or subdivision thereof in any suit involving title to any land or real property belonging to the state or any of its political agencies or subdivisions, whether the title is vested in or appears in the name of the state, or in the name of such agencies or subdivisions.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 20.]

APPEAL AND ERROR ⇨958 — DISCRETION BELOW—INTERVENTION.

4. The authority of a court to make new parties to a suit, especially after judgment or decree, rests in its sound discretion, which, except for abuse, cannot be reviewed by appeal or writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3824.]

LEVEES ⇨9—LEVEE BOARD—COMPROMISE AND SETTLEMENT.

5. A levee board of commissioners to whom the state, by La. Acts 1886, No. 59, and 1888, No. 77, had intrusted the affairs of the levee district, with power to sue and be sued, and to sell, mortgage, pledge, and otherwise dispose of lands which the state donated and caused to be conveyed to the board, may bind the state by a compromise, made in good faith, of a suit brought by the board to set aside a sale and conveyance made by it.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 18.]

[No. 264.]

Argued May 3, 1917. Decided June 4, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review the denial of applications for a mandamus and certiorari to the judge of the District Court for the

Western District of Louisiana, to allow an appeal on the part of, and in behalf of, the state of Louisiana from a decree of such District Court, dismissing a suit by a board of levee commissioners to set aside a sale and conveyance made by such board. Affirmed.

See same case below, 133 C. C. A. 487, 217 Fed. 757.

The facts are stated in the opinion.

Mr. Harry Gamble and Mr. A. V. Coco, Attorney General of Louisiana, for petitioner.

Messrs. Henry Bernstein and Willard F. Keeney for respondent.

*Mr. Justice Clarke delivered the opinion of the court:

By act of its general assembly in 1886, amended in 1888, the state of Louisiana created the Tensas Basin Levee District for the purpose of providing a system of levees and other works to aid in protecting the lands within its boundaries from floods and overflow. The act provided for the appointment of a levee board of commissioners to have charge of the affairs of the district, and constituted this board a corporation, with power to sue and be sued, and to sell, mortgage, pledge, and otherwise dispose of lands which the state donated and caused to be conveyed to the board.

In 1898 the levee board sold to the Tensas Delta Land Company, Limited, a large acreage of the land thus acquired, and executed conveyances for it.

Eleven years later, in 1909, suit was brought by the attorney general of Louisiana, in the name of the state, claiming that the sale of 1898 was fraudulent and void, and praying that it should be set aside and that the state should be decreed to be the owner of the property.

*Such proceedings were had in the case that the supreme court of Louisiana held (State v. Tensas Delta Land Co. 126 La. 59, 52 So. 216) that the only proper party plaintiff in such a suit was the levee board, and that, the state being without authority to maintain it, the case must be dismissed.

After the dismissal of the suit of the state, the levee board brought suit against the Tensas Basin Land Company, Limited, in a district court of Louisiana, upon the same cause of action stated in the prior petition, which case was removed to the United States district court for the appropriate district. The petition was there given the form of a bill in equity, and, as amended, a demurrer to it by the defendant was sustained. On appeal this decision was reversed and the case was remanded for further proceedings, but before the time allowed for answer had expired, the defend-

ant appeared and informed the district court that \$100,000 had been paid in settlement of the case agreed upon between the parties, and moved the court to dismiss the suit. This motion was filed on July 22, 1913, and a rule was forthwith issued to the plaintiff to show cause on the first day of the next term of the court (October 20th) why the motion should not be granted. The return of service of this rule shows personal service on the attorney general as solicitor for the levee board, and acknowledgment of service by the board itself.

On August 5 the board, appearing by its president, answered the rule to show cause, averring that it had "apprised its attorney of record" (the attorney general of the state) "of the said settlement," and, admitting the allegations of the motion, prayed that the suit be forthwith dismissed at its cost.

The attorney general for the state, not satisfied with the settlement, on October 6th filed a motion, which he signed "R. G. Pleasant, Attorney General, State of Louisiana, and Attorney of Record for Complainant." In this*quite anomalous paper he averred somewhat rhetorically that the settlement made by the levee board for which he was attorney, was a "condoning and compromising" of a fraud to which the court should not assent, that he was acting in the case under authority of an act of the general assembly of the state and by order of the governor, to whom alone he was responsible, and "that the complainant could not compromise this suit, nor dismiss it without the governor's consent." He prayed that the motion to dismiss be denied, the agreement of settlement disregarded, and that the case be set down for early trial.

The motion to dismiss came on for hearing on October 20th, but the court deferred consideration of it until the next day, and caused a telegram to be sent to the attorney general in order that he might have full opportunity to be present and be heard, but he did not appear in person or by representative, and thereupon the court heard the evidence and "ordered, adjudged, and decreed that said compromise" . . . "be and the same is recognized by this court as having the effect of the thing adjudged and as settling all the issues in this case," and dismissed the suit.

It cannot escape notice that there is no allegation contained in any paper filed by the attorney general that the levee board, in compromising the controversy and suit, did not act in perfect good faith, nor is there any challenge of the character or competency of the members of the board.

After this entry of dismissal no further action was taken by the attorney general

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until on the 6th day of the following April, when he presented to the district court a "petition of the United States of America on the relation of the state of Louisiana," praying that the state be permitted to intervene and appeal from the judgment ratifying the compromise and dismissing the suit.

*401 The district court denied this petition for leave to intervene and appeal, and thereupon the attorney general filed in the circuit court of appeals for the fifth circuit a "petition for writs of mandamus and certiorari," in which he prayed that court to order that the state of Louisiana be allowed to intervene in the district court and to appeal the case, and that it order that a transcript of all records be sent up to it for review.

The circuit court of appeals denied this petition, assigning two reasons for its action, viz.:

(1) Because the supreme court of Louisiana, on full consideration, had decided that the state was without real or beneficial interest in the lands in controversy, which decision must be controlling in that court; and

(2) Because the state was not a party to the record in the district court, "and one who is not a party to a record and judgment is not entitled to an appeal therefrom."

This decision is now here for review on certiorari.

This plain statement of the history of this litigation so argues against the claims of the petitioner as to make them in appearance, at least, unsubstantial to the point of being frivolous.

*402 The supreme court of Louisiana, considering the statutes of its own state, held, in the case in which the state sought to set aside for fraud the same sale of the same lands involved in this litigation (126 La. 59, 52 So. 216), that the "legislature vested the absolute title to the lands in controversy in the board of commissioners of the Tensas Levee District, with full power to sell the same on such terms as the board might deem proper [and], also vested in said board full power to sue and be sued, and to stand in judgment in all matters relating to their gestion and trust." "Most assuredly," also says the court, "the legislature has divested the state absolutely of all beneficial interest in said lands, and transferred same to the said board of levee commissioners." And as it "has vested the power to sue and be sued in the board of commissioners of the Tensas Levee District, and has vested no such co-ordinate power in the governor or attorney general, we are of the opinion that the institution of this

suit in the name of the state is unauthorized."

This decision determining the effect of the state statutes, where no claim of Federal right was involved, is accepted as conclusive by this court, and unless it has been modified by statute (there has been no modifying decision) the application of the state to intervene and to appeal was properly denied.

To the seemingly insurmountable barrier to the claims of the petitioner presented by this supreme court decision we must add that the state was not at any time a party to this record, and that its first application for leave to intervene and to appeal was long after the term at which the decree of dismissal was rendered, and within a few days of the expiration of the time within which even "a real party in interest" would have been allowed an appeal.

With exceptions not even remotely applicable to a case such as we have here it has long been the law, as settled by this court, that "no person can bring a writ of error (an appeal is not different) to reverse a judgment who is not a party or privy to the record" (Bayard v. Lombard, 9 How. 530, 551, 13 L. ed. 245, 254); and in *Re Leaf Tobacco Board of Trade*, 222 U. S. 578, 56 L. ed. 323, 32 Sup. Ct. Rep. 833, it was announced, in a per curiam opinion, as a subject no longer open to discussion, that "one not a party to a record and judgment is not entitled to appeal therefrom," and that a refusal after decree to permit new parties to a record cannot be reviewed by this court directly on appeal, or indirectly, by writ of mandamus, under circumstances such as were there and are here presented.

Two statutes of Louisiana are relied upon by counsel for petitioner to avoid the obvious and seemingly conclusive result of these decisions by this court and by the supreme court of Louisiana.

*403 *The first of these statutes is article 571 of the Code of Practice of Louisiana, which reads: "The right of appeal is given not only to those who are parties to a cause in which a judgment has been rendered against them, but also to third persons not parties to said suit, when such third persons allege that they have been aggrieved by the judgment."

It is urged in argument that in suits in the United States courts which originate in Louisiana, this statute permits an appeal by strangers to the record "who may allege that they have been aggrieved by the judgment," and the decision of the supreme court of Louisiana in 126 La. 59, 52 So. 216, supra, holding that the state cannot "be aggrieved" by this judgment because it

is without beneficial interest in the lands which are the subject-matter of this litigation, and is without authority to institute a suit for their recovery, is disposed of by saying that it is the practice in Louisiana courts to allow appeals by strangers to the record upon mere allegation of interest, leaving the validity of such allegation to be examined by the appellate court.

This claim cannot be seriously entertained in the face of the long time perfectly settled law that equity suits in Federal courts and the appellate procedure in them are regulated exclusively by Federal statutes and decisions, unaffected by statutes of the states. Textbook citations will suffice: Street, Fed. Eq. Pr. §§ 97 and 98; Simkins, Fed. Eq. Suit, chap. I.

The other statute relied upon by the petitioner was enacted by the general assembly of Louisiana on August 19, 1910, after the decision by the supreme court referred to, and reads:

*404 "Be it enacted by the general assembly of the state of Louisiana, that it is hereby made the duty of the attorney general of the state, upon the request of the governor, to represent the state or any political agency or subdivision*thereof, in any suit in any court involving title to any land or real property belonging to the state of Louisiana or any of its political agencies or subdivisions, whether the title to said land or real property is vested in or appears in the name of the state, or in the name of any of its political agencies or subdivisions."

The claim made by the attorney general for the state now is that this act "withdrew the authority theretofore granted to the levee board by § 3 of the Act of 1886 to sue in such cases as this, with all of the rights appurtenant to the right to sue, and delegated it, through the governor, to the attorney general."

This is a large repealing effect by implication to be asserted for a statute so worded and apparently so simple, and that such meaning was not given to it by the present attorney general's predecessor in office, who was charged with the execution of the statute at the time this litigation was commenced and almost immediately after its enactment, is clear from these facts appearing of record:

The suit by the levee board as petitioner was commenced after this Act of August 19, 1910, was passed, and yet the petition, signed by the attorney general as one of the solicitors of the board, alleges that it was commenced by virtue of a resolution adopted by the board on the 14th day of the preceding July (thus reciting an authority adopted pursuant to power which

it is now claimed had been withdrawn from the board). The petition also recites that the attorney general (predecessor of the present incumbent) appears in the suit pursuant to the authority and direction of the governor, "to represent said board of levee commissioners . . . in the prosecution of said suit;" that the board is a corporation with power to sue and be sued, to take title to and to sell lands under the same laws which had been construed by the Louisiana supreme court (126 La. 59, 52 So. 216), and it prays for a decree recognizing your petitioner (the levee board)*to be the owner of all of said lands so fraudulently and illegally conveyed." The attorney general, with another, signs the petition as attorney "of the board of levee commissioners of the Tensas Basin Levee District," and when the case was removed to the United States district court the petition was recast into a bill in equity in which, after repeating the allegations and prayer of the original bill, the then attorney general adds that the levee board has, "in compliance with the law as laid down by the supreme court of the state of Louisiana in the opinion and judgment rendered by it as aforesaid" (126 La. 59, 52 So. 216), "brought this suit, as it understands it is its duty to do."

Even in his protest to the district court against the settlement, the attorney general appeared "as attorney of record for the complainant," the levee board, and it was long after term, and not until six months, lacking sixteen days, after the decree of the district court approving the settlement had been entered, that he left off the character of solicitor for the board, and, appearing for the state, petitioned for leave for it to intervene and appeal from the decision affirming the settlement approved by his former client. Even in this petition no claim is made that the board had been deprived of its powers by the Act of August 19, 1910, or that it had acted otherwise than in the utmost good faith in making the compromise.

The first time that this astonishing assertion of a repeal by implication by the Act of August 19, 1910, appears in the record, so far as we can discover, is in the brief filed by a third attorney general on April 30, 1917.

This summary of the proceedings in the case out of which the petition we are considering grew shows that the predecessor of the present attorney general, who was in office when the act of 1910 was passed, and also the attorney general who succeeded him, both contended, until *nearly six months after the entry of the settlement decree, that the supreme court had settled

as the law of the case that the state was without title or beneficial interest which would enable it to maintain a suit to set aside the sale alleged to be fraudulent; that the proper plaintiff in such a case was the levee board to which the state had committed the title, custody, and power of disposition of the lands in controversy, and also, apparently, that the purpose of the Act of August, 1910, was simply to authorize the attorney general, on the request of the governor, to take charge (in this case with another solicitor) of a suit to be instituted by the levee board, and thereby to place his professional learning and the weight of his official character at the service of this plaintiff, an "agency or subdivision" of the state. Both attorneys general assumed that the powers of the state and of the levee board over the subject-matter continued as the supreme court had defined them to be before the Act of August, 1910, was passed, and, as we have seen, it was not until long after the entry of the settlement decree that the contention first appeared that the act took away from the levee board and gave to the state the authority to conduct the required litigation. This contemporary construction of the act by the two law officers of the state charged with acting under it is persuasive authority as to its true meaning, and, upon full consideration, we think it is the correct interpretation of it.

To this we add that, except in a class of cases to which this case does not belong, the authority of a court to make new parties to a suit, especially after judgment or decree, rests in its sound discretion, which, except for abuse, cannot be reviewed upon an appeal or writ of error. No claim is made of abuse of discretion by the district court, and plainly, if made, it would be groundless, since the judge refusing to permit the state to intervene had before him at the time of his refusal the decision of its own supreme court that the state was without title, legal or beneficial, qualifying it to litigate the questions involved.

In the original bill the not uncommon allegation of fraud is made, which is denied in the answer. It was entirely proper for the parties to such a litigation, in good faith "balancing the hope of gaining with the danger of losing," to compromise the case and make an end of the controversy, and, as we have said, it is not claimed anywhere in the record that the members of the levee board, which settled the suit, were not men of character and probity, or that they did not act in perfect good faith in concluding the settlement. To these men the state law committed the care of the interests of the inhabitants of the district,

and, within the bounds of their authority, honestly exercised, their action was conclusive upon the state.

It results that the decree of the Circuit Court of Appeals must be affirmed.

(244 U. S. 407)

WILLIAM E. WALL and Etta Foss, Executrix, etc., Appts.

v.

PARROT SILVER & COPPER COMPANY and Anaconda Copper Mining Company.

CONSTITUTIONAL LAW § 43(2)—ESTOPPEL—ASSUMING INCONSISTENT POSITION—RIGHTS OF MINORITY STOCKHOLDERS.

Minority stockholders dissenting to a sale of all the property of the corporation, who have begun a proceeding for the valuation of their stock, conformably to Mont. Rev. Codes, §§ 4409-4412, thereby waive their right to challenge the validity, under U. S. Const. 14th Amend., of the provisions of those statutes, under which such a sale may be made upon a favorable vote of not less than two thirds of the outstanding capital stock, dissenting stockholders to accept an award of the value of their stock as of the date of sale.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41.]

[No. 271.]

Argued May 4 and 7, 1917. Decided June 4, 1917.

APPEAL from the District Court of the United States for the District of Montana to review a decree in favor of defendants in a suit by minority stockholders to set aside an executed sale of all the property and assets of the corporation. Affirmed.

See same case below, 216 Fed. 242.

The facts are stated in the opinion.

Messrs. Francis P. Garland and Asa P. French for appellants.

Messrs. L. O. Evans and John A. Garver for appellees.

*Mr. Justice Clarke delivered the opinion of the court:

The appellants, as owners of 1,210 of the 229,850 shares of the capital stock of the Parrot Silver & Copper Company, a corporation organized under the laws of Montana, filed their bill in the United States district court for the district of Montana, seeking to avoid an executed sale of all the property and assets of that company, made on May 31, 1910, to the Anaconda Copper Mining Company, the consideration being a stipulated number of shares of the vendee company.

The claim of the appellants is that in 1899 certain persons acquired control of a majority of the shares of the capital stock

of the Parrot Company with the fraudulent purpose of so managing its affairs as to deplete and depreciate its assets "and then to acquire them" for less than their real value, thereby depriving the minority stockholders of "the just and fair value of their right and interest" as shareholders, or "of an appraisal of the value of their stock on any adequate basis of value."

It is further claimed that this fraudulent scheme found consummation in the sale to the Anaconda Company, which was made under authority of §§ 4409-4412 of the Revised Codes of Montana.

*409 * Sections 4409 provides that a sale may be made of all the assets of any mining corporation when at least two thirds of the whole number of shares of the capital stock outstanding shall vote in favor of making such a sale at a meeting called and notified as provided in the section. Such a sale of the "whole property of the corporation" works a dissolution of the corporation under § 4410, and its affairs must be wound up. Section 4411 provides that any stockholder who shall not have voted for or authorized such sale may, within twenty days from the date of the stockholders' meeting authorizing it, give written notice that he does not assent thereto, and demand payment of the value of his stock, and ten days after the service of such notice he must, or the corporation may, apply to a designated court and have the value of the stock fixed and appraised. Upon such application the court shall appoint three appraisers who shall take evidence in relation to and shall find the value of the stock of such dissenting stockholder "at the time of his dissent." To any stockholder not satisfied with the award of the appraisers the next section, 4412, allows an appeal to the district court, where the value of the stock shall be reassessed by a jury in the same manner as in "appeals from the assessments of commissioners in condemnation proceedings provided by law." The judgment on such an award must be entered against both the vendor and the vendee corporation, and by the statute it is made a lien superior to the rights of the vendee upon all of the real property sold.

After the sale to the Anaconda Company complained of, the appellants served a notice of dissent on the Parrot corporation and commenced a statutory preceeding for the appraisal of their stock, which has not been brought on for hearing, but is still pending.

*410 The claim upon which the appellants come into this court by direct appeal is that the statutes of Montana,*referred to, are unconstitutional because they provide for a sale of all the property of the corporation upon a favorable vote of less than all (not

less than two thirds) of the shares of the capital stock of the corporation, and that dissenting stockholders must accept an award of the value of their stock, made as of the date of sale. Such an award in this case, it is claimed, would be based upon a valuation of the assets of the company after they had been fraudulently depleted and depreciated, and without its being possible in such a proceeding to add anything to the value of their stock on account of the damage which the persons in control of the defendants by their fraudulent conduct had done to the property of the Parrot Company, and thereby to the value of the appellants' stock prior to the sale. This, it is contended, would result in taking the property of the appellants without just compensation and in violation of the "due process of law" and of the "equal protection of the laws" clauses of the 14th Amendment to the Constitution of the United States.

This summary of this record shows that the claims of the bill presented to the district court for decision two questions, viz:

(1) Did the defendants fraudulently dissipate and depreciate the assets of the Parrot Company prior to the sale complained of, to the damage of the interest of the appellants as stockholders?

(2) If the Montana statutes were given effect, would they so deprive the appellants of a part of the value of their stock as to offend against the designated provisions of the 14th Amendment to the Constitution of the United States?

An examination of this record leads us to fully agree with the trial court in its conclusion that the appellants failed utterly to sustain their allegations that the property of the Parrot Company was fraudulently dissipated and depreciated through the management of the defendants*⁴¹¹ prior to the sale, or that the sale made was in any respect fraudulent. Upon this conclusion the judgment of the district court might well be affirmed, for the reason that where fraud is charged in a bill or set up in an answer, and is denied, the party making the charge will be confined to that issue, and also for the reason that where the claimed constitutional question on which a direct appeal to this court is based is pleaded as resulting from the carrying into effect of a fraudulent scheme, when such charge of fraud fails, the asserted constitutional question ought not to be considered. *French v. Shoemaker*, 14 Wall. 314, 20 L. ed. 852; *Eyre v. Potter*, 15 How. 42, 14 L. ed. 592; *Chicago, B. & Q. R. Co. v. Babcock*, 204 U. S. 585, 593, 51 L. ed. 636, 638, 27 Sup. Ct. Rep. 326.

But we prefer not to have the case go off on this seemingly technical but really sound and substantial rule.

There remains the contention that the statutes of Montana which we have epitomized, if enforced, will deprive the appellants of their property without due process of law because they provide that sale may be made of all the assets of the corporation when authorized by not less than two thirds of the outstanding capital stock of the corporation, and that the plaintiffs must accept either the payment for their shares which this large majority of their associates think sufficient, or, if they prefer, the value in money of their stock, to be determined by three appraisers, or, still at the election of appellants, by a court and jury.

This record does not call upon us to examine into this challenge of the validity of these statutory provisions, similar as they are to those of many other states and of a seemingly equitable character, for the reason that the appellants, by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them. *Great Falls Mfg. Co. v. Atty. Gen.* 124 U. S. 581, 31 L. ed. 527, 8 Sup. Ct. Rep. 631; *Electric Co. v. Dow*, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Leonard v. Vicksburg, S. & P. R. Co.* 198 U. S. 416, 422, 49 L. ed. 1108, 1111, 25 Sup. Ct. Rep. 750. They cannot claim the benefit of statutes and afterwards assail their validity. There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be.

The decision of the District Court is affirmed.

(244 U. S. 368)

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appt.,

v.

WILLIAM F. McKNIGHT, J. Sam Rowland, and George W. Bellamy, Railroad Commissioners of the State of Arkansas, Howard H. Gallup,¹ and William J. Metcalf.

COURTS ⇨508(2)—FEDERAL COURTS—RESTRaining PROCEEDINGS IN STATE COURTS.

1. A Federal district court could not, after its decree permanently enjoining the

¹ Death of Howard H. Gallup, one of the appellees, suggested, and the appearance of Mrs. Jennie Gallup, executrix, etc., filed and entered May 2, 1917, on motion of counsel for the appellees.

enforcement of rates fixed by a state for intrastate traffic on an interstate railway and restraining all shippers and travelers from instituting suit on account of overcharges had been reversed by the Federal Supreme Court with directions to dismiss the bill, prevent persons not parties to the suit from suing in state courts to recover such overcharges by making an order, under a court rule which relates to damages recoverable on bonds given when restraining orders or temporary injunctions are issued, referring to a master the determination of the damages sustained by any person by reason of the granting of the temporary or permanent injunction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1418.]

COURTS ⇨264(4)—FEDERAL COURTS—JURISDICTION—ANCILLARY SUIT.

2. A suit to enjoin the prosecution of actions in a state court to recover overcharges exacted by a carrier is not ancillary (so as to be justiciable in the Federal courts without diversity of citizenship) to a suit in a Federal court to enjoin the enforcement of rates fixed by the state, and to restrain shippers and travelers from suing on account of overcharges, in which a decree granting the relief sought had been reversed by the Federal Supreme Court, with directions to dismiss the bill.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801.]

INJUNCTION ⇨26(4) — JURISDICTION — MULTIPLICITY OF SUITS.

3. A Federal court of equity has no jurisdiction, upon the ground of preventing multiplicity of suits, of a bill which seeks to restrain shippers and travelers from instituting suit against a carrier on account of overcharges collected from them while injunctions, temporary and permanent, afterwards reversed by the Federal Supreme Court, were in force.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 31.]

[No. 183.]

Argued May 2, 1917. Decided June 4, 1917

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which modified, so as to restrain only actions on injunction bonds, a decree of the District Court for the Eastern District of Arkansas restraining shippers and travelers from bringing suit against a carrier on account of overcharges collected while injunctions, temporary and permanent, afterwards reversed on appeal, were in force. Affirmed.

See same case below, 136 C. C. A. 442, 220 Fed. 876.

The facts are stated in the opinion.

Messrs. John M. Moore and Edward J. White for appellant.

Mr. Allyn Smith for appellees.

*Mr. Justice Brandeis delivered the opinion of the court:

On July 18, 1908, the St. Louis, Iron Mountain, & Southern Railway Company filed in the western division of the circuit (now district) court of the United States for the eastern district of Arkansas a bill against the Railroad Commissioners of that state to enjoin the enforcement of intrastate freight and passenger rates promulgated by them. Two private citizens, Leigh and McLean, who were alleged to be shippers and travelers on the railroad, were joined as defendants; and the bill prayed that they "and all other persons belonging to the same class, including all patrons" of the railroad, be enjoined from instituting any suits for penalties or double damages under the Arkansas statutes. On September 3, 1908, a temporary restraining order was granted which, besides enjoining the Railroad Commissioners from enforcing rates promulgated by them, ordered that the two private citizens

"and all other persons and each of them from and after the time that they shall have knowledge of this order be enjoined from at any time instituting any such suit or action for or on account of any failure of the complainant to keep in effect and observe said inhibited rates or for the recovery of damages by reason of such failure, during the time this order shall continue in effect."

The railway company then executed, as ordered, a bond with surety to the United States in the penal sum of \$200,000, "conditioned that the said complainant shall keep a correct account, showing, as respects the carriage of passengers and freight, the difference between the tariff actually charged and that which would have been charged had the rates inhibited hereby been applied, showing the particular carriage in question and the stations between which the same occurred, and the name of the person affected, so far as may be practicable, which record shall be made and kept subject to the further order of this court, and further conditioned that if it shall eventually be decided that so much of this order as inhibits the enforcement of the existing rates should not have been made, that said com-

plainant shall, within a reasonable time, to be fixed by the court, refund in every instance to the party entitled thereto the excess of charge over what would have been charged had the inhibited rate been applied, together with lawful interest and damages."

On June 23, 1909, an order was made for an additional bond without surety in the sum of \$600,000, which provided, among other things, for giving to each passenger or shipper a receipt which would show the amount payable under the enjoined rates.¹

*On May 11, 1911, a final decree was entered for the railway company, making permanent the injunction in the terms of the restraining order, and further ordering "that the bond for injunction filed by the complainant here be released and the sureties thereon discharged from liability." The decree was reversed by this court, with directions to dismiss the bill without prejudice (Allen v. St. Louis, I. M. & S. R. Co. 230 U. S. 553, 57 L. ed. 1625, 33 Sup. Ct. Rep. 1030); and upon filing of the mandate in the district court on July 18, 1913, this was done. But in the decree of dismissal the court "of its own motion, and against the objection of the complainant, refers, under rule 15 of this court, the matter of damages alleged to have been sustained by the defendants, the Railroad Commission of the State of Arkansas, by reason of the granting of the temporary and permanent injunctions herein, to Jeremiah G. Wallace, Esq., who is hereby appointed a special master for the purpose of determining the damages sustained. That in determining these damages, for the recovery of which the said Commissioners are not acting for themselves, but for the benefit of all persons, shippers, consignees, and passengers who have sustained any damages by reason of the granting of said injunctions, the master is hereby authorized, for the purpose of ascertaining these facts, to examine witnesses, administer oaths, and call upon the plaintiff herein for any books or papers, or transcripts thereof, which, in his opinion, are necessary for the purpose of enabling him to determine any facts in issue in connection with any claim filed with him.

¹ The condition prescribed was: "That it shall, on and after July 1st, 1909, issue to each person purchasing a ticket or paying cash fare upon the train from one point in the state of Arkansas to another point in the same state, and confined exclusively to intrastate travel, a certificate or coupon showing the amount paid by such passenger for such ticket and the date thereof; and to every shipper or consignee when paying freight on any commodity shipped from one

part of the state of Arkansas to another part, and which is wholly the subject of intrastate traffic, a receipt or freight bill showing the amount charged for such carriage of freight, and also indorse on the same bill the amount or rate which would have been charged had the inhibited rates continued in force; which receipt or coupon or freight bill shall be prima facie evidence of the amount paid and the date of payment."

372 "And the master is further directed to give notice by publication . . . to the effect that all persons having any claims against the complainant by reason of the granting of the injunctions herein shall present the same to him on or before the 1st day of November, 1913, by filing with him the evidence of their claims, or such other proof as they possess."

Thereafter Gallup brought suit in a state court of Arkansas to recover from the railway company the difference between the aggregate freight and passenger rates actually collected from him while the injunctions, temporary and permanent, were in force (that is, from September 3, 1908, to July 18, 1913), and the amount which would have been collected if the rates enjoined had been in effect. The railway company promptly filed, in the district court, on leave granted, what is called a "supplemental bill of complaint" to restrain Gallup from proceeding in the state court. Metcalf, another shipper, who had not brought suit, but who, it was alleged, was threatening to do so, was also made defendant as representative of the class; and claiming that the facts justified equitable interference on the ground of avoiding multiplicity of suits, an injunction was sought also against him and others similarly situated. The supplemental bill specifically alleged that, by virtue of the decree of May 11, 1911, the railway company was released from all liability on the bonds or otherwise from any damage accruing from the injunctions.

Gallup and Metcalf each moved to dismiss the bill for want of equity. Gallup also answered, alleging, among other things, that the overcharges sought to be recovered were mainly those arising after the entry of the final decree in the district court, and also that the aggregate of claims filed with

the special master under the decree of July 18, 1913, greatly exceeded \$1,000,000, the amount of the bonds. The district court granted the prayer of the supplemental bill. Upon appeal by Gallup and Metcalf the circuit court of appeals modified the decree "so as to restrain only such actions as are brought on one or both of the bonds." From the decree as so modified, the railway company appealed to this court.

The railway company rests its claim to relief upon two grounds:

First: That the district court assumed by the decree of July 18, 1913, jurisdiction to determine all claims arising out of overcharges, so that the commencement by Gallup of suit in the state court was an interference with its jurisdiction.

Second: That, in view of the number and character of the claims of other shippers and travelers, equity should intervene to prevent multiplicity of suits.

It may be doubted whether, in view of the mandate, there was any power in the district court to order reference to the master to determine the liability on the bonds; but on this question we are not required to express an opinion.² For it is clear that even if such power existed, it could extend only to such shippers and travelers as elected to file their claims with the master. The order referring the determination of claims for damages to a special master was declared to be "under rule 15."³ * That rule relates to damages recoverable on bonds given when a restraining order or temporary injunction is issued. Damages arising between May 11, 1911 (the date of the decree granting the permanent injunction), and July 18, 1913 (the date of the decree on mandate dismissing the bill), were not recoverable on the injunction bond. *Houghton v. Meyer* (*Houghton v. Cortelyou*) 208 U. S. 149, 52 L. ed. 432, 28 Sup. Ct. Rep.

² In *Re Louisville*, 231 U. S. 639, 645, 58 L. ed. 413, 415, 34 Sup. Ct. Rep. 255, and *Louisville v. Cumberland Teleph. & Teleg. Co.* 231 U. S. 652, 58 L. ed. 419, 34 Sup. Ct. Rep. 260, where it was held that the district court had discretion to authorize further proceedings, the mandate ordered that the decree be "reversed with costs, without prejudice," and remanded "for further proceedings not inconsistent with the opinion of this court;" while in the instant case the mandate ordered that the decree be "reversed with costs" and remanded "with directions to dismiss the bill." See also *St. Louis & S. F. R. Co. v. Barker*, 210 Fed. 902; *Ex parte Dubuque & P. R. Co.* 1 Wall. 69, 17 L. ed. 514; *Durant v. Essex Co.* (*Durant v. Storrow*) 101 U. S. 555, 25 L. ed. 961; *Mackall v. Richards*, 116 U. S. 45, 47, 29 L. ed. 558, 559, 6 Sup. Ct. Rep. 234; *Re Washington & G. R. Co.* 140 U. S. 91, 97, 35 L. ed. 339, 341, 11

Sup. Ct. Rep. 673; *Re Potts*, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; *Evens & H. Fire Brick Co. v. United States*, 236 U. S. 210, 59 L. ed. 542, 35 Sup. Ct. Rep. 415.

³ Rule 15 is as follows: "In all cases in which an injunction has been granted, and a bond executed by the complainants, damages sustained by the party enjoined, in case the injunction is dissolved, may be assessed in the same proceeding, either by the court or by reference to a master, and judgment entered in the same action against the sureties on the bond; provided, however, that unless the damages are thus assessed in the cause, or a judgment entered that the party enjoined is entitled to no damages by reason of the improper granting of the injunction, he may proceed on the bond in an action at law without any further order or leave of the court."

234. If the remedy of shippers and carrier were limited to proceedings on the bond, they would be denied all recovery for overcharges after May 11, 1911. Furthermore the decree of May 11, 1911, expressly released the railway company and sureties from further liability on the bonds. Insofar as the order referred to the master, "under rule 15," the determination also of damages "alleged to have been sustained by reason of the granting" of the permanent injunction, it was clearly erroneous and affords no justification for enjoining suit in a state court to recover for overcharges made after the final decree. It is, indeed, contended by the railway company, that the effect of the decree entered by the district court is to deprive shippers and travelers of all remedy under the bond.⁴ But Gallup makes no claim* under the bond. He sues on causes of action to recover overcharges arising under the Arkansas statutes. His right to sue, suspended by the injunctions improvidently granted, revived as soon as the permanent injunction was dissolved by the decree dismissing the bill. Although the injunctions enjoined all shippers and travelers, and therefore him, from instituting suits on account of alleged overcharges, Gallup did not in fact become a party to the suit in the district court; and he could not, after the mandate directed dismissal of the bill, be compelled to submit to that court the adjudication of his claim.

The contention of the railway company that the "supplemental bill" should be sustained to prevent multiplicity of suits is also unfounded. Unless it is maintainable as an ancillary bill, the Federal court was without jurisdiction, as there was no diversity of citizenship. But it was not an-

ancillary to any relief properly within the scope of the decree dismissing the original bill. As an independent bill it is also without equity. The only common issue between the railway company and the several shippers and travelers (namely, whether the rates promulgated by the Railroad Commission were confiscatory) had been settled by the decision of this court. In no other respect have shippers and travelers a common interest. The claims of each present a separate controversy unconnected with that of any of the others. This is obviously true as to all issues of fact which will arise in considering their several claims. And the bill contains no allegation or even suggestion that a controverted question of law, common to all the claims, is involved, which will determine their right to recover, or even that there is involved a question of law not fundamental, in which they have a common interest. It might be a convenience to the railway company to have these numerous claims of shippers determined by the master in the district court; but such a course would certainly involve great inconvenience to many of the shippers. The bill cannot be maintained as one to prevent multiplicity of suits.

Affirmed.

(244 U. S. 376)

ILLINOIS SURETY COMPANY, Plff. in Err.,
v.

JOHN DAVIS COMPANY, Emma E. Bairstow, George H. Bairstow, and Jesse B. Blackmer, Executors, etc., et al.

PRINCIPAL AND SURETY ~~66~~102—BOND OF PUBLIC CONTRACTOR—RELEASE OF SURETY — TRANSFER OF CONTRACTOR'S BUSINESS.

⁴ The allegations of the supplemental bill are: "Complainant alleges that [by?] the final decree entered in the aforesaid cause on the 11th day of May, 1911, hereinbefore referred to, it was ordered that the bond for injunction filed by the complainant be released and the sureties thereon discharged from further liability, and it is advised and avers that the effect of said order was to relieve complainant of all liability under said bond and preclude any recovery of damages on said bond or by reason of or growing out of the injunctions ordered in the aforesaid cause.

"Complainant avers that upon the rendition of the final decree in said cause perpetuating and making the temporary injunction theretofore granted permanent said bonds ceased, by operation of law, to have any effect, and complainant is not liable for any damage that may have accrued to any passenger or shipper on its line of railroad after the rendition of the final decree perpetuating and making the temporary injunction permanent."

1. The transfer of the business of a contractor to a corporation formed for that purpose during the progress of the work on a public contract does not release the surety on the bond given conformably to the Act of February 24, 1905 (33 Stat. at L. 811, chap. 778, Comp. Stat. 1916, § 6923), conditioned for the prompt payment by such contractor, "his or their heirs, successors, executors or administrators," to all persons supplying him or them with labor or materials in the prosecution of the work.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 181-185.]

UNITED STATES ~~66~~67(2)—BOND OF PUBLIC CONTRACTOR—INTEREST.

2. Claims for liquidated amounts under the bond of a public contractor given conformably to the Act of February 24, 1905 (33 Stat. at L. 811, chap. 778, Comp. Stat. 1916, § 6923), to secure prompt payment of persons furnishing labor and materials in the prosecution of the work, bear interest from the bringing of suit on the bond, where the amounts are not in dispute, and

the aggregate liability on the claims exceeds the penalty in the bond, and where, under the law of the state where the contract and bond were made and where the contract was to be performed, the liability of a surety on a bond is extended beyond the penalty by way of interest from the date when the liability on the bond accrued.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50.]

UNITED STATES ⇨67(1)—BOND OF PUBLIC CONTRACTOR—LIABILITY—ESTOPPEL.

3. Persons furnishing labor and materials in the prosecution of a public work carried on first by a committee of the contractor's creditors, then by a corporation to which he transferred his business, and still later by a receiver in bankruptcy, are not estopped to enforce the liability of the surety on the bond given conformably to the Act of February 24, 1905 (33 Stat. at L. 811, chap. 778, Comp. Stat. 1916, § 6923), to secure prompt payment for such labor or materials, either by filing against the estates in bankruptcy of both the contractor and the corporation the whole of their claims for material delivered in part to each, or by recommending, in answer to an inquiry, that the receiver in bankruptcy complete the contract, or by filing a claim in bankruptcy against the corporation for materials furnished to the contractor, or by stating to the corporation a single account, covering all the items of claims against both the contractor and the corporation, and accepting part payment, or by participating in the activities of the creditors' committee which supervised the business throughout the whole period.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50.]

UNITED STATES ⇨67(2)—BONDS OF PUBLIC CONTRACTOR — "LABOR AND MATERIALS" — RENTAL OF EQUIPMENT — FREIGHT.

4. Claims for rental of cars, track, and equipment used in the construction of a public work and for the expense of loading the plant and the freight thereon to and from the site of the work are for "labor or materials" within the meaning of the bond given conformably to the Act of February 24, 1905 (33 Stat. at L. 811, chap. 778, Comp. Stat. 1916, § 6923), to secure prompt payment to all persons furnishing labor or materials in the prosecution of the work.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50.]

For other definitions, see Words and Phrases, First and Second Series, Labor and Materials.]

[No. 235.]

Argued April 27, 1917. Decided June 4, 1917.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which, reversing a judgment of the District Court for the Northern District of Illinois, allowed certain claims upon the bond of a public contractor. Affirmed.

See same case below, 141 C. C. A. 409, 226 Fed. 653.

The facts are stated in the opinion.

Mr. Albert J. Hopkins for plaintiff in error.

Messrs. Worth Allen, William D. McKenzie, Newton Wyeth, Robert J. Cary, F. Harold Schmitt, and Charles S. Holt for defendants in error.

* Mr. Justice Brandeis delivered the opinion of the court:

This is an action against the Illinois Surety Company on a bond given by one Schott under Act of Congress, February 24, 1905 (33 Stat. at L. 811, chap. 778, Comp. Stat. 1916, § 6923), to secure performance of his contract for work on the Naval Training Station at Chicago.¹ It is brought for the benefit of persons who furnished labor or materials. The bond provides:

"The condition of the above bond is such, that if the said above bounden principal, W. H. Schott, his or their heirs, successors, executors or administrators . . . shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in the aforesaid contract, then this obligation to be void and of no effect, otherwise to remain in full force and virtue."

The bond was given on August 3, 1908. Schott was then heavily indebted, and his business was being conducted under the supervision of a creditors' committee. Later, on the advice of that committee, the Schott Engineering Company was incorporated to take over the business; and on January 2, 1909, all the assets were transferred to it. Schott became president, the members* of the creditors' committee directors. Substantially all the capital stock was issued to Schott, and all was retained by him except \$36,000 preferred stock which was

¹ The act, which is entitled, "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works," provides that a contractor's bond shall include the obligation to: "promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States."

later sold—the proceeds being used to pay debts. Neither the government nor the Surety Company was advised of the transfer, which left the management and the conduct of the business unchanged; and the work was proceeded with continuously from the execution of the bond until January 14, 1910, when both Schott and the company were adjudicated bankrupt. After a short interruption, the work was resumed by the receiver under authority of the court; and settlement was made with the government. Twenty-seven creditors, six of whom furnished labor or materials prior to January 2, 1909, the rest of whom had claims arising between that date and the bankruptcy, sought to recover on the bond.

The district court allowed recovery on five of the claims, aggregating \$15,333.24, which accrued prior to the transfer of the business to the Schott Engineering Company. The circuit court of appeals reversed that judgment and allowed the claims of all who joined in the writ of error to that court—nineteen, aggregating \$38,121.02; but it reduced them pro rata to make the aggregate equal the penalty of the bond,—\$31,047.18. It then allowed interest on all from the date of the commencement of the suit. 141 C. C. A. 409, 226 Fed. 653. The Surety Company appealed to this court and contends:

(1) As to each claim that it was released from liability by the transfer of the business to the Schott Engineering Company during the progress of the work.

(2) As to each claim that interest should not begin to run before the date when the amount payable on all claims was ascertained by the judgment of the circuit court of appeals.

(3) As to certain claims, that the creditors are estopped by specific acts from enforcing the liability upon the bond.

* (4) As to the claim of the United States

Equipment Company, that rental for cars, track, and equipment is not a claim for "labor and materials" recoverable on bond.

These contentions will be considered in their order.

First: The purpose of the act was to provide security for the payment of all persons who provide labor or material on public work. This was done by giving a claim under the bond in lieu of the lien upon land and buildings customary where property is owned by private persons. Decisions of this court have made it clear that the statute and bonds given under it must be construed liberally, in order to effectuate the purpose of Congress as declared in the act. In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the act. Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute.² As the basis of recovery is supplying labor and material for the work, he who has supplied them to a subcontractor may claim under the bond, even if the subcontractor has been fully paid. *Mankin v. United States*, 215 U. S. 533, 54 L. ed. 315, 30 Sup. Ct. Rep. 174.* If Schott had formally sublet the contract to the Engineering Company, the Surety Company would clearly be liable. But the transfer of the business was, at most, a subletting; since under Rev. Stat. § 3737, Comp. Stat. 1916, § 6890, Schott could not assign a contract with the United States.

It is urged that the bond referring to Schott provides protection only to those "supplying him or them labor and materials." But the claims in question were in a very practical sense furnished him—as well as the Engineering Company. He re-

² *United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co.* (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142; *United States use of Hill v. American Surety Co.* 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; *United States Fidelity & G. Co. v. United States*, 209 U. S. 306, 52 L. ed. 804, 28 Sup. Ct. Rep. 537; *Mankin v. United States*, 215 U. S. 535, 54 L. ed. 316, 30 Sup. Ct. Rep. 174; *Title Guaranty & T. Co. v. Crane Co.* 219 U. S. 24, 55 L. ed. 72, 31 Sup. Ct. Rep. 140; *United States Fidelity & G. Co. v. United States*, 231 U. S. 237, 58 L. ed. 200, 34 Sup. Ct. Rep. 88; *United States ex rel. Alexander Bryant Co. v. New York Steamfitting Co.* 235 U. S. 327, 59 L. ed. 253, 35 Sup. Ct. Rep. 108; *Illinois Surety Co. v. United States*, 240 U. S. 214, 60 L. ed. 609, 36 Sup. Ct. Rep. 321. See also *Equitable Surety Co. v.*

United States, 234 U. S. 448, 58 L. ed. 1394, 34 Sup. Ct. Rep. 803. In *Hardaway v. National Surety Co.* 211 U. S. 552, 53 L. ed. 321, 29 Sup. Ct. Rep. 202, where recovery was denied, the "use plaintiffs" had not furnished materials or labor, but were financiers. In *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U. S. 157, 58 L. ed. 893, 34 Sup. Ct. Rep. 550, the questions involved were whether suit was brought within the statutory period. In *United States Fidelity & G. Co. v. United States*, 204 U. S. 349, 51 L. ed. 516, 27 Sup. Ct. Rep. 381; *United States v. Congress Constr. Co.* 222 U. S. 199, 56 L. ed. 163, 32 Sup. Ct. Rep. 44; *Title Guaranty & Surety Co. v. United States*, 223 U. S. 567, 57 L. ed. 969, 33 Sup. Ct. Rep. 614, the questions raised were as to the jurisdiction of the court.

maintained liable on the contract; and no one else was known to United States. Furthermore, if the attention is to be directed to the precise wording of the bond, it should be noted that it refers to Schott, "his or their heirs, successors, executors or administrators;" and the Engineering Company may properly be deemed a successor. The argument that the surety's risk ought not to be increased by holding it liable for the default of strangers to the original contract is of no greater force in the case of an assignee than it is in that of the subcontractor. The Surety Company could protect itself by insisting that the contractor require a bond from all subcontractors and assignees. The Surety Company was in no wise prejudiced by the transfer of the business, since the management remained unchanged; and no reason is shown for applying the rule of *strictissimi juris*. *United States Fidelity & G. Co. v. Golden Pressed Fire Brick Co. (United States Fidelity & G. Co. v. United States)* 191 U. S. 416, 426, 48 L. ed. 242, 246, 24 Sup. Ct. Rep. 142.

Second: The contract and bond were made in Illinois and were to be performed there. Questions of liability for interest must therefore be determined by the law of that state. *Scotland County v. Hill*, 132 U. S. 107, 117, 33 L. ed. 261, 265, 10 Sup. Ct. Rep. 26. Under the law of Illinois the liability of a surety on a bond is extended beyond the penalty by way of interest from the date when the liability on the bond accrued. *Holmes v. Standard Oil Co.* 183 Ill. 70, 55 N. E. 647. See *United States v. United States Fidelity & G. Co.* 236 U. S. 512, 530, 531, 59 L. ed. 696, 704, 705, 35 Sup. Ct. Rep. 298. The liability here accrued at least as early as the commencement of the suit. The Surety Company contends that the amount each claimant was to receive was not made definite until it was actually decided by the court of appeals. But the claims were all for liquidated amounts; and in no instance was the amount in dispute. The controversy was merely as to which of the claimants should be entitled to share in the liability under the bond. The Surety Company might have paid into court at the commencement of the suit an amount equal to the penalty of the bond. It did not elect to do so; and as the aggregate liability on the claims exceeds the penalty, it was properly held for an additional amount equal to interest from the commencement of the suit.

Third: The contention of the Surety Company that certain of the claimants are estopped from enforcing liability on the bond rests upon different acts in respect to the several creditors. As to some it is because they filed against the estates in bankruptcy of both Schott and the En-

gineering Company the whole of their claims for material delivered in part to each. As to one creditor the estoppel is predicated upon the fact that, in answer to an inquiry, he recommended that the receiver in bankruptcy complete the contract. As to another creditor the estoppel is predicated upon the fact that he filed his claim in bankruptcy against the Engineering Company while the materials had been furnished to Schott. As to still another, the contention rests upon the fact that having claims against both Schott and the Engineering Company, he had stated to the Engineering Company a single account covering all the items, and had accepted part payment; and furthermore had participated in the activities of the creditors' committee which supervised the business throughout the whole period. Such acts lack all the elements of an equitable estoppel. The Surety Company was not led thereby to do or to omit to do anything. It did not rely upon, nor was it affected by, any of the acts it now calls attention to. *Dickerson v. Colgrove*, 100 U. S. 578, 580, 25 L. ed. 618, 619. There is in fact no inconsistency between the claimants' earlier acts and their attempt to recover on the bond. The Surety Company's contention is without merit.

Fourth: The specific objection made to the claim of the United States Equipment Company, for rental of cars, track, and equipment used at the Naval Training Station, and the expense of loading the plant and freight thereon to and from the station, is also unfounded. The Surety Company contends that this is not supplying "labor and materials." The equipment was used in the prosecution of the work. Material was thus supplied, although a loan serving the purpose, no purchase of it was made. The expense of loading and freight was properly included with the fixed rental as recoverable under the bond. *Title Guaranty & T. Co. v. Crane Co.* 219 U. S. 24, 34, 55 L. ed. 72, 77, 31 Sup. Ct. Rep. 140.

Judgment affirmed.

Mr. Justice Van Devanter and Mr. Justice McReynolds dissent.

(244 U. S. 383)

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY OF TEXAS, Missouri, Kansas, & Texas Railway Company, and American Surety Company of New York, Plffs. in Err.,

v.

J. H. WARD, J. R. Ward, and Houston & Texas Central Railroad Company.

CARRIERS — 35 — CONNECTING CARRIERS — CARMACK AMENDMENT — EFFECT OF SECOND BILL OF LADING — LACK OF CONSIDERATION.

1. The terms of the original bill of

lading for an interstate shipment issued under the Act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1916, § 8563), which governs the entire transportation, could not be altered by a second bill of lading issued by a connecting carrier, since the latter was already bound to transport the shipment at the rate and upon the terms named in the original bill of lading, and the acceptance by the shipper of the second bill was therefore without consideration and was void.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94.]

CARRIERS ⇨180(1)—CONNECTING CARRIERS—CARMACK AMENDMENT—NOTICE OF CLAIM—SECOND BILL OF LADING.

2. To require the shipper of an interstate shipment, in order to recover for a loss, to file his verified claim with the connecting carrier which caused the injury, as is provided in a separate bill of lading issued by that carrier, would defeat the purpose of the Act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1916, § 8563), which was to relieve shippers of the difficult and almost impossible task of determining on which of several connecting lines the damage occurred.

CARRIERS ⇨68—CONNECTING CARRIERS—CARMACK AMENDMENT—WAIVER—ACCEPTING SECOND BILL OF LADING.

3. Acceptance by the shipper of an interstate shipment of a second bill of lading issued by a connecting carrier did not and could not operate as a waiver of any rights thereafter accruing under the original bill of lading issued conformably to the Act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1916, § 8563), by the initial carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 148, 194, 207-209, 216.]

[No. 241.]

Submitted April 30, 1917. Decided June 4, 1917.

IN ERROR to the Court of Civil Appeals, Third Supreme Judicial District of the State of Texas, to review a judgment which affirmed a judgment of the District Court of Llano County, in that state, against certain carriers in an action to recover damages for injuries to an interstate shipment. Affirmed.

See same case below, — Tex. Civ. App. —, 169 S. W. 1035.

The facts are stated in the opinion.

Messrs. Alexander Britton, Joseph M. Bryson, Charles C. Huff, Alexander H. McKnight, and C. S. Burg for plaintiffs in error.

No appearance for defendants in error.

* Mr. Justice Brandeis delivered the opinion of the court:

This is an action to recover damages for injuries to cattle in the course of an interstate shipment. The cattle were delivered on August 23, 1912, by J. R. Ward to the Houston & Texas Central Railroad Company at Llano, Texas, for transportation by it to Elgin, Texas, and over connecting lines, the Missouri, Kansas, & Texas Railway Company of Texas, and the Missouri, Kansas, & Texas Railway Company, to Winona, Oklahoma. The Houston Company issued a through bill of lading in the form of the "live-stock contract" in common use, and charged a through rate, which was paid by the shipper, as agreed. The cattle arrived at destination in a crippled and debilitated condition, alleged to have resulted from the*delay, rough handling, and other negligence of the carriers. Plaintiffs brought this suit for damages in the district court for Llano county, joining the three carriers as defendants. The petition contained no reference to the Carmack Amendment (June 29, 1906, chap. 3591, 34 Stat. at L. 584, 595, Comp. Stat. 1916, §§ 8563, 8604a, 8604aa).¹ The Houston Company answered, setting up a provision in the bill of lading limiting liability to injuries occurring on its own line; and alleging that the cattle were transported to Elgin with ordinary care and there delivered in good condition to the connecting carrier. The Missouri, Kansas, & Texas Railway Company of Texas, in its answer, denied the allegations of the complaint, and, in addition, alleged that it had accepted the cattle at Elgin under a second bill of lading or live-stock contract, executed by it and by one E. A. Barrer, as agent of the shipper; that the plaintiff had failed to comply with a stipulation therein, requiring, as a condition precedent to liability, that a written claim for damages be filed within thirty days after the happening of the injuries complained of; and that "the said shipment constituted and was an interstate shipment, originating in Llano, Llano county, Texas, and destined to Wynona, in the state of Oklahoma, . . . and the said provisions of said bill of lading were and are, each and all binding upon [under?] the laws of Congress relating to interstate commerce in force at the time said bill of lading was executed and said shipment made."

The record is silent as to the circumstances under which this second bill of lading was executed; and although it is alleged to have been issued in consideration

¹The rights of the parties are not affected by the Act of March 4, 1915, chap. 176, 38 Stat. at L. 1196, Comp. Stat. 1916, § 8604a, dispensing with the necessity of notice of claim in certain cases.

of a special reduced rate theretofore duly filed with the Interstate Commerce Commission, there is nothing to indicate that it affected the through rate already agreed upon in the original bill of lading. This lower rate referred to appears to have been merely the customary special rate offered in consideration of an agreed maximum valuation on the cattle per head. The same agreed value was stipulated in the original bill of lading, which expressly "limits the liability of carriers in consideration of a lower rate being granted." The Missouri, Kansas, & Texas Railway Company set up the same defense, alleging that it had accepted the shipment under the second bill of lading.

A jury trial having been waived, the case was heard by the court, and judgment rendered in favor of the Houston Company, but against the other two defendants in amounts which were found to represent the damage suffered in the course of the transportation through the negligence of their respective agents. Upon appeal by these defendants, the court of civil appeals of the third supreme judicial district affirmed the judgment, on the ground that the liability of the connecting carriers must be governed by the provisions of the bill of lading issued by the initial carrier,—(which did not require a written claim in thirty days),—and that the second bill of lading was void under the Carmack Amendment (— Tex. Civ. App. —, 169 S. W. 1035). Upon denial of a petition for rehearing the case was brought here on writ of error.

The purpose of the Carmack Amendment has been frequently considered by this court.² It was to create in the initial carrier unity of responsibility for the transportation to destination. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; *Northern P. R. Co. v. Wall*, 241 U. S. 87, 92, 60 L. ed. 905, 907, 36 Sup. Ct. Rep. 493. And provisions in the bill of lading inconsistent with that liability are void. *Norfolk & W. R. Co. v. Dixie Tobacco Co.* 228 U. S. 593, 57 L. ed. 980, 33 Sup. Ct. Rep. 609. While the receiving carrier is thus responsible for the

whole carriage, each connecting road may still be sued for damages occurring on its line; and the liability of such participating carrier is fixed by the applicable valid terms of the original bill of lading.³ The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not altered by the second, issued by the connecting carrier. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void.

The railway companies contend that while the Carmack Amendment makes the receiving carriers pay for all liability incurred by the connecting lines, the question of whether there is any such liability or not must be determined by reference to the separate contracts of each participating carrier, and not to the contract of the initial carrier alone. If, as contended, a shipper must, in order to recover, first file his "verified claim" with the connecting carrier who caused the injury, as provided in a separate bill of lading issued by such carrier, the shipper would still rest under the burden of determining which of the several successive carriers was at fault. Such a construction of the Carmack Amendment would defeat its purpose, which was to relieve shippers of the difficult, and often impossible, task of determining on which of the several connecting lines the damage occurred. For the purpose of fixing the liability, the several carriers must be treated, not as independent contracting parties, but as one system; and the connecting lines become in effect mere agents, whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 206, 55 L. ed. 167, 182, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 491, 56 L. ed. 516, 523, 32 Sup. Ct. Rep. 205.

The railway companies also contend that the acceptance of the second bill of lading operated as a waiver of all rights thereafter accruing under the first. The record

² *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; *Georgia, F. & A. R. Co. v. Blish Mill Co.* 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; *St. Louis, I. M. & S. R. Co. v. Starbird*, 243 U. S. 592, 61 L. ed. 917, 37 Sup. Ct. Rep. 462, decided April 30, 1917.

³ *Georgia, F. & A. R. Co. v. Blish Mill Co.* 241 U. S. 190, 194, 196, 60 L. ed. 948, 951, 952, 36 Sup. Ct. Rep. 541; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 648, 57 L. ed. 683, 686, 33 Sup. Ct. Rep. 391. See also *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. 836, 36 Sup. Ct. Rep. 469; *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. ed. 453, 36 Sup. Ct. Rep. 177.

discloses no evidence of intention to make such a waiver and there was no consideration for it. Furthermore, as stated in *Georgia, F. & A. R. Co. v. Blish Mill. Co.* 241 U. S. 190, 197, 60 L. ed. 948, 952, 36 Sup. Ct. Rep. 541, "the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal act. . . . A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

Judgment affirmed.

(244 U. S. 360)

NEW YORK CENTRAL & HUDSON
RIVER RAILROAD COMPANY, Plff.
in Err.,

v.

MICHAEL TONSELLITO, an Infant, Who
Sues by James Tonsellito, His Next
Friend. (No. 239.)

NEW YORK CENTRAL & HUDSON
RIVER RAILROAD COMPANY, Plff.
in Err.,

v.

JAMES TONSELLITO. (No. 240.)

COURTS ⇨399(2)—ERROR TO STATE COURT
—FOLLOWING DECISION BELOW—ACTION
UNDER FEDERAL EMPLOYERS' LIABILITY
ACT.

1. A judgment in favor of plaintiff in an action under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, §§ 8657-8665), will not be disturbed on writ of error to a state court, where there is adequate evidence to justify the submission of the issues to the jury, and the charge cannot be said to contain material errors, and both state courts have sustained the judgment.

[Ed. Note.—For other cases, see *Courts, Cent. Dig.* § 1090; *Appeal and Error, Cent. Dig.* §§ 3384, 3385.]

COMMERCE ⇨8(6) — EXCLUSIVENESS OF
FEDERAL REGULATION—EMPLOYERS' LIABILITY—COMMON-LAW ACTION—SUIT BY
FATHER OF INJURED MINOR EMPLOYEE.

2. The common-law right of the father of a minor employee of an interstate railway company, injured through the latter's negligence while he was employed in interstate commerce, to sue the company on account of expenses incurred for medical attention to his son and for the loss of the latter's services, did not survive the enactment of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, §§ 8657-8665), in which Congress declared when, how far, and to whom, such carriers shall be liable on account of accidents to employees in the specified class.

[Nos. 239 and 240.]

Submitted April 30, 1917. Decided June 4, 1917.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a judgment which affirmed a judgment of the Circuit Court of Hudson County, in that state, in favor of plaintiff in a suit under the Federal Employers' Liability Act, brought by the father as next friend of the injured minor employee. Affirmed. Also

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a judgment which affirmed a judgment of the Circuit Court of Hudson County, in that state in favor of plaintiff in an action by the father of a minor employee of an interstate railway company, injured while employed in interstate commerce, to recover from the company on account of expenses incurred for medical attention to the son, and for loss of the latter's services. Reversed and remanded for further proceedings.

See same case below, 87 N. J. L. 651, 94 Atl. 804.

The facts are stated in the opinion.

Messrs. Albert C. Wall and John A. Hartpence for plaintiff in error.

Mr. Alexander Simpson for defendants in error.

Mr. Justice McReynolds delivered the opinion of the court:

By stipulation, these causes were tried together before the same jury and upon the same testimony. Michael Tonsellito, an infant seventeen years old, suing by his father, James Tonsellito, as next friend, and relying upon the Federal Employers' Liability Act, obtained a judgment for personal injuries suffered while employed by plaintiff in error—Number 239. These injuries, he alleged, resulted from negligence in constructing and maintaining its roadbed and in starting a locomotive without giving him a reasonable opportunity to climb thereon. James Tonsellito recovered for himself on account of expenses incurred for medical attention to his son and loss of the latter's services—Number 240. Both judgments were affirmed by the court of errors and appeals. 87 N. J. L. 651, 94 Atl. 804.

Reversal is asked in the cause instituted by Michael Tonsellito because (1) he was not engaged in interstate commerce when injured; (2) no negligence by the railroad was shown; (3) he assumed the risk; and (4) he was a mere volunteer when the accident occurred. We think there was adequate evidence to justify submission of all these matters to the jury; and we are unable to say the charge contains material error. Both state courts have sustained the judgment; there are no special circumstances demanding comment; and it seems

enough to announce our conclusion. *Great Northern R. Co. v. Knapp*, 240 U. S. 464, 466, 60 L. ed. 745, 751, 36 Sup. Ct. Rep. 399; *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. ed. 319, 37 Sup. Ct. Rep. 116.

The court of errors and appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions in *New York C. etc. R. Co. v. Winfield*, 244 U. S. 147, 61 L. ed. —, 37 Sup. Ct. Rep. 546, and *Erie R. Co. v. Winfield*, 244 U. S. 170, 61 L. ed. —, 37 Sup. Ct. Rep. 556 (decided May 21, 1917). There we held the act "is comprehensive and also exclusive" in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. "It establishes a rule or regulation which is intended to operate uniformly in all the states as respects interstate commerce, and in that field it is both paramount and exclusive." Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state.

The judgment in Number 239 is affirmed.

In Number 240 the judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Brandeis concurs in the result announced in No. 240.

(244 U. S. 362)

CHARLES MASON and A. Hanson, Plffs.
in Err.,
v.

UNITED STATES.

WITNESSES  297 — PRIVILEGE — SELF-CRIMINATION.

Witnesses called to testify before a grand jury engaged in investigating a charge of gambling against other persons cannot justify, under the claim of their constitutional privilege against self-crimination, their refusal to answer the questions whether a game of cards was going on at the table at which they were sitting at a specified time and place, or whether on that occasion they saw anyone playing cards, there being no suggestion that, under the local law (*Alaska Comp. Laws 1913, § 2032*), it is criminal to sit at a table where cards

are being played, or to join in such game unless played for something of value.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1011, 1026-1037.]

[No. 604.]

Submitted April 11, 1917. Decided June 4, 1917.

IN ERROR to the District Court of the United States for the District of Alaska, Second Division, to review an order imposing a fine for contempt in refusing to answer certain questions asked upon an investigation before a grand jury. Affirmed.

The facts are stated in the opinion.

Mr. George B. Grigsby for plaintiffs in error.

Solicitor General Davis and Mr. Robert Szold for defendant in error.

* Mr. Justice McReynolds delivered the opinion of the court:

Plaintiffs in error were separately called to testify before a grand jury at Nome, Alaska, engaged in investigating a charge of gambling against six other men. Both were duly sworn. After stating that he was sitting at a table in the Arctic Billiard Parlors when these men were there arrested, Mason refused to answer two questions, claiming so to do might tend to incriminate him. (1) "Was there a game of cards being played on this particular evening at the table at which you were sitting?" (2) "Was there a game of cards being played at another table at this time?" Having said that at the specified time and place he, also, was sitting at a table, Hanson made the same claim and refused to answer two questions. (1) "If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw anyone there playing 'stud poker' or 'pangini'?" (2) "If at this same time you saw anyone playing a game of cards at the table at which you were sitting?"

The foreman of the grand jury promptly reported the foregoing facts and the judge at once heard the recalcitrant witnesses; but as the record contains no detailed statement of what then occurred we cannot know the exact circumstances. The court, being of opinion "that each and all of said questions are proper and that the answers thereto would not tend to incriminate the witnesses," directed them to return before the grand jury and reply. Appearing there, Mason again refused to answer the first question propounded to him, but, half-yielding to frustration, said in response to the second, "I don't know." Hanson refused to answer either question.

A second report was presented by the foreman; the witnesses were once more brought into court; and after hearing evidence adduced by both sides and arguments of counsel they were adjudged in contempt. It was further ordered "that they each be fined in the sum of \$100, and that they each be imprisoned until they comply with the orders of the court by answering the questions." Immediately following this order they made answers, but these are not set out in the record. The fines are unpaid; and we are asked to reverse the trial court's action in undertaking to impose them because it conflicts with the inhibition of the 5th Amendment that no person "shall be compelled in any criminal case to be a witness against himself."

During the trial of Aaron Burr and "Re Willie," Fed. Cas. No. 14,692e, the witness was required to answer notwithstanding his refusal upon the ground that he might thereby incriminate himself. Chief Justice Marshall announced the applicable doctrine as follows: "When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which it is conceived courts have generally observed. It is this: When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be."

The constitutional protection against self-incrimination "is confined to real danger, and does not extend to remote possibilities out of the ordinary course of law." *Heike v. United States*, 227 U. S. 131, 144, 57 L. ed. 450, 455, 33 Sup. Ct. Rep. 226, Ann. Cas. 1914C, 128; *Brown v. Walker*, 161 U. S. 591, 599, 600, 40 L. ed. 819, 821, 822, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

In *Reg. v. Boyes* (1861) 1 Best & S. 311, 329, 330, 121 Eng. Reprint, 730, Cockburn, Ch. J., said:

"It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further,

that the witness was the sole judge as to whether his evidence would bring him into danger of the law; and that the statement of his belief to that effect, if not manifestly made mala fide, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. . . . To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question: . . . A question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril.

"Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things,—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

The statement of the law in *Reg. v. Boyes* was expressly approved by all the judges in *Ex parte Reynolds* (1882) L. R. 20 Ch. Div. 294, 51 L. J. Ch. N. S. 756, 46 L. T. N. S. 508, 30 Week. Rep. 651, 46 J. P. 533. Similar announcements of it may be found in *Ex parte Irvine*, 74 Fed. 954, 960; *Ward v. State*, 2 Mo. 120, 122, 22 Am. Dec. 449; *Ex parte Buskett*, 106 Mo. 602, 608, 14

L.R.A. 407, 27 Am. St. Rep. 378, 17 S. W. 753, 9 Am. Crim. Rep. 754.

The general rule under which the trial judge must determine each claim according to its own particular circumstances, we think, is indicated with adequate certainty in the above-cited opinions. Ordinarily, he is in much better position to appreciate the essential facts than an appellate court can hold, and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.

^{*367} In the present case the witnesses certainly were not relieved from answering merely because they declared* that so to do might incriminate them. The wisdom of the rule in this regard is well illustrated by the enforced answer, "I don't know," given by Mason to the second question, after he had refused to reply under a claim of constitutional privilege.

No suggestion is made that it is criminal in Alaska to sit at a table where cards are being played, or to join in such game unless played for something of value. The relevant statutory provision is § 2032, Compiled Laws of Alaska 1913, copied in the margin.¹

The court below evidently thought neither witness had reasonable cause to apprehend danger to himself from a direct answer to any question propounded, and, in the circumstances disclosed, we cannot say he reached an erroneous conclusion.

Separate errors are also assigned to the trial court's action in permitting counsel to introduce two documents in evidence; but we think the points are without substantial merit.

The judgment under review is affirmed.

¹ "Sec. 2032. That each and every person who shall deal, play, or carry on, open or cause to be opened, or who shall conduct, either as owner, proprietor or employee, whether for hire or not, any game of faro, monte, roulette, rouge-et-noir, lansquenet, rondo, vingt-un, twenty-one, poker, draw poker, brag, bluff, thaw, craps, or any banking or other game played with cards, dice, or any other device, whether the same shall be played for money, checks, credit, or any other representative of value, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$500, and shall be imprisoned in the county jail until such fine and costs are paid; Provided, That such person so convicted shall be imprisoned one day for every \$2 of such fine and costs: And provided further, That such imprisonment shall not exceed one year."

WESTERN OIL REFINING COMPANY,
Plff. in Err.,
v.

A. W. LIPSCOMB, Clerk, etc.

COMMERCE  40(2) — STATE TAXATION—
FOREIGN CORPORATION — CONTINUOUS
SHIPMENT—LOCAL TRANSPORTATION.

A foreign corporation which shipped into the state a tank car of oil and a carload of steel barrels containing just the quantity of oil and the number of barrels necessary to fill orders from two towns in the state, which had been taken by a traveling salesman, billing the cars to one town, at which the orders from there were to be and were filled, and then rebilling such cars to the other town, where the orders from that place could be and were filled,—could not be subjected to a privilege tax without violating the commerce clause of the Federal Constitution, the intrastate transportation being both in fact and in law a connected part of a continuous interstate movement.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30.]

[No. 168.]

Submitted March 22, 1917. Decided June 4, 1917.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment which reversed a judgment of the Circuit Court of Maury County, in that state, for the recovery back by a foreign corporation of a privilege tax which was asserted to be a tax upon interstate commerce. Reversed.

The facts are stated in the opinion.

Messrs. Henry Clay True and A. L. Dorsey for plaintiff in error.

Mr. Frank M. Thompson for defendant in error.

* Mr. Justice Van Devanter delivered the opinion of the court:

This was a suit by an Indiana corporation to recover money paid under protest as an occupation or privilege tax in Tennessee. The plaintiff had an oil refinery in Illinois and a steel barrel factory in Indiana, and was selling the products of its refinery and factory upon orders taken by traveling salesmen in its employ. For the purpose of filling orders so taken in Maury county, Tennessee, it shipped into that county from its refinery a tank car of oil and from its factory a car of steel barrels. Both cars were billed to the plaintiff at Columbia, in that county, and, after the orders from that place were filled, were rebilled to the plaintiff at Mount Pleasant, in the same county, where the orders from the latter place were filled. At both places the orders were filled directly from the cars by a traveling agent

of the plaintiff and the purchase price was collected at the time,—this being what was contemplated when the orders were taken. If the order was for both oil and barrels, the oil was drawn out of the tank car into the barrels and the two were jointly delivered; and if oil alone was ordered, it was drawn from the tank car into barrels otherwise provided by the buyer. When the cars were originally shipped they contained just the quantity of oil and the number of barrels required to fill the orders from the two places, and the plaintiff intended that they should remain at Columbia only long enough to fill the orders from that place and then should be sent to Mount Pleasant, so the orders from that place could also be filled. The quantity of oil and the number of barrels required to fill the orders from Mount Pleasant were in the cars continuously from the time of the original shipment*until the cars reached that place. The plaintiff had no office or local agent in Tennessee, nor any oil depot, storage tank, or warehouse in that state.

The statute, chap. 479, Acts 1909, § 4, under which the tax was exacted and paid, provides:

"Each and every person, firm, partnership, corporation, or local agent having oil depots, storage tanks or warehouses for the purpose of selling, delivering, or distributing oil of any description, and each and every person, firm, partnership, corporation, or local agent using a railroad car or railroad depots for such purpose, shall pay a privilege tax as follows."

The objection made to the tax, as applied in the circumstances stated, was that it was a tax upon interstate commerce and therefore violative of the commerce clause of the Constitution. In the county court judgment was given for plaintiff, and this was reversed by the supreme court of the state, which held, first, that what was done up to and including the filling of the orders from Columbia was interstate commerce, and the state could not exact a privilege tax therefor consistently with the commerce clause of the Constitution (see *Western Oil Ref. Co. v. Dalton*, 131 Tenn. 329, 174 S. W. 1138), and, second, that what was done thereafter—rebilling and forwarding the cars from Columbia to Mount Pleasant and then filling the orders from that place—was intrastate commerce and afforded an adequate basis for exacting the tax.

Of the first part of the decision it is enough to say it is supported by a long line of adjudicated cases in this court, among them being these: *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Dozier v. Alabama*, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A. (N.S.)

264, 30 Sup. Ct. Rep. 649; *Crenshaw v. Arkansas*, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; *Stewart v. Michigan*, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476.

In the second part of the decision we think the court erred. Unlike *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360, this is not a case where, at the time of the*original billing, the shipper had no purpose to continue the transportation beyond the destination then indicated; nor is it a suit, as was that, to penalize a carrier which rightly conformed its action to what was said in the bill of lading. On the contrary, it is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated, and where there is nothing which requires that decisive effect be given to the bill of lading. Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done, and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; *Railroad Commission v. Worthington*, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; *Texas & N. O. R. Co. v. Sabine Tram Co.* 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; *Railroad Commission v. Texas & P. R. Co.* 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837; *Chicago, M. & St. P. R. Co. v. Iowa*, 233 U. S. 334, 343, 58 L. ed. 988, 992, 34 Sup. Ct. Rep. 592; *South Covington & C. Street R. Co. v. Covington*, 235 U. S. 537, 545, 59 L. ed. 350, 353, L.R.A. 1915F, 792, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158.

Here, when the cars were started from Illinois and Indiana, it was intended by the shipper, as is expressly conceded, that they should be taken to Columbia, Tennessee, where a portion—a definite portion—of the contents of each was to be taken out and delivered, and that the cars, with the remainder of the contents, should proceed to Mount Pleasant in the same state; and this is what actually was done. Columbia was the destination of only a part of the merchandise, not of all. As to part, it was merely the place of a temporary stop en route. The*original billing to Columbia

*235

*240

*350

and the rebilling from there to Mount Pleasant operated in the same way as would an original billing to Mount Pleasant, with the privilege of stopping en route at Columbia to deliver a part of the merchandise. Indeed, it is stipulated that the reason for not billing the cars through to Mount Pleasant in this way was because the carriers receiving the shipments "would not allow such a stop-over privilege, though the same is allowed on nearly every other kind of shipment." Certainly the transportation of the merchandise destined to Mount Pleasant was not completed when it reached Columbia; nor was the continuity of its movement broken by its temporary stop at that place. As to that merchandise the journey to Columbia and the journey from there to Mount Pleasant were not independent, each of the other, but in fact and in legal contemplation were connected parts of a continuing interstate movement to the latter place.

It results that the tax was imposed for carrying on interstate commerce, and so was repugnant to the Constitution and void.

Judgment reversed.

The CHIEF JUSTICE dissents, being of opinion that the case is controlled by May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976.

(244 U. S. 351)

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY OF IDAHO, Appt.,

v.

UNITED STATES.

PUBLIC LANDS ⇨92—RAILROAD RIGHT OF WAY—FOREST RESERVE — "LANDS SPECIALLY RESERVED FROM SALE."

1. Lands in the forest reserve are excepted from the grant in the Act of March 3, 1875 (18 Stat. at L. 482, chap. 152, Comp. Stat. 1916, § 4921), of a right of way for railroads over the public lands, by the provision of § 5, declaring that the act shall not apply to "any military, park, or Indian reservation or other lands specially reserved from sale."

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282.]

PUBLIC LANDS ⇨92—RAILROAD RIGHT OF WAY—TEMPORARY WITHDRAWAL FOR FOREST RESERVE.

2. The temporary withdrawal by the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, of a tract of public land with a view to the creation of a permanent forest reserve, under the Act of March 3, 1891 (26 Stat. at L. 1095, chap. 561, Comp. Stat. 1916, § 5121), § 24, if, after further examination, that should receive the President's approval, was as much an obstacle to the acquisition of a railroad right of way over such lands under the Act of March 3, 1875 (18 Stat. at L. 482, chap. 152, Comp. Stat.

1916, § 4921), § 5, excepting military, park, or Indian reservation, or "other lands specially reserved from sale" from its provisions granting railroad rights of way over the public lands, as was the permanent reserve thereafter created by proclamation of the President. The power to establish the reserve included the power to make the temporary withdrawal, and the act of the Secretary of the Interior in directing the latter was, in legal contemplation, the act of the President.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282.]

PUBLIC LANDS ⇨92—RAILROAD RIGHT OF WAY—FOREST RESERVE — NECESSITY OF APPROVAL BY INTERIOR DEPARTMENT.

3. Only through the approval of the Secretary of the Interior can the right of way for a railroad through the forest reserve be acquired without further action by Congress, in view of the exception in the Act of March 3, 1875 (18 Stat. at L. 482, chap. 152, Comp. Stat. 1916, § 4921), of military, park, or Indian reservation, "or other lands specially reserved from sale" from the general provisions of that act, granting railroad rights of way over the public lands, and of the provision in the Act of March 3, 1899 (30 Stat. at L. 1233, chap. 427, Comp. Stat. 1916, § 4945), that in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a railroad over and across any forest reservation when, in his judgment, the public interests will not be injuriously affected thereby.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282.]

PUBLIC LANDS ⇨92—RAILROAD RIGHT OF WAY—CONTRACTS—ENFORCEMENT.

4. A railroad company which has availed itself of advance permission to construct its road through a forest reserve, granted by the Forest Office on the faith of the written promise of its representative on its behalf to execute a stipulation to be prescribed by the Forester, to be as nearly as practicable like those previously executed by it in respect to its railroad in another forest reserve, is not only bound by such promise, but must execute the required stipulation or discontinue the construction and operation of its road in the reserve.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282.]

PUBLIC LANDS ⇨92—RAILROAD RIGHT OF WAY—EQUITY—JURISDICTION.

5. Equity has jurisdiction of a suit by the United States to enjoin a railway company from constructing and operating its railroad through a national forest reserve unless it executes and files with the Secretary of the Interior a stipulation, as required by that officer, in accordance with an agreement entered into by a representative of the railway company on its behalf, and to obtain damages for timber destroyed and injury done in the course of construction and operation of such railroad.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282.]

EQUITY 6-148(5)—PLEADING—MULTIFARIOUSNESS.

6. A bill filed by the United States to enjoin a railway company from constructing or operating its railroad through a national forest reserve unless it executes and files with the Secretary of the Interior a stipulation, as required by that officer, in accordance with an agreement entered into by a representative of the railway company on its behalf, and to obtain damages for timber destroyed and injury done in the course of construction and operation of such railroad, is not multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 358.]

[No. 176.]

Argued April 18 and 19, 1917. Decided June 4, 1917.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the District Court for the District of Idaho in favor of the United States in a suit to enjoin a railway company from constructing or operating its road through a national forest reserve unless it executes and files with the Secretary of the Interior a stipulation required by that officer, and to obtain damages for timber cut and destroyed and injury done in the course of the construction and operation of such road. Affirmed.

See same case below, 134 C. C. A. 84, 218 Fed. 288.

The facts are stated in the opinion.

Messrs. F. M. Dudley and H. H. Field for appellant.

Assistant Attorney General Kearful and Mr. W. W. Dyar for appellee.

*Mr. Justice Van Devanter delivered the opinion of the court:

This is a suit by the United States to enjoin a railroad company from constructing or operating its railroad through a national forest reserve in Idaho unless it executes and files with the Secretary of the Interior a stipulation required by that officer, and to obtain damages for timber cut and destroyed and injury done in the course of the construction and operation of such railroad. In the district court (207 Fed. 164) and in the circuit court of appeals (134 C. C. A. 84, 218 Fed. 288), the government prevailed. The railroad company prosecutes this appeal.

The forest reserve had its inception in an order by the Commissioner of the General Land Office, made March 21, 1905, temporarily withdrawing a large body of public lands from all disposal, save under the mineral land laws. The order was made by direction of the Secretary of the

Interior with a view to the creation of a permanent forest reserve, under § 24 of the Act of March 3, 1891, chap. 561, 26 Stat. at L. 1095, Comp. Stat. 1916, § 5121, if, after further examination, that should receive the President's approval. The permanent reserve was created November 6, 1906, by a proclamation of the President. Between the temporary withdrawal and the President's proclamation the railroad company was incorporated under the laws of Idaho, and filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization. During the same period it also filed in the local land office a map or profile of its proposed railroad through the reserve, and after the President's proclamation it filed in that office a second and then a third map. The line of the proposed road shown upon the second map differed widely from that upon the first, and the line shown upon the third differed materially from those upon the others. The first and second maps, neither of which had been approved, were returned to the company as superseded by the third. It was filed May 10, 1907. At that time, as also before any map was filed, the regulations governing applications for railroad rights of way in forest reserves required the applicant to enter into a stipulation respecting the use and enjoyment of the privilege, the prevention of forest fires, the compensation to be made for timber cut or destroyed, and the duty of the company to pay for any injury otherwise done to the reserve. 32 Land Dec. 481; 34*Land Dec. 583. One provision in the regulations said: "No construction can be allowed on a reservation until an application for right of way has been regularly filed in accordance with the laws of the United States and has been approved by the Department, or has been considered by this office or the Department, and permission for such construction has been specifically given." After filing the third map the company sought permission from the Forest Office to proceed with the construction of its railroad in advance of the approval of its map, and to that end its authorized representative, Mr. George R. Peck, in its behalf, signed and filed in the Forest Office the following memorandum:

"Whereas, the Chicago, Milwaukee, & St. Paul Railway Company of Idaho desires immediate permission from the Forest Service to begin construction of the company's railroad in the Cœur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the company that it will execute and abide by stipulation and conditions to be prescribed by the Forester in respect to said railroad; such stipulation

and conditions to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana."

The Forester wrote upon the memorandum, and signed, an indorsement, saying: "Approved and advance permission given to construct, subject to ratification hereof by the company." At the same time a telegram was sent to the supervisor of the reserve, saying: "Advance permission given to-day St. Paul Railroad Company to construct railroad through Cœur d'Alene, subject usual stipulations. Supervise clearing and piling and scale all timber cut."

There was no express ratification of the Peck memorandum, but shortly after it was made the company entered upon the reserve and actively proceeded with the construction of its road, which it would not have been permitted to do without the memorandum. Not until the work had proceeded for some months was there any indication that the memorandum was not satisfactory to the company. It then declined to execute the stipulation called for by the memorandum and assigned as a reason that Mr. Peck had acted upon the mistaken belief that the President's proclamation creating the permanent reserve preceded the filing of the first map, when in fact the map was filed before the proclamation was issued, and that the execution of such a stipulation as was called for by the memorandum was indispensable, when, as the company asserted, it was entitled, under the Act of March 3, 1875, infra, to a right of way through the reserve without entering into any stipulation or assenting to any conditions. But the officers of the Forest Service insisted, with the full sanction of the Secretary of the Interior and of the Secretary of Agriculture, that the stipulation be executed, and that without it the company was not entitled to proceed. This resulted in a conference at which the company particularly requested that its construction work be not disturbed, and assented to an arrangement for further negotiations, or, if need be, a "friendly lawsuit." Further negotiations failed and the present suit followed. When it was begun the road through the reserve was nearly completed and was in operation, the construction being on the line shown on the third map. Approval had not been given to this map, but had been withheld, awaiting the company's execution of the prescribed stipulation.

The district court, after concluding and announcing that the company was bound by the Peck memorandum and that the government was entitled to a decree, gave the

parties an opportunity to agree upon the form of stipulation called for by that memorandum, and then postponed the assessment of damages as a matter which might be affected materially by the terms of the stipulation. Afterward the parties brought into court a form of stipulation, which they agreed was what was required by the Peck memorandum, and that form was adopted by the court, with the addition only of a paragraph declaring that the stipulation should be deemed to have been executed as of May 10, 1907, which was the date of the Peck memorandum, of the permission to proceed with the construction, and of the filing of the map according to which the road was constructed.

Rights of way for railroads over lands of the United States were granted only by special acts until March 3, 1875, when Congress enacted a general law upon the subject and confided its administration to the Land Department. Chap. 152, 18 Stat. at L. 482, Comp. Stat. 1916, § 4921. But that law, by its 5th section, was declared to be inapplicable to "any military, park, or Indian reservation, or other lands specially reserved from sale." Lands in a forest reserve not only are specially reserved from sale, but, like those in the reservations particularly named, are set apart for a public purpose. Act June 4, 1897, chap. 2, 30 Stat. at L. 34-36, Comp. Stat. 1916, §§ 5123-5134. That they come within the excepting provision of the 5th section, as do lands in other public reservations, is plain. Both Congress and the Land Department have so regarded them. House Report No. 1212, 54th Cong. 1st Sess.; House Report No. 1790, 55th Cong. 3d Sess.; Re Brainard & N. M. R. Co. 29 Land Dec. 257. Thus the company neither did nor could acquire a right of way over these lands under the Law of 1875. And this is true notwithstanding the preliminary steps taken, as before recited, in advance of the creation of the permanent reserve. The temporary withdrawal was made several months before any of those steps were taken,—indeed, before the company came into existence,—and remained in force until the permanent reserve was created. While the withdrawal was in force it was as much of an obstacle to the acquisition of a railroad right of way over these lands as was the permanent reserve thereafter. The power to establish the reserve included the power to make the temporary withdrawal, and the act of the Secretary of the Interior in directing the latter was, in legal contemplation, the act of the President. United States v. Morrison, 240 U. S. 192, 212, 60 L. ed. 599, 608, 36 Sup. Ct. Rep. 326; Wilcox v. Jackson, 13 Pet. 498, 512, 513,

10 L. ed. 264, 271, 272; *Wolsey v. Chapman*, 101 U. S. 755, 769, 770, 25 L. ed. 915, 920, 921.

We come, then, to the provision in the Appropriation Act of March 3, 1899, chap. 427, 30 Stat. at L. 1233, Comp. Stat. 1916, § 4945, which says:

"That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."

Doubtless if this provision were separately considered, its purpose would seem obscure; but it must be considered in connection with the Law of 1875 and the rulings thereunder, and when this is done its purpose seems reasonably plain. That law, by its 1st section, provides in general terms for rights of way for railroads over public lands. By its 4th section it deals with the identification of the desired right of way by a survey and plat, and provides for filing the plat, and securing its approval by the Secretary of the Interior. By its 5th section, as has been seen, it excepts forest and other reservations from its operation. Because of this exception the Secretary of the Interior was ruling—properly so, as we think—that his authority did not extend to receiving and approving surveys and plats of rights of way in forest reserves. And so, to obtain such a right of way it was necessary to go to Congress. The requests for special acts came to be frequent, especially as the reserves were increasing in number. In this situation Congress passed the provision last quoted. It is a general and continuing provision, and says, in substance, that rights of way for railroads*through forest reserves may be secured when, and only when, the public interests will not be injuriously affected, and it commits the solution of that question to the Secretary of the Interior. If "in his judgment" the public interests will not be jeopardized, he "may file and approve" surveys and plats of any such right of way. In short, he is invested with a large measure of discretion to be exercised for the conservation of the public interests, and only through his approval can the right of way be acquired without further action by Congress.

Here the Secretary made it manifest, through the regulations before noticed and otherwise, that, in his judgment, due regard for the public interests required that a stipulation, such as was described in the Peck memorandum, be exacted of the company as a condition to the approval of the

survey and map,—that is, to securing the right of way. Rightly understanding that this was so, Mr. Peck, the company's representative, promised on its behalf that it would comply with that condition. The promise was given for the purpose of securing permission to proceed at once with the construction of the road, and on the faith of the promise the permission was given. While this was said to be subject to the company's ratification, it must be held upon this record that there was an implied ratification. The company promptly availed itself of the permission and proceeded with the work of construction. The circumstances were such that it must have known how the permission was obtained. It was largely benefited thereby and to these benefits it ever since has held fast. True, after some months had elapsed it manifested a purpose to disaffirm Mr. Peck's promise, but that was after the implied ratification and after the construction had proceeded so far that restoration of the original situation was not possible.

It follows that the company not only is bound by the Peck memorandum, but is in a position where it must*execute the required stipulation or discontinue the construction and operation of its railroad in the reserve.

It is objected that the case is not one which is cognizable in a court of equity and that the bill is multifarious. Both branches of the objection are without merit,—so plainly so that a discussion of them would serve no purpose.

The assessment of the damages is called in question, but without any good reason. The stipulation agreed upon as conforming to the Peck memorandum was rightly regarded as decisive of several of the questions bearing upon the assessment, and no reason is perceived for disturbing the concurring decisions below upon the others.

The decree unconditionally commands the execution and filing of the prescribed stipulation without awarding an alternative injunction, and counsel for the government suggest that it should have enjoined the company from the further occupation of the reserve unless, within a prescribed time, the stipulation be executed and filed. The criticism is not without merit, and doubtless is prompted by a careful study of the bill. But, as the government has not appealed and the company is not complaining of the failure to put the matter in the alternative, the point may be passed without further notice.

Decree affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

ERIE RAILROAD COMPANY, Plf. in Err.,
v.
EVELYN J. PURUCKER, Administratrix
of Byron B. Marietta,¹ Deceased.

TRIAL $\S$ 253(9)—REQUESTED INSTRUCTION
—ASSUMED RISK—EMPLOYERS' LIABILITY.

1. A requested charge in an action against a railway company to recover for the death of a section man who was run over by an engine while on his way to report for work, that if, for his own convenience, he voluntarily went along the tracks of the railroad, and this railroad was being at the time used and operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks,—was properly refused, where such request failed to call attention to the circumstances under which the testimony tended to show he was using the tracks at the time, and the knowledge of conditions which should have been taken into consideration in order to attribute assumption of risk to him, and failed to take into account the undisputed testimony that the engine ran into him without signal or warning.

[Ed. Note.—For other cases, see Trial, Cent. Dig. $\S$ 620.]

MASTER AND SERVANT $\S$ 295(1)—TRIAL—
REQUESTED INSTRUCTION—ASSUMED RISK.

2. The trial court properly refused a requested instruction, in an action against an interstate railway carrier to recover for the death of a section man who was run over by an engine on his way to report for work, that if, in the getting off from the track on which he saw a train approaching, he could, with safety and reasonable convenience, have stepped away from the tracks, and by his own choice stepped on a parallel track and was struck by a train on that track, he assumed the risk of such choice. Such request did not cover the elements of assumed risk, and was more properly applicable to the defense of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. $\S\S$ 1168, 1169, 1179.]

[No. 211.]

Argued April 23, 1917. Decided June 4,
1917.

IN ERROR to the Court of Appeals of Richland County in the State of Ohio to review a judgment which affirmed a judgment of the Court of Common Pleas of that county in favor of plaintiff in a personal-injury action brought by a section man against an interstate railway company. Affirmed.

The facts are stated in the opinion.

¹ Death of Byron B. Marietta, the defendant in error herein, suggested, and the appearance of Evelyn J. Purucker, administratrix, as the party defendant in error herein, filed and entered October 9, 1916, on motion of Mr. N. M. Wolfe, in behalf of counsel for the defendant in error.

Messrs. C. E. McBride and N. M. Wolfe for plaintiff in error.

Mr. W. S. Kerr for defendant in error.

*Mr. Justice Day delivered the opinion of the court:

Byron B. Marietta brought this suit against the Erie Railroad Company, to recover damages for injuries alleged to have been caused to him by the negligence of the company. He died pending this proceeding in error and the case was revived in the name of his administratrix. Marietta was what is known as a section man in the employ of the company, and had been such for a period of about four weeks before the injury happened. It was his duty to work on the track of the company wherever directed by the section foreman on the section extending from Pavonia, in Richland county, Ohio, westward for a distance of several miles. The Erie Railroad Company was engaged in both interstate and intrastate commerce. The testimony shows that it was customary for the section foreman to direct Marietta where to work and to tell him on the previous day where to report for work on the following day. On the day before the injury was incurred, he was directed by the foreman to report at a point on the section about a quarter of a mile east of a certain tower, located upon the defendant's track. Early on the morning of the day of the injury, he started from his residence to report to the foreman accordingly. It appears that at and near the place of injury the company has a double track; that the north track is used for trains going west and the south track for trains going east; that the plaintiff, in going to the place designated, went upon the south track and was walking eastwardly, when a passenger train bound east came upon this track, and to get out of the way of it he stepped over upon the north or west-bound track; that while walking on that track he was struck and run over by an engine which was running backward and in the opposite direction from that in which trains ordinarily ran upon the north track. This engine had been detached from a train of cars and after pushing another train up a grade on the west-bound track was returning to its own train at the time of the injury. Marietta testified that he had no warning and did not see the approaching engine, owing to steam and smoke from the passenger train, which had just passed upon the other track. The engineer and fireman of the backing engine testified that they did not see Marietta until after he was run over by the engine, and gave no signal or warning of its approach.

The case was brought, and by the state court was tried, under the state law. No objection reviewable in this court involves the correctness of the charge of the trial court submitting the questions of negligence and contributory negligence to the jury. The company brings the case here because it contends that it alleged and showed that it was an interstate railroad, engaged in the carriage of freight and passengers between states, and that the train of cars from which the engine which struck Marietta was detached and to which it was returning was engaged in interstate commerce; that inasmuch as he was a section man or track man, employed to work upon the track of an interstate railroad, and was proceeding to his work at the time of his injury, both parties were engaged in interstate commerce and the Federal Employers' Liability Act applied to the case, and that because of the refusal of the trial court to charge as to assumption of risk, the company was deprived of the benefit of that defense.

The court of appeals treated the case as one controlled by the state law, and held that the Employers' Liability Act did not apply, as, in its view, Marietta was not engaged at the time of his injury in interstate commerce, and affirmed the ruling of the trial court in refusing the two requests to charge which are the basis of the assignments of error in this court. These requests were: (1) "If the plaintiff, for his own convenience, voluntarily went along the tracks of the railroad, and this railroad was being at the time used and operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks;" and (2) "If the plaintiff, in getting off the track on which he saw a train approaching, could with safety and reasonable convenience have stepped to the right or south of such track, and by his own choice stepped on a parallel track and was struck by a train on such parallel track, he assumed the risk of such choice." The refusal to give these requests raises the only Federal question in the case.

Conceding, without deciding, that the Federal Employers' Liability Act applied to the circumstances of this case, nevertheless the two requests were properly refused. A request to charge must be calculated to give the jury an accurate understanding of the law having reference to the phase of the case to which it is applicable. *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 115, 119, 57 L. ed. 1098, 1100, Ann. Cas. 1914C, 172, 33 Sup. Ct. Rep. 654. The first request simply asked a broad charge that if the plaintiff voluntarily, for his own convenience, went upon the tracks of the railroad, and the railroad was at the time being used and

operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks. This request omitted elements essential to make assumption of risk applicable to the case. It failed to call attention to the circumstances under which the testimony tended to show the plaintiff was using the tracks at the time, and the knowledge of conditions which should have been taken into consideration in order to attribute assumption of risk to him. It failed to take into account the undisputed testimony that the engine ran into Marietta without signal or warning to him. Under such circumstances the injured man would not assume the risk attributable to the negligent operation of the train, if the jury found it to be such, unless the consequent danger was so obvious that an ordinarily prudent person in his situation would have observed and appreciated it. *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 313, 314, 60 L. ed. 1016, 1020, 36 Sup. Ct. Rep. 564; *Chesapeake & O. R. Co. v. Proffitt*, 241 U. S. 462, 468, 60 L. ed. 1102, 1106, 36 Sup. Ct. Rep. 620, and cases cited.

The second request pertained to the conduct of the plaintiff, in view of the particular situation, and what he should have done to protect his safety, considering his danger at the time, and is open to the same objections. This request did not cover the elements of assumed risk* and was more properly applicable to the defense of contributory negligence, concerning which the court must be presumed to have given proper instructions to the jury.

Affirmed.

(244 U. S. 325)

FARMERS IRRIGATION DISTRICT, William Holden et al., Board of Directors of the Farmers Irrigation District, Plffs. in Err.,

v.

STATE OF NEBRASKA ON THE RELATION OF PETER O'SHEA.

CONSTITUTIONAL LAW §299—DUE PROCESS OF LAW—TAKING PRIVATE PROPERTY WITHOUT COMPENSATION—COMPELLING CONSTRUCTION OF BRIDGE OVER IRRIGATION CANAL.

1. The property of an irrigation district incorporated under Neb. Laws 1895, p. 269, with the power of eminent domain, was not taken without compensation, contrary to U. S. Const. 14th Amend., when the highest court of the state held that, as one of the conditions of this grant of power, it was obligated to build a bridge over its irrigation canal for the benefit of a purchaser of the lands on both sides of the canal, although the district had not been obliged to exercise the power of eminent domain to obtain the canal in question, being the successor in title in the ownership of such

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1916, §§ 8657-8665).

canal to a corporation which had caused the canal to be constructed over and across land which it then owned.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 851, 852, 858-862, 867-869.]

CONSTITUTIONAL LAW 243 — WATERS AND WATER COURSES 216 — EQUAL PROTECTION OF THE LAWS—BRIDGE OVER IRRIGATION CANAL.

2. Owners of irrigation canals are not denied the equal protection of the laws, contrary to U. S. Const. 14th Amend., merely because they are required by Neb. Rev. Stat. 1913, § 3438, to build bridges for the benefit of adjacent landowners, while no such obligation is imposed upon owners of canals constructed for other uses.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702; Waters and Water Courses, Cent. Dig. § 305.]

[No. 215.]

Submitted April 25, 1917. Decided June 4, 1917.

IN ERROR to the Supreme Court of the State of Nebraska, to review a judgment which, reversing a judgment of the District Court for Scotts Bluff County, in that state, granted a peremptory writ of mandamus to compel an irrigation district to build a bridge over its irrigation canal for the benefit of an adjacent landowner. Affirmed.

See same case below, 98 Neb. 239, L.R.A. 1915E, 687, 152 N. W. 372.

The facts are stated in the opinion.

Mr. Fred A. Wright for plaintiff in error.

Messrs. Thomas M. Morrow and William Morrow for defendant in error.

*Mr. Justice Day delivered the opinion of the court:

Peter O'Shea filed his petition in the district court of Scotts Bluff county, Nebraska, alleging, among other things, that the Farmers Irrigation District is a corporation organized and existing under and by virtue of an act to provide for the organization and government of irrigation districts, and to provide for acquiring the right of way to build irrigation ditches or canals, and other property, for the dividing of certain portions of the territory of the state of Nebraska into irrigation districts, and for the purpose of buying irrigating canals already constructed, or partially constructed, and paying for the same; that the Farmers Irrigation District is the owner of an irrigation canal in Scotts Bluff county, Nebraska, which canal intersects certain described real estate owned by the relator; that that portion of this real estate lying north of the right of way of the canal does not abut upon any public highway, nor has the relator any private way from this real estate lying north of the canal to any highway; that the only convenient way by which the real

estate on the north side of the canal can be used with that on the south side is to construct a bridge across the canal; that that portion of the land lying south of the canal abuts upon a public highway, but that portion lying north of the right of way of the canal is completely cut off from any public highway, because of the fact that the canal forms an impassable barrier unless a bridge is constructed over the same; that the portion of said real estate north of said canal is a quarter of a mile from the east side of the same to a public highway, and is also a distance of a quarter of a mile from the west side of said real estate to a public highway, and is also a distance of one-half mile from the north side of the same to a public highway, without any private way leading to any highway, and the lands between the east, west, and north side of said real estate, and the public highways, are held in private ownership; that it is necessary for the free and convenient use of the lands on both sides of the canal by the owner thereof that the owner of the canal erect a suitable and convenient bridge across the canal; that demand has been made upon the respondents to erect a bridge across the canal at a point to be indicated by the relator on these premises, and that respondents have refused to erect such bridge; that the owner of the premises has no way of ingress and egress from that portion of the premises lying north of the right of way of the canal except through the private property of others. Wherefore, relator prayed that an alternative writ of mandamus issue to the respondents, commanding them forthwith to erect a suitable and convenient wagon bridge over the canal at a point to be designated by the relator, or to show cause why a peremptory writ of mandamus should not issue.

The alternative writ of mandamus was issued as prayed for, and the respondents thereupon appeared and answered, alleging that in and prior to the year 1906 the land on both sides of the canal was owned by the Tri-State Land Company; that said Tri-State Land Company while the owner of said land caused an irrigation ditch or canal to be constructed over and across the same, which irrigation ditch is the same now owned by the Farmers Irrigation District, the Tri-State Land Company originally being the owner of both the land and the irrigation ditch; that thereafter the Tri-State Land Company sold and conveyed the canal together with the right of way to the Farmers Mutual Canal Company, and the latter company thereafter sold and conveyed the canal and the right of way to the respondent, the Farmers Irrigation District, which now holds the same; that the Tri-

State Land Company treated the parcel of land lying north of the canal and the parcel lying south of the canal as two separate tracts and parcels of lands; that the Tri-State Land Company conveyed these tracts at different times and as separate parcels to the relator, Peter O'Shea, and that O'Shea purchased the lands after the construction of the irrigation canal and at different times as two separate and distinct tracts of land, divided from each other by the right of way and canal of the Farmers Mutual Canal Company; and that therefore the rights of the relator, O'Shea, are derived from and through the Tri-State Land Company, and that he has no greater or other right in the premises than the Tri-State Land Company would have.

The respondents for a further defense alleged that § 3438 of the Revised Statutes of the state of Nebraska for the year 1913, which attempts to confer the right on land-owners under certain circumstances to compel the owners of irrigation canals to build bridges thereover, is unconstitutional, null, and void; that said section deprives the respondent, Farmers Irrigation District, of its property without due process of law and deprives it of equal protection of the laws, and is class legislation in that it purports to require the building of certain bridges only by the owners of irrigation canals, and does not apply to other canals of similar nature carrying water, such as drainage canals and mill races.

The case coming to trial, it was ordered by the court that a peremptory writ of mandamus be denied and that the action be dismissed. Appeal was taken to the supreme court of Nebraska, which court reversed the judgment and granted a peremptory writ of mandamus (98 Neb. 239, L.R.A.1915E, 687, 152 N. W. 372), and a writ of error brings the case to this court.

*This action was brought under the terms of § 3438, Revised Statutes of Nebraska, which reads:

"Any person, company, corporation, or association constructing a ditch or canal through the lands of any person, company, or corporation having no interest in said ditch or canal shall build such ditch or canal in a substantial manner so as to prevent damage to such land; in all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any inclosed field."

It appears from a stipulation between the parties to this case that during the year 1906 the Tri-State Land Company was the owner of the lands here involved, and that during that year it constructed this canal over the lands; that afterwards, in 1909, the canal and right of way were conveyed to the Farmers Mutual Canal Company, which company, on the 17th day of December, 1912, conveyed the same to the Farmers Irrigation District; that on April 25, 1910, the Tri-State Land Company conveyed to O'Shea the parcel of land lying north of the canal, and on July 14, 1911, the parcel of land lying south of the canal, and that these are the only conveyances under which O'Shea claims title; that at the times of of these conveyances the canal was fully completed, and had been in operation a number of years, the canal being built 46 feet wide on the bottom with a carrying capacity of at least 7 feet in depth, and constructed by excavating to a depth of about 3 feet in the ground, and with banks above the natural surface of the ground to a height of about 8 feet, with a slope of $\frac{1}{2}$ to 1.

The district court of Scotts Bluff county, Nebraska, held that the portion of the land occupied by the right of way of the irrigation canal was never owned by Peter O'Shea, and for that reason denied his right to a writ of mandamus. The supreme court of Nebraska held that while the canal was built over the land by the then owner of the land, nevertheless under the statute it was the duty of the present owner of the canal to build the bridge required by the act.

The supreme court of the state construed § 3438, Revised Statutes of Nebraska 1913, as applicable to the situation here presented, inasmuch as it applies to "all cases," and held that the fact that the Tri-State Land Company, when the canal was constructed, owned the land upon which it was built and on both sides of the canal, did not relieve the Farmers Irrigation District, successor in title to the Tri-State Land Company in the ownership of the canal, from the statutory obligation to build the bridge at the instance of one who subsequently purchased the adjacent lands. There is much discussion of the meaning of the statute in the opinion of the court with which we have nothing to do upon this writ of error. The construction of the state statute by the highest court of the state is conclusive in this court.

The questions here to be decided arise under the 14th Amendment to the Federal Constitution, it being contended by the plaintiffs in error that the property of the Farmers' Irrigation District was taken for

private use without compensation, and that the statute, as construed by the state court, has the effect to deprive it of the equal protection of the laws.

The Farmers Irrigation District is incorporated under a statute (Neb. Laws 1895, pp. 269, 277) which gives it the right to enter upon any land in the district and to locate the line for any canals and necessary branches thereof, and to acquire, either by purchase or condemnation, all lands and waters and other property necessary for the construction, use, maintenance, repair, and improvement of the canals and works, lands for reservoirs for the storage of water. It is also given the statutory authority to acquire by purchase any irrigation ditches, canals, or reservoirs already constructed. The supreme court of Nebraska, construing this statute as imposing the obligation to build bridges for the benefit of adjacent landowners, and reading the same in connection with the authority conferred upon the corporation to exercise the right of eminent domain, held that the company must take the burdens of the legislation with its benefits, and that having by its incorporation accepted the rights conferred under the statute of its creation, it must exercise them within the limitations and upon the conditions therein named. In other words, it was held that the state had said to the corporation of its own creation: "You may have the right to appropriate property to the public use which you are authorized to serve, but when the canals constructed for that purpose divide land so that it is necessary to connect the several portions thereof by bridges, you shall construct them at your own expense." It is familiar law that a state may impose conditions, within constitutional limitations, upon the exercise of corporate authority conferred by it. The state was not obliged to confer upon this corporation the sovereign authority to take property by the right of eminent domain. When it did so, we do not think it took the property of the corporation without compensation when it also obliged the latter to comply with the conditions of this grant of power, one of which was that it should construct bridges under the circumstances now presented.

Nor do we think it makes any difference that the corporation was not obliged to exercise the power of eminent domain to obtain this particular right of way. This right existed, was conferred by the state, and might be used to construct other portions of the canal for the purposes intended. In this construction and application of the legislation of the state we are unable to find the taking of property without compensation, as is contended by the plaintiffs in error.

As to the denial of the equal protection of the laws, this court has frequently held that there is nothing in this provision of the 14th Amendment to prevent the states from reasonable classification of subjects for legislative action. This statute applies equally to all owners of irrigation canals. The fact that it does not embrace canals constructed for other uses and purposes does not make it obnoxious to the equal protection clause of the 14th Amendment.

It follows that the judgment of the Supreme Court of Nebraska must be affirmed.

(244 U. S. 332)

ERIE RAILROAD COMPANY, Plff. in Err.,

v.
HENRY M. STONE and Clark Noble, Partners Doing Business under the Name of Stone & Noble.

CARRIERS ⇐218(5) — LIMITING LIABILITY—NOTICE OF CLAIM.

1. A stipulation in a contract for an interstate live-stock shipment conditioning any liability for damages upon presentation of the claim in writing to the terminal carrier within five days from the time when the stock was removed from the cars at destination is, as a matter of law, valid and reasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696.]

CARRIERS ⇐218(10) — LIMITING LIABILITY—AGREED VALUE—NOTICE OF CLAIM—PUBLISHED TARIFFS.

2. A shipper of live stock in interstate commerce is bound by stipulations in the bill of lading issued pursuant to the Act of June 29, 1906 (34 Stat. at L. 586, chap. 3591, Comp. Stat. 1916, § 8569), in conformity with the carrier's official tariffs, classifications, and rules duly published and filed with the Interstate Commerce Commission, limiting liability to an agreed value on which a reduced rate was based, and conditioning any liability upon the giving of written notice to the terminal carrier within five days after the stock was removed from the cars at destination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 947.]

[No. 254.]

Argued May 3, 1917. Decided June 4, 1917.

IN ERROR to the Court of Appeals of Crawford County in the state of Ohio to review a judgment which affirmed a judgment of the Common Pleas Court of that county for the recovery by the shippers of an interstate shipment of live stock of the full amount of the damage, notwithstanding a stipulation in the bill of lading limiting liability to an agreed value, and a failure to comply with a provision in such bill of lading respecting the presentation of

notice of claim. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. William E. Cushing, C. E. McBride, and N. M. Wolfe for plaintiff in error.

No appearance for defendants in error.

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*Mr. Justice Day delivered the opinion of the court:

Suit was brought in the common pleas court of Crawford county, Ohio, by Stone and Noble, present defendants in error, hereinafter designated as the plaintiffs, against the Lake Erie & Western Railroad Company and the present plaintiff in error, the Erie Railroad Company, to recover damages to certain horses shipped under bills of lading hereinafter referred to. Plaintiffs recovered a judgment in the court of original jurisdiction, and the same was affirmed by the court of appeals of Crawford county, to review which judgment a writ of error brings the case to this court.

The horses were shipped under a contract designated "Limited-Liability Live-Stock Contract," which was executed in duplicate on the part of the Lake Erie & Western Railroad company and the shippers. That contract contained the following stipulation:

* 3324

"That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the Erie Ry. agent of said carrier at his office in East Buffalo, N. Y., within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose lines the loss or injury occurs."

At a trial some four years before the one in which a verdict and judgment were rendered against the Erie Railroad Company, a verdict and judgment were rendered in favor of the Lake Erie & Western Railroad Company, and that company is out of the case.

The suit was tried as to the Erie Railroad Company at the February term, 1914, of the common pleas court of Crawford county, and the court charged the jury, among other things, that it was conceded that no written claim was filed within five days after the shipments respectively ar-

rived at their destinations, and submitted to the jury the question whether this limitation was reasonable. The jury gave a verdict in favor of the plaintiffs for a sum which included the interstate shipments here involved and the intrastate shipment for which a separate cause of action was stated in the amended petition. It is this judgment upon the lump sum which was affirmed by the court of appeals of Crawford county.

For a defense the Erie Railroad Company set up, among other things, that the horses were shipped under the terms of the written live-stock contract above referred to; that this contract contained the requirement of notice already stated and gave a choice of two published tariff rates, the lower one based upon the agreed valuation of not exceeding \$100 for each horse. The recovery in the case was for the full value of the horses, and not for the limited-liability valuation. The answer further set up that each of the interstate shipments in question came into the hands of the Erie Railroad Company for transportation from Ohio to East Buffalo, New York; that its official tariffs, classifications, and rules applicable to such interstate shipments, and in print and in force at and during the term of shipments, were duly filed with the Interstate Commerce Commission, pursuant to the acts of Congress. At the trial the Erie Railroad Company put in evidence its tariff rates, showing the alternative rate based upon the lower valuation, and the contract containing the stipulation as to notice already set forth.

The Federal question here presented is whether the court was right in leaving to the jury the question of the reasonableness of the requirement that notice should be given within five days, and permitting the jury, if it found that this limit was unreasonable, to give a verdict in excess of the limited liability contracted for.

This case requires little discussion, as the principles governing it have been settled by frequent decisions of this court. We need not stop to consider whether the requirement of the live-stock contract that a claim for damages should be presented within five days from the time the stock was removed from the cars was reasonable or not, for this question has been answered in favor of the reasonableness of such stipulation in the recent case of *Northern P. R. Co. v. Wall*, 241 U. S. 87, 60 L. ed. 905, 36 Sup. Ct. Rep. 493. See also *St. Louis, I. M. & S. R. Co. v. Starbird*, decided by this court on April 30, 1917 [243 U. S. 592, 61 L. ed. 917, 37 Sup. Ct. Rep. 462].

In the case under consideration it appears that the reduced rates under which

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these horses were shipped and the limited liability arising from shipping under such reduced rates were fixed by the tariff schedules and the form of limited-liability contract duly published and filed with the Interstate Commerce Commission, as required by law. These rates and that contract, which contained the notice requirement, thus became binding upon the parties until changed by order of the Commission. This is too well-settled to need discussion. The rules and regulations, duly published and filed, which in any wise affect the rates or the value of the service to be rendered, are controlling upon both parties to the shipping contract. Act of June 29, 1906, 34 Stat. at L. § 2, p. 586, chap. 3591, Comp. Stat. 1916, § 8569. The binding force of these contracts and regulations has been affirmed in many cases; among them: *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 652, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 112, 58 L. ed. 868, 876, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 98, 59 L. ed. 853, 855, L.R.A.1915E, 665, P.U.R.1915C, 300, 35 Sup. Ct. Rep. 494; *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 515, 58 L. ed. 703, 706, 34 Sup. Ct. Rep. 380, 8 N. C. C. A. 53; *George N. Pierce Co. v. Wells F. & Co.* 236 U. S. 278, 285, 59 L. ed. 576, 582, 35 Sup. Ct. Rep. 351; *Southern R. Co. v. Prescott*, 240 U. S. 632, 638, 60 L. ed. 836, 839, 36 Sup. Ct. Rep. 469; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. 1022, L.R.A.1917A, 265, 36 Sup. Ct. Rep. 555; *Norfolk Southern R. Co. v. Chatman* [244 U. S. 276, 61 L. ed. —, 37 Sup. Ct. Rep. 499], decided by this court on May 21, 1917.

It follows that the judgment of the Court of Appeals of Crawford County must be reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

(244 U. S. 336)

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Petitioner,

v.

UNITED STATES.

MASTER AND SERVANT — 13 — HOURS OF SERVICE — UNAVOIDABLE DELAY.

Unavoidable accidents causing delay do not excuse a carrier, under the proviso in the Hours of Service Act of March 4, 1907 (34 Stat. at L. 1416, chap. 2939, Comp. Stat. 1916, § 8679), § 3, "that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act

of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen," in keeping a train crew on duty beyond the prescribed period in order to complete the regular run after the train had arrived at an intermediate point (a division terminal, but not the terminal for the train crew) at which the company could readily have substituted a relief crew for the men who had then already been on duty for more than the prescribed period.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

[No. 267.]

Argued May 4, 1917. Decided June 4, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the Southern District of California, enforcing penalties for violations by a carrier of the Hours of Service Act. Affirmed.

See same case below, 136 C. C. A. 354, 220 Fed. 748.

The facts are stated in the opinion.

Messrs. Paul Burks, E. W. Camp, Robert Dunlap, and Gardiner Lathrop for petitioner.

Assistant Attorney General Underwood and Mr. Alex. Koplin for respondent.

*Mr. Justice Day delivered the opinion of the court:

The United States brought an action in the district court of the United States for the southern district of California, southern division, against the Atchison, Topeka, & Santa Fe Railway Company to recover the sum of \$1,500 for three alleged violations of the Hours of Service Act of March 4, 1907 (34 Stat. at L. 1415, 1416, chap. 2939, Comp. Stat. 1916, §§ 8678, 8679), the relevant parts of which are as follows:

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive*hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: . . .

"Sec. 3. . . . Provided, That the pro-

visions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen. . . ."

From the stipulated facts the following appears: That the Atchison, Topeka, & Santa Fe Railway Company is a corporation duly organized and existing under the laws of Kansas, and was at the times mentioned in the complaint a common carrier engaged in interstate commerce by rail. That at the times mentioned in the petition this railway company operated a certain interstate passenger train from Los Angeles, California, to Phoenix, Arizona, known as train No. 18, and a similar train from Phoenix to Los Angeles, known as train No. 17. That this latter train customarily, and on the dates in question, moved from Phoenix to Parker, Arizona, in charge of train and engine crews, which crews were changed at Parker, where there was attached to the train an engine in charge of a crew which ran from Parker to Barstow, California, a distance of 183.5 miles. That at Parker train No. 17 was taken in charge of and handled from that point to Los Angeles, a distance of 335.3 miles, by a passenger train crew, consisting of a conductor and two brakemen, who were the employees of the railroad company mentioned in the complaint.

That the terminals for the passenger train crews engaged in the operation of trains Nos. 17 and 18 are Los Angeles and Parker. That the employees described in the complaint resided and had their homes in Los Angeles, from which point they customarily left for Parker in charge of train No. 18, which arrived at Parker at or about 1:15 o'clock A. M., whereupon they were relieved until 10:40 o'clock P. M., on the same day. That during the interval they were permitted to enjoy the accommodations for rest at Parker, which was their "away-from-home terminal." That at 10:40 o'clock P. M. they reported for the return trip to Los Angeles on train No. 17, and customarily reached Los Angeles at or about 10:15 o'clock A. M. on the next day, from which time until 10:30 o'clock P. M. on the following day they were not on duty, and during that time they were permitted to repair to and remain at their respective homes in Los Angeles, which was their "home terminal."

That on October 2d and 3d, 1912, passenger train No. 17 was operated between Parker and Los Angeles by the employees named in the complaint, and that they were com-

pelled to be and remain on duty in connection with the movement of that train from 10:40 o'clock P. M. on October 2d, until 8:25 o'clock P. M. on October 3d, under the circumstances hereinafter set forth.

That the employees named reported for duty at Parker, at 10:40 o'clock P. M. on October 2d, and at 11:10 o'clock P. M. departed from Parker in charge of train No. 17, which arrived at Barstow, California, at 7:10 o'clock A. M. on October 3d, having been delayed for a period of two hours and thirty minutes on account of washouts, the cause of this delay not being known to the defendant, or to any of its officers or agents in charge of the employees at the time they left Parker, and incapable of being foreseen. That train No. 17 was scheduled to leave Barstow, at 4:45 o'clock A. M. on October 3d, but by reason of the delay in reaching Barstow it actually left that point at 7:45 o'clock A. M., with ample time then remaining to reach Los Angeles within less than sixteen hours after*the conductor and brakemen entered upon their service, but at 8:30 o'clock, and while the train was being operated between Barstow and San Bernardino, California, an axle broke under the tank of the engine, whereby the movement of the train was necessarily and unavoidably delayed for a period of six hours and ten minutes, with the result that instead of reaching San Bernardino at 7:35 o'clock A. M., according to its usual schedule, or at 10:35 o'clock A. M., as it would have done but for the delays in reaching and leaving Barstow, it actually arrived at San Bernardino at 5:30 o'clock P. M., and that instead of reaching Los Angeles at 10:15 o'clock A. M., in accordance with its usual schedule, or at 1:16 o'clock P. M., as it would have done but for the delays in reaching and leaving Barstow had there been no further delays, it actually reached Los Angeles at 8:25 o'clock P. M. on October 3d, the employees having been on duty for twenty-one hours and forty-five minutes. That the breaking of the axle whereby the train was delayed for six hours and ten minutes was a casualty and an unavoidable accident, and the delay to the train caused thereby was the result of causes not known to defendant, or to any of its officers or agents in charge at the time the employees left Parker, and which could not have been foreseen.

That train No. 17, after having been delayed in reaching and leaving Barstow, and after having been delayed six hours and ten minutes by the broken axle, proceeded to Los Angeles in charge of the employees who were in charge when it left Parker, and that in going to Los Angeles the train and employees passed through the station of San

341 Bernardino, California, which is a point known and designated as a division terminal, and which was a place appointed and customarily used as a terminal from and to which crews of certain other passenger and freight trains of the defendant brought their trains, but which was not a terminal for train crews in charge of trains Nos. 17 and 18, or of any other trains operating between Parker and Los Angeles. That at and previous to the time the employees in charge of train No. 17 had been continuously on duty for a period of sixteen hours, defendant had in its employ at Los Angeles and also at San Bernardino passenger train crews which were customarily assigned to other passenger trains, and crews which were subject to call which were customarily used in operating freight trains, who were qualified, should necessity require, to operate passenger trains between San Bernardino and Los Angeles. That the employees in charge of train No. 17 could have been relieved at San Bernardino and the train placed in charge of one of such other freight or passenger train crews at a time which would have permitted the employees in charge of train No. 17 to "deadhead" from San Bernardino to Los Angeles on that train without performing any service.

That before the delay of six hours and ten minutes which resulted from the broken axle had expired, and before the damage which had caused such delay had been repaired, and before the train left the point where the damage occurred, it was known to the defendant and its officers and agents that such employees would have been on duty in excess of sixteen hours by the time they reached San Bernardino, but that no effort was made to relieve them before they had been on duty continuously in excess of sixteen hours, either previous to or at the time of their arrival at San Bernardino, or at any time before they reached Los Angeles.

342 That it is commonly understood by railroad men with a knowledge of the practical operation of trains that the word "terminal" has reference to certain train or trains or certain crew or crews, and means the beginning or the end of the employee's run, or the point at which, in the regular course of business, he would go on duty as a member of a particular crew, or at which, in the regular course of business, he would cease to be a member of such crew of a particular train and be relieved from duty.

*343 Judgment was rendered in the sum of \$100 upon each cause of action against the railroad company. Upon proceedings in error, this judgment was affirmed by the United States circuit court of appeals for the ninth circuit (136 C. C. A. 354, 220 Fed. 748), and a writ of certiorari brings the case here.

It is the contention of the railroad company that the detention in service beyond the period prescribed by the statute being due to an unavoidable accident, the limitation of the statute for that trip was at an end and the company was not liable for the penalty imposed because of the extra service required upon that trip. On the other hand, the government insists that, in view of the prime purpose of the statute to limit the hours of service so as to keep within the time prescribed, and not to subject the men to service beyond these hours, it was the company's duty to relieve the crew at San Bernardino by supplying their places with others instead of keeping them on duty to Los Angeles, thereby requiring service in excess of that permitted by the statute.

Considering these opposing contentions, it must be remembered that the purpose of the act was to prevent the dangers which must necessarily arise to the employee and to the public from continuing men in a dangerous and hazardous business for periods so long as to render them unfit to give that service which is essential to the protection of themselves and those intrusted to their care. It is common knowledge that the enactment of this legislation was induced by reason of the many casualties in railroad transportation which resulted from requiring the discharge of arduous duties by tired and exhausted men whose power of service and energy had been so weakened by overwork as to render them inattentive to duty, or incapable of discharging the responsible labors of their positions.

* To promote the end in view, so essential* to public and private welfare, Congress, in this Hours of Service Act, provided the limitations named upon the hours of service. The act is remedial and in the public interest, and should be construed in the light of its humane purpose. Congress also realized that it might be impracticable in all cases to keep the employment within the hours fixed in the act, and added a proviso to relieve from the general application of the requirements of the law so that it might not apply when the employment beyond the periods named was caused by casualty or unavoidable accident or the act of God, or where the delay was the result of a cause not known to the carrier or its officer or agent at the time the employee left a terminal, and which could not have been foreseen.

It was not the intention of the proviso, as we read it, to relieve the carrier from the exercise of diligence to comply with the general provisions of the act, but only to relieve it from accidents arising from unknown causes which necessarily entailed overtime employment and service. *United States v. Dickson*, 15 Pet. 141, 10 L. ed.

689. It is still the duty of the carrier to do all reasonably within its power to limit the hours of service in accordance with the requirements of the law.

Applying this view to the present case, it was the duty of the company, after the breakdown between Barstow and San Bernardino, to use all reasonable diligence to avoid the consequences of the unavoidable accidents which had delayed the movement of the train and to relieve the crew by the means practically at hand. This the company might have done by putting on a relief crew at San Bernardino instead of permitting an already exhausted crew, when their condition is judged by the service performed, to hazard their own lives and safety as well as the safety of others by continuing the journey to Los Angeles.

* The requirement of continued service after the train reached San Bernardino was not occasioned by the unforeseen accidents, but was the direct consequence of the failure of the company to relieve the employees by the substitution of a fresh crew, as the record shows could readily have been done.

It is contended by the company that this construction of the statute is opposed to that given by the Interstate Commerce Commission, the body intrusted by Congress with the enforcement of the act, and is against the understanding of the law which the Commission had given the company to believe would be enforced.

It appears that two constructions of the act have been given by the Interstate Commerce Commission; one on March 16, 1908, as follows:

"The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point."

This construction would plainly require the railroad company to have substituted a new crew at San Bernardino and not to require the further service to Los Angeles. The other construction, and the one which the company contends should be controlling, was given later, on May 24, 1908, and is as follows:

"Section 3 of the law provides that 'the provisions of this act shall not apply in any case of casualty or unavoidable accident or act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.'"

"Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso removes the application of the law to that trip. (See Rule 287.)"

These possibly diverse rulings of the Commission were rescinded on April 9, 1917, by the following order of the Commission:

"Conference Rulings 88 (b) and 287 (i), relating to the Hours of Service Law, rescinded, for the reason that they were issued as informal expressions of the Commission's views to act as guides until the questions could be judicially interpreted, and they having been judicially interpreted and are now before the court on appeal, there is no further occasion for these former views of the Commission."

If the construction contended for by the company be adopted, it would follow that the employees might be kept in service for indefinite periods, until the termination or end of the run should be reached, which it is not difficult to suppose might require many hours of service beyond the limitations prescribed in the body of the act. This construction would defeat the purpose of the act by permitting the employees to endanger themselves and the public by the continued service of tired and exhausted men. We reach the conclusion that in keeping the crew in service beyond San Bernardino the company was guilty of a violation of the statute.

We find no error in the judgment of the Circuit Court of Appeals, and the same is affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

(244 U. S. 317)

PAUL HILL SAUNDERS, Plff. in Err.,
v.

DANIEL SHAW and the Board of Drainage Commissioners of the Bayou Terre-Aux-Bœufs Drainage District.

CONSTITUTIONAL LAW §290(3)—DUE PROCESS OF LAW—OPPORTUNITY TO PRESENT DEFENSE.

1. A suit to enjoin the collection of a drainage tax, in which the trial court had ruled that it was not open to plaintiff to show that his land was not benefited by the drainage improvement, was decided against an intervening holder of bonds payable out of such tax, without giving him the proper opportunity to present his evidence, and hence without the due process of law guaranteed by U. S. Const. 14th Amend., where the highest state court, upon the ground that plaintiff's land was low and marshy and had not been benefited or drained, and could not be drained under the drainage system, reversed the judgment below dismissing the suit and granted an injunction against the

assessment, since such intervener was not bound to go on and offer evidence upon the trial as to the physical condition of the land which he contended was inadmissible, in order to rebut testimony already ruled to be inadmissible in accordance with his view.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871, 872.]

COURTS —396(6)—ERROR TO STATE COURT —FEDERAL QUESTION—WHEN RAISED IN TIME.

2. The claim that a suit to enjoin the collection of a drainage tax, in which the trial court had ruled that it was not open to plaintiff to show that his land was not benefited by the drainage improvement, was decided against an intervening holder of bonds payable out of such tax without giving him the proper opportunity to present his defense, and hence without the due process of law guaranteed by U. S. Const. 14th Amend., when the highest state court, upon the ground that plaintiff's land was not and could not be drained under the drainage system, reversed the judgment below, dismissing the suit, and granted an injunction against the assessment, was raised in time to serve as the basis of a writ of error from the Federal Supreme Court, although it was first made in the assignment of errors filed with the chief justice of the state court shortly after that court had refused to consider an application for rehearing, since a party is not bound to contemplate a decision of the case before his evidence is heard, and therefore was not bound to ask a ruling or take other precautions in advance.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1080.]

[No. 472.]

Argued May 9, 1917. Decided June 4, 1917.

IN ERROR to the Supreme Court of the State of Louisiana to review a decree which, reversing a decree of the District Court of the Parish of St. Bernard, in that state, granted an injunction against the collection of a drainage tax. Reversed.

See same case below, 138 La. 918, 70 So. 910.

The facts are stated in the opinion.

Mr. William Winans Wall for plaintiff in error.

Messrs. Frank L. Richardson and Frank Soule for defendants in error.

* Mr. Justice Holmes delivered the opinion of the court:

This is a suit for an injunction against the collection of a drainage tax. The drainage district had issued bonds payable out of the tax, and the plaintiff in error, who held some of these bonds, was allowed to intervene in defense. At the trial the plaintiff offered evidence to show that the land taxed was outside of the levee system that

the drainage commissioners were building, that it would receive no benefit, and really was an island or islands in the Gulf of Mexico. The defendant objected and the evidence was excluded as inadmissible under the pleadings, but it was spread upon the record and completed in order to carry the case to the supreme court. The defendant then put in testimony that the land was not in the Gulf of Mexico, and that the maps produced could not be relied upon for the depth of the water when water was indicated, but cross-examination to show the physical condition of the property was objected to—the defendants' position being that the question was not open, and that being the ruling of the court. Judgment was entered for the defendant* and intervener and was affirmed on appeal by the supreme court. A rehearing was granted, however, and the court, observing that the answer and testimony showed that the land was low and marshy, had not been benefited or drained and could not be drained under the present system, held that the case was governed by *Myles Salt Co. v. Iberia & St. M. Drainage Dist.* 239 U. S. 478, 60 L. ed. 392, L.R.A.—, —, 36 Sup. Ct. Rep. 204, decided after the first decision in the present case; reversed the judgment and granted an injunction against the assessment upon this land.

The intervening defendant thereupon applied for a rehearing, but the court declined to consider the application under its rule that only one rehearing should be granted. He now brings this writ of error and says that he has been deprived of due process of law, contrary to the 14th Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The chief justice and Mr. Justice O'Neill were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principle of the *Myles Salt Co.* Case that to remand it would be an empty form,—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's

rights are protected without giving him a chance to put his evidence in.

*The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. *Home Teleph. & Teleg. Co. v. Los Angeles*, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312. It appears that shortly after the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done.

Judgment reversed.

(244 U. S. 310)

SEABOARD AIR LINE RAILWAY COMPANY, Plff. in Err.,

v.

ELIZABETH BLACKWELL.

COMMERCE §58 — STATE REGULATION—
SLOWING DOWN FOR GRADE CROSSING—
BLOW-POST LAW.

The requirement of Ga. Civ. Code, § 2675, that the engineer of a railway train shall begin to check the speed of his train when 400 yards from each public road crossing at grade, and shall keep checking the speed so as to stop in time should any person or thing be crossing the track on the road, is invalid under U. S. Const. art. 1, § 8, as a direct burden on interstate commerce, when applied to an interstate passenger train which, under the facts as admitted by demurrer, crosses 124 highways at grade between Atlanta and the South Carolina line,—a distance of 123 miles,—none of which crossings present conditions making them peculiarly dangerous, but at each of which such train would be compelled by the law to slow down practically to a full stop, thereby consuming not less than three minutes at each crossing which would more than double

the running time of the train between the aforesaid points.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 77-86, 100.]

[No. 213.]

Submitted April 25, 1917. Decided June 4, 1917.

IN ERROR to the Court of Appeals of the State of Georgia to review a judgment entered pursuant to the opinion of the Supreme Court of the state, affirming a judgment of the City Court of Elberton in favor of plaintiff in an action against a railway company for a wrongful death involving the validity, as applied to interstate trains, of the Georgia blow-post law. Reversed and remanded for further proceedings.

See same case below, in supreme court, 143 Ga. 237, 84 S. E. 472, Ann. Cas. 1917A, 967; in court of appeals, 16 Ga. App. 504, 85 S. E. 686.

The facts are stated in the opinion.

Messrs. Lamar C. Rucker, Andrew J. Cobb, Howell C. Erwin, and W. L. Erwin for plaintiff in error.

No appearance for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

This writ of error is directed to a judgment entered upon a verdict for the sum of \$1,000 in the city court of Elberton, Georgia, for the death of a son of defendant in error, alleged to have been caused by the railway company. *The judgment was affirmed by the court of appeals of Georgia.

The facts as charged are: That the deceased was driving a horse and buggy along a public road in the county of Elbert, and while crossing the railroad track of the railway company at a public crossing outside of the city of Elberton, he was struck by the engine of one of the company's passenger trains and received injuries from which he died three days later.

That the employees of the company in charge of the train failed to blow the engine whistle at the blow post 400 yards south of the crossing, failed to keep blowing it until the train arrived at the crossing, and failed to check the speed of the train at such blow post and keep it checked until the train reached the crossing, and, so failing, the company was guilty of negligence.

That the employees of the company failed to keep the train under control, and approached the crossing at a high and dangerous rate of speed, so that they could not stop the same in time to save the life of the deceased, and that such conduct was negligence. And that "such conduct was

negligence if they saw said deceased on the crossing, and it was negligence if they did not see him, and it was negligence under the blow-post law,¹ and it was negligence regardless of the blow-post law."

"The company by its answer denied the various acts of negligence charged against it and its employees and denied "that the failure to comply with said blow-post law was negligence on its part relatively to the transaction in question."

The company set out the applicable sections of the law and alleged that its train was running in interstate commerce between the states, and especially between Georgia and South Carolina. That between the city of Atlanta, Georgia, and the Savannah river, a distance of 123 miles, where the same is the boundary line of Georgia, there are 124 points where the line of the railroad crosses public roads of the different counties of the state, established pursuant to law, and that all of such crossings are at grade.

That in order to comply with the law the speed of a train would have to be so slackened that there would be practically a full stop at each of the road crossings; that the time required for such purpose would depend upon various conditions, which might or might not exist at the time and at the crossings; among others, the state of the weather and the percentage of grade; but it would not be less than three minutes for a train composed of an engine and three cars, and for a train of a greater number of cars the time would be greater,—for an average freight train, not less than five minutes.

That the train alleged to have caused the death of the deceased was composed of an engine, a mail car, and two coaches, and that if the blow-post law had been complied with on the day in question at least three minutes would have been consumed at each crossing,—more than six hours between Atlanta and the Savannah river. That the running time between those points

according to the adopted schedule was four hours and thirty minutes. That if the law had been complied with the time consumed between those points would have been more than ten and one-half hours.

That for freight trains the time consumed would be more than sixteen hours, the maximum speed of such trains on the company's road being 20 miles an hour.

That the crossings are the usual and ordinary grade crossings and there are no conditions which make any one of them peculiarly dangerous other than such danger as may result from the crossing of a public road by a railroad track at grade.

That between the city of Atlanta and the Savannah river the line of the company's railroad crosses the tracks of two other railroads, and that under the laws of the state a train is required to come to a full stop 50 feet from the crossing, and that the time so consumed would increase the time required to operate between the points referred to.

That the law as applied to the train in question is an unreasonable regulation of interstate commerce and a violation of ¶ 3, § 8, article I., of the Constitution of the United States, and that therefore the company is not guilty of the various acts of negligence charged against it.

Upon demurrer to the answer of the company the averments in regard to the law were struck out except the denial that the failure to comply with the law was negligence on the company's part "relatively to the transaction in question."

The case so went to the jury, including the defense that the deceased failed to exercise ordinary care and diligence for his own safety. The jury returned a verdict for the sum of \$1,000.

A motion for a new trial was denied. The railway company then took the case to the court of appeals of the state, and that court invoked the instruction of the supreme court upon the question whether that part of the law (Civil Code of the

¹ "Sec. 2675. A post to be erected.—There must be fixed on the line of said roads, and at the distance of 400 yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road.

"Sec. 2676. Neglecting to erect such posts.—Should any company fail or neglect to put up said posts, the superintendent thereof shall be guilty of a misdemeanor.

"Sec. 2677. Failing to blow whistle.—If 37 S. C.—41.

any engineer neglects to blow said whistle as required, and to check the speed required, he is guilty of a misdemeanor: Provided, that within the corporate limits of the cities, towns, and villages of this state, the several railroad companies shall not be required to blow the whistle of their locomotives on approaching crossings or public roads in said corporate limits, but in lieu thereof the engineer of said locomotives shall be required to signal the approach of their trains to such crossings and public roads in said corporate limits, by tolling the bell of said locomotive; and on failure to do so, the penalties of this section shall apply to such offense." [Ga. Code 1914.]

state, § 2675) which requires the engineer to check the speed of the train on approaching a public crossing, so as to stop in time should any person or thing be crossing the railroad track on its road, is unconstitutional so far as an interstate train is concerned, under the conditions set forth in the answer of the company, for the reason that, as thus applied, the statute is a regulation of interstate commerce and repugnant to the commerce clause of the Constitution of the United States.

The supreme court answered the question in the negative. The opinion of the court is very elaborate, but the basis of it is that the law is a valid exercise of the police power of the state, that there was no displacement of its exercise by congressional action, and that by its exercise in the law in question it did not directly burden interstate commerce.

The court of appeals accepted necessarily the views of the supreme court and sustained the ruling of the trial court upon the demurrer to the plea of the company that the law violated the commerce clause of the Constitution.

To the contention of the company that the deceased had not observed ordinary care for his own safety, and could have avoided the injury which resulted in his death, the court answered that it was a jury question, and said: "In view of the evidence as to the defendant's failure to comply with the provisions of the 'blow-post law' there is sufficient testimony as a whole to support the jury's findings in favor of the plaintiff." The court hence affirmed the judgment.

It will be observed, therefore, from this statement, that the law of the state was an element in the decisions of the state tribunals and its constitutionality was sustained against the attacks of the railway company. The question is therefore presented for our consideration. In its consideration we need not descant upon the extent of the police power of the state and the limitations upon it when it encounters the powers conferred upon the national government. There is pertinent exposition of these in *Southern R. Co. v. King*, 217 U. S. 524, 54 L. ed. 863, 30 Sup. Ct. Rep. 594, in which the law now under review was passed upon. The case is clearer as to the relation of the powers and that the power of the state cannot be exercised to directly burden interstate commerce. It was recognized that there might be crossings the approach to which the state could regulate. But, on the other hand, it was said there might be others so numerous and so near together that to require the slackening of speed would be practically destruc-

tive of the successful operation of interstate passenger trains; and therefore "statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation but also a direct burden upon interstate commerce, and therefore beyond the power of the state to enact."

That case went off on a question of pleading. An answer was filed that did not invoke the Federal Constitution. This was attempted to be done by an amended answer which was very general and to which a demurrer was sustained. At the trial of the action there was an offer of evidence of the specific effect of the law upon the operation of trains as showing the impediment of the law to interstate commerce. The evidence was excluded. This court sustained the ruling on the ground that the evidence was not admissible under the pleadings. The ruling upon the demurrer to the answer was sustained on the ground that the answer contained only general averments constituting "mere conclusions." It was said that the averments "set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. For aught that appears as allegations of fact in this answer the crossing at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained."

The facts so specified, and which it was decided would give illegal operation to the statute, are alleged in the present case, and, assuming them to be true,—and we must so assume,—compel the conclusion that the statute is a direct burden upon interstate commerce, and, being such, is unlawful. The demurrer to the answer averring them was therefore improperly sustained.

We express no opinion on the third defense of the company.

Reversed and case remanded for further proceedings not inconsistent with this opinion.

The CHIEF JUSTICE, Mr. Justice Pitney, and Mr. Justice Brandeis dissent on the ground that the regulation in question was within the class which the state is entitled to enact in the absence of congressional action, and until such action. There having been no action by Congress, there is therefore no ground for holding the state action void as a regulation of interstate commerce.

(244 U. S. 300)

CUYAHOGA RIVER POWER COMPANY,
Plff. in Err.,

v.

NORTHERN REALTY COMPANY and the
Northern Ohio Traction & Light Com-
pany.

COURTS ⇨392—ERROR TO STATE COURT—
HIGHEST STATE COURT.

1. The court of appeals of the state of Ohio is the highest court of the state in which a decision could be had, within the meaning of the Judicial Code, § 237,* governing writs of error to state courts, where the Ohio supreme court denied an application to direct the court of appeals to certify the record for review, and dismissed for want of jurisdiction a writ of error prosecuted to the court of appeals from the supreme court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1046, 1047.]

COURTS ⇨391(4)—ERROR TO STATE COURT
—DECISION ON NON-FEDERAL GROUND.

2. The Ohio court of appeals must be regarded as having rested its judgment dismissing condemnation proceedings on its decision of the preliminary questions raised, i. e., the existence of the petitioning corporation, its right to make the appropriation, its inability to agree as to the compensation to be paid for the property, and the necessity for appropriation,—grounds broad enough to sustain the judgment irrespective of the merits of the Federal question involved in the defense concerning the public character of the use to which the owner of the property sought to be condemned had applied it, and the consequent want of authority to take it for the benefit of the petitioning corporation,—where the supreme court of the state, in dismissing, for want of jurisdiction, a writ of error to the court of appeals, declared that there was no question under the state or Federal Constitution involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1092.]

COURTS ⇨398(1)—ERROR TO STATE COURT
—DECISION ON NON-FEDERAL GROUND.

3. The Federal Supreme Court will not take jurisdiction of a writ of error to a state court where the absence of an opinion by the court below makes it impossible to say whether its judgment rested upon state questions adequate to sustain it independent

of the Federal question, both being in the case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1085-1087.]

[No. 342.]

Argued May 8 and 9, 1917. Decided June 4, 1917.

IN ERROR to the Court of Appeals, Eighth District, of the State of Ohio, to review a judgment which affirmed a judgment of the Common Pleas Court of Summit County, in that state, dismissing the petition in condemnation proceedings. Dismissed for want of jurisdiction.¹

The facts are stated in the opinion.

Messrs. Carroll G. Walter, John L. Wells, and William Z. Davis for plaintiff in error.

Messrs. Joseph S. Clark, John C. Weadock, and T. H. Hogsett for defendants in error.

*Mr. Chief Justice White delivered the³⁰¹ opinion of the court:

The Cuyahoga River Power Company, plaintiff in error, was chartered under the laws of Ohio to build and maintain a system of dams, canals, and locks in the Big Cuyahoga river for the generation of electricity for light, heat, and other purposes. The corporation was granted authority to acquire by condemnation or purchase property necessary for the conduct of its business. In July, 1911, the Power Company commenced this action against the Northern Realty Company, one of the defendants in error, to condemn a large tract of land owned by it adjacent to the river. After the suit was brought this land was sold by the defendant company and was ultimately acquired by the Northern Ohio Traction & Light Company, chartered by the state to operate an interurban electric railway, and upon the land thus bought by it after the commencement of the suit that company, for its charter purposes, built and was operating two large power plants.

Upon its own motion the Traction Company was made a party to the pending suit for expropriation. In conformity with the Ohio statutes regulating the procedure in eminent domain, four preliminary questions were required to be passed upon by the court without a jury, and, if decided in favor of the plaintiff, a jury was then required to determine the question of compensation. The four preliminary questions were these: (a) the existence of the

¹ Leave granted on June 11, 1917, to present petition for rehearing within sixty days, on motion of Mr. Wade H. Ellis, in behalf of counsel for the plaintiff in error.

petitioning corporation, (b) its right to make the appropriation, (c) its inability to agree as to the compensation to be paid for the property, and (d) the necessity for the appropriation. The defendants not only relied upon these four preliminary propositions, but also resisted the taking on the ground that a condemnation of the land under the petition of the Power Company would be inconsistent with and destructive of the public use to which the land had been applied by the Traction Company. The court did not come to a jury trial on the question of compensation because, after hearing evidence on the preliminary issues, on motion of the defendants it entered an order dismissing the petition, no reason for such decision having been expressed.

The case was taken to the court of appeals, it being assigned as error that the trial court had erred in its rulings on the four preliminary questions, and it was further alleged that the refusal of the court to order the condemnation of the land upon the theory that it was not subject to be condemned because, after the suit had been brought, it had been acquired by the Traction Company and by it dedicated to a public use, constituted an impairment of the contract rights of the plaintiff and a taking of its property without due process of law, in violation of the Constitution of the United States. Following a judgment of affirmance without a written opinion, the Power Company applied to the supreme court of the state to direct the court of appeals to certify the record for review, which was denied, and a writ of error which was prosecuted to the court of appeals from the supreme court was dismissed for want of jurisdiction for the stated ground that the case did not "involve any question arising under the Constitution of the United States or the state of Ohio." Because of the asserted denial of the alleged Federal rights referred to the case is here, the writ of error being directed to the court of appeals.

Our jurisdiction to review is challenged by a motion to dismiss, based upon two grounds which we consider separately.

1. It is contended that as, under § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1916, § 1214], we have jurisdiction to review only final judgments of the highest court of the state in which a decision could be had, the writ of error should have been prosecuted to the supreme court of Ohio. In view, however, of the denial by that court of the application to direct the court of appeals to certify the record for review, and its order dismissing the writ of error for want of jurisdiction, the contention is without merit.

Stratton v. Stratton, 239 U. S. 55, 60 L. ed. 142, 36 Sup. Ct. Rep. 26; Valley S. S. Co. v. Wattawa, 241 U. S. 642, 60 L. ed. 1217, 36 Sup. Ct. Rep. 447; Second Nat. Bank v. First Nat. Bank, 242 U. S. 600, 61 L. ed. 518, 37 Sup. Ct. Rep. 236.

2. It is contended that, conceding the existence of Federal questions in the case, nevertheless as there were independent state grounds broad enough to sustain the judgment, there is no jurisdiction. We think the contention is sound. Despite some suggestion to the contrary it is certain that the four preliminary propositions concerned purely local law, and if decided adversely to the plaintiff, were broad enough to sustain the judgment irrespective of the merits of the Federal question which, it is insisted, was involved in the particular defense made by the Traction Company concerning the public character of the use to which it had applied the property and the consequent want of authority to take it for the benefit of the Power Company, which was submitted to the court along with the preliminary questions. Leaving aside any inference sustaining the view that the supreme court treated the preliminary questions as having been adversely decided and the constitutional questions as having been eliminated when it refused to order up the record for review, that conclusion is sustained by its express declaration, made in refusing the writ of error, that there was no question under the state or Federal Constitution involved,—a conclusion which, if it had not been in so many words declared, would by necessary implication have resulted from the dismissal of the writ of error for want of jurisdiction, since, under the Constitution and laws of Ohio, if a question under the Constitution of the United States or the state Constitution had existed, the duty to take jurisdiction would have been obvious.

*But assuming that we are not controlled by the statement of the supreme court of Ohio on this subject, and must determine it upon our own conception as to what was done by the court whose judgment is under review, the result would be the same. We so conclude because, looked at from the point of view of the action of the trial court and of the court of appeals, the case presents the single question of what principle is to be applied where, from an absence of an opinion expressed by the court below, it is impossible to say whether its judgment was rested upon state questions adequate to sustain it independent of the Federal questions, or upon such Federal questions, both being in the case. But the rule which controls such a situation has long prevailed and was clearly expressed in Allen

v. Arguimbau, 198 U. S. 149, 154, 155, 49 L. ed. 990, 993, 25 Sup. Ct. Rep. 622, where a writ of error to the supreme court of Florida was dismissed, as follows: "The supreme court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad; but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction. *Dibble v. Bellingham Bay Land Co.* 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635; *Johnson v. Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111;" *Bachtel v. Wilson*, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243; *Adams v. Russell*, 229 U. S. 353, 57 L. ed. 1224, 33 Sup. Ct. Rep. 846.

Dismissed for want of jurisdiction.

Mr. Justice Day and Mr. Justice Clarke took no part in the consideration and decision of this case.

(244 U. S. 305)

EMMA F. DOEPEL et al., Heirs at Law of Hollen H. Fearnow, Deceased, Pliffs. in Err.,

v.

LUTTIE B. JONES, Elmer Jones, and the Phoenix Mutual Life Insurance Company.

PUBLIC LANDS $\S$ 35(5) — HOMESTEAD — FRAUDULENT SETTLEMENT — COMPLETION OF ENTRY BY HEIRS OF ENTRYMAN.

1. A homestead entryman who, contrary to the Act of May 2, 1890 (26 Stat. at L. 81, chap. 182, Comp. Stat. 1916, $\S$ 5025), $\S$ 24, prohibiting fraudulent settlement on public lands in Oklahoma, agreed with his mother, for a promised consideration, that he would make the entry, comply with the homestead laws, and pay rent for the use of the land in the meanwhile, and that when the patent was issued it would be for her, and not for his account, and he would deed the land to her, derived no right from his entry, and transmitted none to his heirs, and vested them with no right after his death to complete the entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. $\S$ 76.]

PUBLIC LANDS $\S$ 128 — HOMESTEAD — FRAUDULENT SETTLEMENT — CANCELLATION OF ENTRY — EQUITABLE RIGHT OF HEIRS OF ENTRYMAN.

2. No equitable right to hold the patent as trustee could possibly arise in favor of the heirs of the homestead entryman, where his entry had been canceled and patent issued to another, because of the former's agreement, contrary to the Act of May 2, 1890 (26 Stat. at L. 81, chap. 182, Comp.

Stat. 1916, $\S$ 5025), $\S$ 24, prohibiting fraudulent settlement of public lands in Oklahoma, that he would make the homestead entry for the benefit of another.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. $\S$ 344.]

[No. 571.]

Argued May 8, 1917. Decided June 4, 1917.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which reversed a judgment of the District Court of Kay County, in that state, in favor of plaintiffs in a suit to establish a resulting trust. Affirmed.

See same case below, — Okla. —, 156 Pac. 309.

Statement by Mr. Chief Justice White:

It is sought upon this writ of error to reverse a judgment which sustained the validity of a patent issued by the United States to the defendant in error, Luttie B. Jones, under the homestead laws. The controversy originated in a suit brought by the plaintiffs in error, charging that the Land Department had, without warrant of law, overruled contests which they had filed against the right of the defendant in error to take the land under the homestead law, and that therefore she held the patent for the same in trust for their benefit.

The facts stipulated or shown by documentary evidence, as to which there is no dispute, are these: Hollen*H. Fearnow, being qualified to make a homestead entry, applied in 1899 to make such entry in his own name. Before making the application he had agreed with his mother, for a promised consideration, that he would make the entry, comply with the homestead laws, and pay rent for the use of the land in the meanwhile, and that when the patent was issued it would be for her, and not for his account, and he would deed the land to her. About two years after the entry was made a marriage ceremony was performed between the applicant and Luttie B. Fearnow and they lived together as husband and wife and resided on the land. Some years later after the marriage ceremony and before final proof or patent, Lena Barnes instituted in the local land office a contest against the right of Fearnow to make the homestead entry. This contest was based upon the fact that the agreement which we have stated had been made, and upon the charge that, under the law of the United States, it absolutely disqualified him from making the entry. In December, 1903, after a hearing in the local land office the contest was sustained, the application by Fearnow was canceled, and an entry by Barnes

under the homestead law was allowed. This order was taken for review to the Commissioner of the General Land Office, and in January, 1905, on the ground of an irregularity or deficiency of notice in the contest proceeding the order was reversed and the local land office was directed "to appoint a day for the hearing of this contest, of which both parties shall have at least thirty days' notice. Upon the final determination of the case, should plaintiff be held to have established the truth of the averments of her affidavit of contest, said H. E. No. 13,690 [the Barnes entry] which is hereby suspended, will remain intact; otherwise it will be canceled and said H. E. 10,171 [the Fearnow entry] reinstated."

Ten months after this order the entryman, Fearnow, died, it not appearing that in the intervening time any further steps were taken concerning the reinstatement of his homestead entry, and after the elapsing of more than a year from his death the entrywoman, Barnes, dismissed her contest and relinquished her homestead entry. On the same day, November 26, 1906, Luttie B. Fearnow, as the widow of Fearnow, filed a relinquishment of his homestead entry, and on that day also made her own application to enter in her own individual right the land as a homestead, and this application was allowed. The following month the plaintiffs in error, asserting themselves to be the heirs of Hollen H. Fearnow, and as such entitled, under the law, to the benefits of his homestead entry and to complete the same, contested the application of Luttie B. Fearnow on the ground that she was not his widow and not entitled to the land as such, because she bore such a relation of consanguinity to her alleged deceased husband as to cause the pretended marriage relation between them to be incestuous under the laws of Oklahoma, where the land was situated, as well as under the laws of Kansas, where the marriage between them purported to have been celebrated. The local land office rejected the contest, following previous decisions of the Land Department holding that the question of the existence of a marriage was one for judicial cognizance, and until its nullity was declared or found by a competent court the marriage was binding on the Land Department. The Commissioner of the General Land Office, in reviewing, recited the previous facts as to the Barnes contest, the action taken upon it, the cancelation of the Fearnow homestead entry, the setting aside of the contest proceeding and the order made in it, and affirmed the action on the authorities which the local land office had relied upon. In reviewing and sustaining this action on appeal the Secretary of

the Interior decided that the subject-matter of the marriage and its nullity was not primarily cognizable in the Interior Department. Independently of this, however, his action was placed, in addition, on distinct and different grounds, as follows:

"But, independent of this, contestants have presented no grounds upon which their contest can be sustained. They do not allege a priority of right to make entry, or that the entryman has not complied with the law. Their claim rests upon their relationship to Hollen H. Fearnow, and if they have any right whatever by virtue of their heirship to Hollen H. Fearnow it is a right to perfect his entry, not to make entry in their own right. To avail themselves of this right it would be necessary to reinstate that entry and to show that it was improperly canceled, not by reason of any technical objection in the procedure, but upon its merits. Furthermore, their delay in not presenting their claim, even if valid, is a sufficient reason for rejecting their application to contest this entry."

The consequence was to definitely reject the contest and affirm the right to enter of Luttie B. Jones, she having in the meantime remarried, and, on the making of final proof and compliance with the legal requirements a patent for the land to her issued in March, 1909. This suit, as we have said, was then begun for the purpose previously stated, the basis of the relief being substantially the claim which had been pressed in the controversy in the Department.

Messrs. Samuel Herrick, Milton Brown, L. A. Maris, and Cody Fowler for plaintiffs in error.

Messrs. J. F. King, W. P. Hackney, and L. D. Moore for defendants in error.

Mr. Chief Justice White, after making the foregoing statement, delivered the opinion of the court:

It cannot be seriously disputed that if the agreement was made by Fearnow, the original applicant, that he would make the homestead entry not for himself, but for the benefit of another, would, during the time that he was apparently taking the steps to complete the entry, pay rent for the land to such other person, and when the patent was issued deed the land to such person, such agreement caused that entry to be absolutely void for repugnancy to § 24 of the Act of Congress of May 2, 1890 (26 Stat. at L. 81, chap. 182, Comp. Stat. 1916, § 5025). But as it was expressly stipulated that the facts as to such agreement were true, it must follow necessarily that the entryman derived no right from

his entry and transmitted none to his heirs, and vested them with no right after his death to complete that which was not susceptible of being completed.

Moreover, as it is not disputable that the Land Department in its final ruling against the contestants placed its action upon the prior cancelation of the homestead entry because of the particular agreement referred to which was the basis of the Barnes contest, it must necessarily result that there is an absence of the essential foundation upon which alone the asserted rights of the plaintiffs in error could possibly rest. But, putting this latter view aside, we are of opinion that the court below was clearly right in holding that, as the facts were ad-

mitted which absolutely destroyed the effect of the original Fearnow homestead entry, and therefore caused it to be impossible for that entry to be the generating source of rights in favor of the plaintiffs in error, no equitable rights arose in their favor growing out of the cancelation of that entry and the issue of the patent to the defendant in error. It seems superfluous to reason to demonstrate that no equitable right to hold the patentee as a trustee could possibly arise in favor of the plaintiffs in error since the application to enter upon which they rely was in legal contemplation nonexistent, and hence could afford no basis for equitable rights of any character.

Affirmed.

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FOLLOWING ARE MEMORANDA
OF
CASES DISPOSED OF AT OCTOBER TERM, 1916,

WITHOUT OPINIONS AND NOT ELSEWHERE OR OTHERWISE DISPOSED OF IN THIS EDITION.

EX PARTE: IN THE MATTER OF CLAIR D. VALLETTE and Alfred B. Quinton, Petitioners. [No. —, Original.]

Petition for a hearing on motion for leave to file bill of complaint in the name of the United States v. State of Florida.

Messrs. Alfred B. Quinton and Clair D. Vallette for petitioners.

October 16, 1916. Denied.

REPUBLIC OF CUBA, Plaintiff, v. STATE OF NORTH CAROLINA. [No. —, Original.]

Motion for leave to file declaration.

Messrs. Marcus H. Burnstine, Frederic R. Coudert, and Howard Thayer Kingsbury for plaintiff.

Messrs. T. W. Bickett, J. S. Manning, and William W. Kitchin for defendant.

January 8, 1917. Withdrawn on motion of counsel for the plaintiff.

H. H. HALE, Plaintiff in Error, v. E. W. RECORD. [No. 255.]

In Error to the Supreme Court of the State of Oklahoma.

Messrs. Watson E. Coleman and Frederick S. Stitt for plaintiff in error.

No counsel appeared for defendant in error.

May 1, 1917. Dismissed, with costs, pursuant to the Tenth Rule.

MOSES D. BEER, Plaintiff in Error, v. AMERICAN EXPRESS COMPANY. [No. 263.]

In Error to the Supreme Court of the State of Mississippi.

Messrs. Lawrence Maxwell and Joseph S. Graydon for plaintiff in error.

Burch & Minor, for defendant in error.

May 2, 1917. Dismissed with costs on motion of counsel for the plaintiff in error.

DAMASO APURADO et al., Plaintiffs in Error and Appellants, v. ENSEBIA BROCE et al. [No. 265.]

In Error to and Appeal from the Supreme Court of the Philippine Islands.

Messrs. C. L. Bouvé and W. E. Richardson for plaintiffs in error and appellants.

Mr. C. W. O'Brien for defendants in error and appellees.

May 2, 1917. Dismissed with costs, pursuant to the Tenth Rule.

FRANCIS C. WELCH et al., Trustees, etc., Plaintiffs in Error, v. CITY OF BOSTON. [No. 268.]

In Error to the Superior Court of the State of Massachusetts.

Mr. Barton Corneau for plaintiffs in error.

No counsel appeared for defendant in error.

May 2, 1917. Dismissed with costs, pursuant to the Tenth Rule.

UNITED STATES, Appellant, v. BOARD OF COUNTY COMMISSIONERS OF OSAGE COUNTY, OKLAHOMA, et al. [No. 270.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

The Attorney General for appellant.

No counsel appeared for appellees.

May 3, 1917. Dismissed on motion of counsel for the appellant.

H. N. JOHNSON et al., Appellants, v. WILLIAM G. MCADOO, Secretary of the United States Treasury Department. [No. 897.]
Appeal from the Court of Appeals of the District of Columbia.

Mr. Cornelius J. Jones for appellants.

Mr. Solicitor General Davis for appellee.

May 7, 1917. Per Curiam: Judgment af-

firmed with costs upon the authority of *Belknap v. Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 48 L. ed. 1134, 24 Sup. Ct. Rep. 820; *United States ex rel. Goldberg v. Daniels*, 231 U. S. 218, 58 L. ed. 191, 34 Sup. Ct. Rep. 84; *Louisiana v. McAdoo*, 234 U. S. 627, 58 L. ed. 1506, 34 Sup. Ct. Rep. 938.

JOSEPH FRIEDMAN, Plaintiff in Error, v. **UNITED STATES**. [No. 860.]

In Error to the United States Circuit Court of Appeals for the First Circuit.

Messrs. William H. Taylor and Charles T. Gallagher for plaintiff in error.

Mr. Solicitor General Davis for defendant in error.

May 7, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of *Macfadden v. United States*, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

OHIO C. BARBER, Petitioner, v. **COLUMBIA CHEMICAL COMPANY**. [No. 520.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Charles E. Smoyer for petitioner.

Mr. W. T. Holliday for respondent.

May 7, 1917. Denied.

SUPREME LODGE OF THE WORLD, LOYAL ORDER OF MOOSE, Petitioner, v. **THOMAS P. KENNEY**, as Administrator, etc. [No. 1033.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama.

Mr. E. J. Henning for petitioner.

No counsel appeared for respondent.

May 7, 1917. Denied.

N. J. M. SHIMER, Petitioner, v. **SABINE W. WISTER**. [No. 1077.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. J. S. Freemann for petitioner.

Messrs. Thomas Stokes and George Wharton Pepper for respondent.

May 7, 1917. Denied.

OCEAN STEAMSHIP COMPANY, LIMITED, Petitioner, v. **UNITED STATES STEEL PRODUCTS COMPANY**. [Nos. 1080, 1081, 1082, and 1083.]

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Charles S. Haight for petitioner.

Mr. J. Parker Kirlin for respondent.

May 7, 1917. Denied.

EDWARD N. MAULL et al., Petitioners, v. **L. B. SKINNER MANUFACTURING COMPANY**. [No. 1087.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. F. M. Durrance and George C. Bedell for petitioners.

Mr. T. Hart Anderson for respondent.

May 7, 1917. Denied.

RALPH H. CAMERON, Appellant, v. **THOMAS F. WEEDIN**, Register of the United States Land Office, Phoenix, Arizona, et al. [No. 1112.]

Appeal from the District Court of the United States for the District of Arizona.

No counsel appeared for appellant.

The Attorney General for appellees.

May 7, 1917. Docketed and dismissed with costs, on motion of the Assistant to the Attorney General Todd, in behalf of counsel for the appellees.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY, Plaintiff in Error, v. **LILLIAN WILLIVER**, Administratrix, etc. [No. 1008.]

In Error to the Court of Errors and Appeals of the State of New Jersey.

Mr. Frederic B. Scott for plaintiff in error.

No counsel appeared for defendant in error.

May 8, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error.

HIDEKUNI IWATA, Appellant, v. **CHARLES T. CORNELL**, as Immigration Inspector in Charge. [No. 253.]

Appeal from the District Court of the United States for the Southern District of California.

Mr. Lewis H. Smith for appellant.

Mr. Solicitor General Davis for appellee.

May 21, 1917. Per Curiam: Judgment

affirmed with costs upon the authority of:

(1) Bugajewitz v. Adams, 228 U. S. 585, 590, 591, 57 L. ed. 978-980, 33 Sup. Ct. Rep. 607; (2) Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. 218, 33 Sup. Ct. Rep. 31; Lewis v. Frick, 225 U. S. 699, 56 L. ed. 1263, 32 Sup. Ct. Rep. 835; (3) United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201; Tang Tun v. Edsell, 223 U. S. 673, 56 L. ed. 606, 32 Sup. Ct. Rep. 359; Low Wah Suey v. Backus, 225 U. S. 460, 56 L. ed. 1165, 32 Sup. Ct. Rep. 734.

PHILADELPHIA & READING RAILWAY COMPANY, Plaintiff in Error, v. UNITED STATES. [Nos. 878 and 879.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Messrs. William Clarke Mason and Charles Heebner for plaintiff in error.

The Attorney General for defendant in error.

May 21, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of *McLish v. Roff*, 141 U. S. 661, 665, 35 L. ed. 893, 894, 12 Sup. Ct. Rep. 128; *Covington v. First Nat. Bank*, 185 U. S. 270, 277, 46 L. ed. 906, 907, 22 Sup. Ct. Rep. 645; *Heike v. United States*, 217 U. S. 423, 54 L. ed. 821, 30 Sup. Ct. Rep. 539.

EMMA TAYLOR,¹ Administratrix of Frank Taylor, Deceased, and John P. Kirby, Plaintiffs in Error, v. DRAINAGE DISTRICT NUMBER FIFTY-SIX OF EMMET COUNTY, IOWA, et al. [No. 178.]

In Error to the Supreme Court of the State of Iowa.

Mr. Edgar A. Morling for plaintiffs in error.

Messrs. Hugh H. Obear, Charles A. Douglas, Thomas Ruffin, and James W. Morse for defendants in error.

May 21, 1917. Per Curiam: Judgment affirmed with costs upon the authority of *Huling v. Kaw Valley R. & Improv. Co.* 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 540, 40 L. ed. 252, 16 Sup. Ct. Rep. 88; *Leigh v. Green*, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; *Ballard v. Hunter*, 204 U. S. 241, 261, 262, 51 L. ed. 461, 474, 475, 27 Sup. Ct. Rep. 261; *American Land Co. v. Zeiss*, 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200.

¹ Death of Frank Taylor, one of the plaintiffs in error herein, suggested, and the appearance of Emma Taylor, administratrix, as a party plaintiff in error, filed and entered November 13, 1916, on motion of Mr. Hugh H. Obear, in behalf of counsel for the plaintiffs in error.

MATEO FAJARDO CARDONA, Plaintiff in Error, v. PEOPLE OF PORTO RICO. [Nos. 832, 833, and 834.]

In Error to the Supreme Court of Porto Rico.

Mr. Willis Sweet for plaintiff in error.

Mr. Samuel T. Ansell for defendant in error.

May 21, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of *Deming v. Carlisle Packing Co.* 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; *Overton v. Oklahoma*, 235 U. S. 31, 59 L. ed. 112, 35 Sup. Ct. Rep. 14; *Stewart v. Kansas City*, 239 U. S. 14, 60 L. ed. 120, 36 Sup. Ct. Rep. 15.

STATE OF NEBRASKA EX REL. HENRY C. BITTENBENDER AND ADA M. BITTENBENDER, Plaintiffs in Error, v. EXCISE BOARD OF THE CITY OF LINCOLN, NEBRASKA. [No. 250.]

In Error to the Supreme Court of the State of Nebraska.

Ada M. Bittenbender for plaintiffs in error.

Messrs. George W. Berge and C. Petrus Peterson for defendant in error.

May 21, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of: (1) *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Leathe v. Thomas*, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *Mellon Co. v. McCafferty*, 239 U. S. 134, 60 L. ed. 181, 36 Sup. Ct. Rep. 94; (2) *Jones v. Montague*, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611; *Richardson v. McChesney*, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43; *Stearns v. Wood*, 236 U. S. 75, 59 L. ed. 475, 35 Sup. Ct. Rep. 229.

GRAND RAPIDS & INDIANA RAILWAY COMPANY, Plaintiff in Error, v. UNITED STATES. [No. 266.]

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. James H. Campbell, Elvert M. Davis, and Frederic D. McKenney for plaintiff in error.

Mr. Assistant Attorney General Underwood and Mr. S. Milton Simpson for defendant in error.

May 21, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of *Hollander v. Fechheimer*, 162 U. S. 326, 40 L. ed. 985, 16 Sup. Ct. Rep. 795; *California Nat. Bank v. Stateler*, 171 U. S. 447, 43 L. ed. 233, 19 Sup. Ct. Rep. 6; *Martinez v. International Bkg. Corp.* 220 U. S. 214, 222, 223, 55 L. ed. 438, 443, 31 Sup. Ct. Rep. 408.

PRAIRIE OIL & GAS COMPANY, Senes W. Anthony, and Charles Anthony, Plaintiffs in Error, v. **ANNIE CARTER**. [No. 849.]
In Error to the Supreme Court of the State of Oklahoma.

Messrs. Joseph W. Bailey, George S. Ramsey, and Villard Martin for plaintiffs in error.

Mr. S. W. Hayes for defendant in error.

May 21, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237, Judicial Code, as amended by the Act of Congress of September 6, 1916. See *Prairie Oil & Gas Co. v. Carter*, 244 U. S. 646, 61 L. ed. —, 37 Sup. Ct. Rep. 402.

GEORGE SCHWEDE v. ZENITH STEAMSHIP CO. [No. 372.]

On Certificate from and Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. R. B. Newcomb and Frank M. Cobb for petitioner.

Messrs. Luther Day and Harvey D. Gould-er for respondent.

May 21, 1917. Per Curiam: Judgment of District Court of the United States for the Northern District of Ohio affirmed with costs by an equally divided court, and cause remanded to the said District Court. (Mr. Justice Day took no part in the consideration or decision of this case.)

JOHN KENNY, Petitioner, v. LABAN MILES et al., Admr., etc. [No. 1093.]

Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Mr. Charles J. Kappler for petitioner.

Messrs. Charles H. Merillat and H. P. White for respondents.

May 21, 1917. Granted.

EMANUEL J. DOYLE, Collector of Internal Revenue, Petitioner, v. MITCHELL BROTHERS COMPANY. [No. 1103.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Solicitor General Davis for petitioner.

Mr. Mark Norris for respondent.

May 21, 1917. Granted.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, Petitioner, v. SOUTHERN PACIFIC COMPANY. [No. 1055.]

Petition for Writ of Certiorari to the Supreme Court of the State of California. Mr. Christopher M. Bradley for petitioner.

Messrs. Henley C. Booth and William F. Herrin for respondent.

May 21, 1917. Denied.

W. C. BASS et al., Petitioners, v. MRS. M. A. GEIGER. [No. 1034.]

Petition for Writ of Certiorari to the Supreme Court of the State of Florida.

Mr. George Palmer Garrett for petitioners.

No counsel appeared for respondent.

May 21, 1917. Denied.

NICHOLAS F. BRADY et al., as Executors, etc., Petitioners, v. CHARLES W. ANDERSON, Late Collector of Internal Revenue, etc. [No. 1088.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. John M. Perry for petitioners.

Mr. Solicitor General Davis for respondent.

May 21, 1917. Denied.

SOUTHERN RAILWAY COMPANY, Petitioner, v. VIRGINIA McGUIN, Administratrix, etc. [No. 1096.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. R. Walton Moore for petitioner.

Mr. Leo P. Harlow for respondent.

May 21, 1917. Denied.

WILSON D. WING, Petitioner, v. CHARLES DILLINGHAM, Receiver, etc., et al. [No. 1105.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Henry C. Coke and Weldon Bailey for petitioner.

Mr. John M. Kennerly for respondents.

May 21, 1917. Denied.

J. M. SHELTON et al., Petitioners, v. GAS SECURITIES COMPANY. [No. 1107.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Irving B. Melville for petitioners.

Messrs. Platt Rogers and James G. Rogers for respondent.

May 21, 1917. Denied.

CHIN HING, Petitioner, v. HENRY M. WHITE,
as Commissioner of Immigration, etc.
[No. 1111.]

Petition for Writ of Certiorari to the
United States Circuit Court of Appeals for
the Ninth Circuit.

Mr. Charles R. Pierce for petitioner.

Mr. Solicitor General Davis for respondent.

May 21, 1917. Denied.

EX PARTE: BERNARD B. SELLING et al., a
Special Committee, etc., Petitioners. [No.
21, Original.]

Messrs. Bernard B. Selling, Henry M.
Campbell, Otto Kirchner, Clarence A. Light-
ner, and Sidney T. Miller for petitioners.

Messrs. T. A. E. Weadock and Harrison
Geer for respondent.

May 21, 1917. Case stricken from the
docket on motion of Solicitor General Davis,
in behalf of counsel for petitioners.

(244 U. S. 630)

WASHINGTON RAILWAY & ELECTRIC
COMPANY, Plff. in Err.,
v.ANN CATHERINE SCALA, Administratrix
of the Estate of Alvin Joseph Scala, De-
ceased.COURTS ⇨388 — ERROR TO DISTRICT OF
COLUMBIA COURT OF APPEALS—FEDERAL
QUESTION—EMPLOYERS' LIABILITY.

1. The Federal Supreme Court has jurisdiction of a writ of error to the court of appeals of the District of Columbia in a case in which the construction of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the Act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1916, § 8662), is drawn in question.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1038-1040.]

COMMERCE ⇨27(6)—EMPLOYERS' LIABILITY—WHO ARE "COMMON CARRIERS BY RAILWAY"—ELECTRIC RAILWAY.

2. A corporation incorporated as a railway company with full power of eminent domain, owning and operating an interstate line of electric railway constructed largely on a private right of way, and engaged in carrying passengers for hire between its termini, is a "common carrier by railway" within the meaning of the Act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the Act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1916, § 8662), governing the liability of interstate railway carriers for the death or injury of their employees when employed in interstate commerce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Carriers.]

LIMITATION OF ACTIONS ⇨127(15)—SUSPENSION BY SUIT — AMENDMENT—NEW CAUSE OF ACTION—EMPLOYERS' LIABILITY.

3. The amendment of the counts in the complaint in an action for death brought under the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the Act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1916, § 8662), which alleged that the injuries received caused the deceased to suffer intense pain, by adding an allegation that such injuries caused him "conscious pain and suffering," did not introduce a new cause of action which would be barred, because the two years' limitation prescribed by the act had then elapsed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 545.]

PLEADING ⇨245(4)—AMENDMENT—ELEMENTS OF DAMAGES.

4. The trial court could permit the counts in the complaint in an action for death under the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the Act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1916, § 8662), which alleged that the injuries received caused the deceased to suffer intense pain, to be amended after

the evidence was all in by adding an allegation that such injuries had caused him "conscious pain and suffering," where, under these counts as they stood before the amendment, testimony had been admitted without objection, tending to prove that the deceased suffered pain during the comparatively short interval between the time he was injured and when he lapsed into the period of unconsciousness which preceded his death. [Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 660, 664-666.]

MASTER AND SERVANT ⇨286(15)—QUESTION FOR JURY—NEGLIGENCE.

5. The maintenance by an electric railway company of a pole so close to the track that a conductor on one of its cars cannot safely discharge the duties required of him is sufficient evidence of negligence to justify the submission to the jury of the question of the liability of such company for his death as the result of a collision with such pole while he was standing or moving along the running board of an open summer car in the evening, after dark.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1022.]

[No. 826.]

Argued May 8, 1917. Decided June 11, 1917.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiff in an action for death, brought under the Federal Employers' Liability Act. Affirmed.

See same case below, 45 App. D. C. 484.

The facts are stated in the opinion.

Mr. John S. Barbour for plaintiff in error.

Messrs. Daniel W. O'Donoghue and Arthur A. Alexander for defendant in error.

* Mr. Justice Clarke delivered the opinion of the court:

This case is before us on writ of error to the court of appeals for the District of Columbia, and we shall refer to the parties as they appeared in the trial court, the defendant in error as plaintiff and the plaintiff in error as defendant.

On July 8, 1913, the plaintiff's decedent was a conductor in the employ of the defendant, a common carrier of passengers by an electric railroad, with termini as hereinafter described, and when standing or moving along the "running or stepping board" of an open summer car, in the evening, after dark, his body in some manner struck against one of the poles supporting the overhead wires and he was so injured that he died within an hour.

The negligence charged in the third and fourth counts of the declaration on which the case was tried is the placing of the

poles so close to the track that the decedent did not have a reasonably safe place in which to discharge the duties required of him, and the allegations of these counts bring the case within the Federal Employers' Liability Act, approved April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1916, § 8662).

A motion by the defendant in error to dismiss the writ of error for want of jurisdiction and a petition filed by the plaintiff in error for a writ of certiorari, both of which were postponed to the hearing on the merits, are denied.

Coming to the merits of the case we are confronted with eighteen claims of error, which, however, resolve themselves into but three of substance sufficient to call for attention, viz:

(1) That the defendant at the time of the accident was not a "common carrier by railroad" within the meaning of the Federal Employers' Liability Act of April 22, 1908.

(2) That the trial court erred in permitting the plaintiff to amend her declaration on the trial, after all the testimony had been introduced, and at a time more than two years after the accident had occurred, by inserting a claim for "conscious pain and suffering" of the deceased.

This amendment, it is claimed, in effect allowed a recovery on a second and new cause of action after it was barred by the two years' limitation of the act.

(3) That the court erred in submitting the case to the jury, for the reason that no substantial evidence of negligence was introduced on the trial.

Four acts of Congress, the first providing for the incorporation of the defendant company and the other three amending the first, were introduced in evidence on the theory that they were private acts and otherwise would not be before this court.

With these acts and the evidence and admissions shown in the record before us, it is clear that the defendant was incorporated as, and at the time of the accident complained of was, a railway company, not a street railway company; that it had full powers of eminent domain; that at the time of the accident complained of it owned and operated a line of electric railway extending from a terminus within the District of Columbia to a terminus at Cabin John creek, in the state of Maryland, a large part of the line being constructed on a private right of way, and that it was at that time a common carrier of passengers for hire between its termini.

It is argued that under the decision in *Omaha & C. B. Street R. Co. v. Interstate*

Commerce Commission, 230 U. S. 324, 57 L. ed. 1501, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890, the railway of the defendant was a street railroad, and that therefore the defendant was not a "common carrier by railroad" within the terms of the Act of 1908 as amended. That case dealt with a purely street railway in the streets of two cities, and the decision was that it was not a "railroad" such as was intended to be placed under the jurisdiction of the Interstate Commerce Commission by the Interstate Commerce Act of 1887 [24 Stat. at L. 379, chap. 104, Comp. Stat. 1916, § 8563]. The case is of negligible value in determining either the construction of the act we are considering in this case, or the classification of the defendant, which clearly enough is a suburban railroad common carrier of passengers within the scope of the Federal Employers' Liability Act, as is sufficiently decided by *United States v. Baltimore & O. S. W. R. Co.* 226 U. S. 14, 57 L. ed. 104, 33 Sup. Ct. Rep. 5; *Kansas City Western R. Co. v. McAdow*, 240 U. S. 51, 60 L. ed. 520, 36 Sup. Ct. Rep. 252, 11 N. C. C. A. 857; *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60 L. ed. 1037, 36 Sup. Ct. Rep. 668; and *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. ed. 1125, 36 Sup. Ct. Rep. 683, 12 N. C. C. A. 1083.

This first claim of error of the defendant must be denied.

Seven days before the case came on for trial, the court granted leave to the plaintiff, no objection being noted, to amend the fourth count of her declaration by adding the allegation that the injuries received by the deceased caused him to "suffer intense pain." After all of the evidence had been introduced on the trial, the court, immediately before charging the jury, permitted the plaintiff to further amend the third and fourth counts of her declaration by adding to each the allegation that the negligence of the defendant resulted in "conscious pain and suffering" to the deceased. To the allowing of this last amendment the defendant objected, and, the objection being overruled, excepted, and it thereupon answered the declaration as thus amended, pleading "not guilty and the statute of limitations of two years."

The death of plaintiff's decedent occurred on July 8, 1913. This amendment was allowed on October 29, 1915, and it is urged that the effect of it was to allow the plaintiff to recover upon a claim that the deceased endured "conscious pain and suffering," which would not have been allowed without the amendment, and that such claim was barred by the provision of the *Employers' Liability Act*, that no action

shall be maintained under it unless commenced within two years from the time the cause of action accrued. Before this last amendment the third and fourth counts of the declaration stated a case of negligence plainly within the terms of the Employers' Liability Act, and claimed damages for the death of deceased from injuries which the prior amendment alleged caused him to "suffer intense pain." Under these two counts as they then stood, testimony was admitted, without objection, tending to prove that the deceased suffered pain during the comparatively short interval between the time he was injured and when he lapsed into the period of unconsciousness which preceded his death.

As we have seen, the fourth count, before the amendment objected to, alleged that the injuries received caused the deceased to suffer "intense pain," and the added allegation is that the injuries caused him "conscious pain and suffering." The difference between the two, if there is any difference at all, is too elusive for application in the practical administration of justice, and the claim that "this amendment added a new cause of action to the declaration is too fanciful for discussion. At most it was a slight elaboration of a probably sufficiently claimed element of damage, and the allowance of the amendment was well within the authority and the effect of *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; *Illinois Surety Co. v. United States*, 240 U. S. 214, 60 L. ed. 609, 36 Sup. Ct. Rep. 321; and *Seaboard Air Line R. Co. v. Renn*, 241 U. S. 290, 60 L. ed. 1006, 36 Sup. Ct. Rep. 567.

A word will suffice for the claim remaining. The trolley pole against which plaintiff's decedent struck was shown to be considerably closer to the track than the other poles on the line, and it is sufficient to say that the trial and appellate courts both found that the maintaining of such pole so close to the track that a conductor could not safely discharge the duties required of him constituted evidence of negligence sufficient to justify submitting the case to the jury, and with this conclusion we cordially agree.

The record shows that the case was submitted to the jury in a comprehensive charge sufficiently favorable to the defendant, and the judgment of the Court of Appeals of the District of Columbia is affirmed.

The CHIEF JUSTICE did not take part in the consideration or decision of this case.

(244 U. S. 617)

AMERICAN EXPRESS COMPANY, George C. Taylor, Individually and as President of the American Express Company, and Wells Fargo & Company, Plffs. in Err.,
v.

STATE OF SOUTH DAKOTA EX REL. CLARENCE C. CALDWELL, as Attorney General of the State of South Dakota, et al.

CARRIERS — 26 — INTERSTATE COMMERCE COMMISSION — AUTHORIZING EXPRESS COMPANIES TO RAISE INTRASTATE RATES.

1. Implied authority both to maintain interstate express rates and to raise to their level the intrastate rates involved was given to express companies by an order of the Interstate Commerce Commission directing such companies to remove an existing discrimination against interstate commerce by ceasing to charge higher rates between Sioux City, Iowa, and South Dakota points than for substantially equal distances between such South Dakota points and five named South Dakota cities, where the report of the Commission, which was made a part of the order, contains a finding that the interstate rates, which had been prescribed by the Commission, were not shown to be unreasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67-82.]

CARRIERS — 26 — INTERSTATE COMMERCE COMMISSION — FINDINGS — DISCRIMINATION — REASONABLENESS OF INTERSTATE AND INTRASTATE RATES.

2. A finding of the Interstate Commerce Commission that interstate express rates between Sioux City, Iowa, and South Dakota points are reasonable, made when ordering the express companies to remove an existing discrimination against interstate commerce by ceasing to charge higher rates between such points than for substantially equal distances between such South Dakota points and five named cities in that state,—does not necessarily imply that the intrastate rates are unreasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67-82.]

COMMERCE — 85 — FEDERAL POWER OVER INTRASTATE RATES—AUTHORITY OF INTERSTATE COMMERCE COMMISSION.

3. Congress could and did invest the Interstate Commerce Commission with authority to remove an existing discrimination against interstate commerce by directing a change of an intrastate rate prescribed by state authority.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138.]

CARRIERS — 32(1)—INTERSTATE COMMERCE COMMISSION—POWERS—REGULATING INTRASTATE RATES.

4. An order of the Interstate Commerce Commission directing express companies to remove an existing discrimination against interstate commerce by ceasing to charge higher rates between Sioux City, Iowa, and South Dakota points than for substantially

equal distances between such South Dakota points and five named South Dakota cities is not invalid because it leaves to the express companies a discretion to determine how the discrimination shall be removed, whether by lowering the interstate rates, which the Commission found were not unreasonable, or by raising the intrastate rates, or by doing both.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 83.]

COMMERCE ⚡8(15)—CONFLICTING STATE AND FEDERAL REGULATIONS—RAISING LOCAL EXPRESS RATES UNDER SANCTION OF INTERSTATE COMMERCE COMMISSION—NOTICE.

5. The requirement of S. D. Laws 1911, chap. 207, § 10, as amended by Laws 1913, chap. 304, that no advance in intrastate rates may be made except after thirty days' notice to the Board of Railroad Commissioners by the filing of schedules, and to the public by publication and posting in every office of the carrier in the state, may be disregarded by express companies when raising intrastate rates conformably to an order of the Interstate Commerce Commission, which directed such companies to remove an existing discrimination against interstate commerce by ceasing to charge higher rates between Sioux City, Iowa, and South Dakota points than for substantially equal distances between such South Dakota points and five named South Dakota cities.

CARRIERS ⚡32(1)—INTERSTATE COMMERCE COMMISSION—REGULATING INTRASTATE RATES—SCOPE OF ORDER.

6. The intrastate rates involved in an order of the Interstate Commerce Commission directing express companies to remove an existing discrimination against interstate commerce by ceasing to charge higher rates between Sioux City, Iowa, and South Dakota points than for substantially equal distances between such South Dakota points and five named South Dakota cities must be deemed to be those only between the five named cities and points in competitive territory, i. e., those commercially tributary both to the five cities and to Sioux City, Iowa, in view of the qualification of the general words of such order by the clause, "which said relation of rates has been found by the Commission to be unjustly discriminatory," and of the report of the Commission, made a part of the order, which makes it clear that the order applied only to competitive territory in the southeastern section of South Dakota.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 83.]

COMMERCE ⚡8(15)—CONFLICTING STATE AND FEDERAL REGULATION—FEDERAL REGULATION OF INTRASTATE RATES—INDEFINITENESS OF ORDER OF INTERSTATE COMMERCE COMMISSION.

7. An order of the Interstate Commerce Commission directing express companies to remove an existing discrimination against interstate commerce by ceasing to charge higher rates between Sioux City, Iowa, and

South Dakota points than for substantially equal distances between such South Dakota points and five named South Dakota cities is not so indefinite as not to serve the express companies as a justification for failure to observe the regulations and orders imposed by state authority respecting such intrastate rates, since the necessary data for adjusting the rates in controversy is furnished by the limitation in such order to the relation of rates to and from Sioux City, and to and from the five South Dakota cities "under substantially similar circumstances and conditions and for substantially equal distances," and by the statement in the Commission's report, which is made a part of the order, that one of such express companies operates over the lines of the Chicago & Northwestern and Chicago, St. Paul, Minneapolis, & Omaha Railway Companies, and the other over the line of the Chicago, Milwaukee, & St. Paul Railway Company.

COURTS ⚡489(9)—CONFLICTING STATE AND FEDERAL JURISDICTION—ENJOINING ORDER OF INTERSTATE COMMERCE COMMISSION.

8. A state court has jurisdiction, notwithstanding the exclusiveness of Federal jurisdiction under the Acts of June 18, 1910 (36 Stat. at L. 539, chap. 309, Comp. Stat. 1916, § 993), and October 22, 1913 (38 Stat. at L. 219, chap. 32), of suits "to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission," of a suit to enjoin express companies from putting into effect special tariffs increasing intrastate rates, although the answer sets up as a justification an order of the Interstate Commerce Commission directing such express companies to remove an existing discrimination against interstate commerce by ceasing to charge higher rates between Sioux City, Iowa, and South Dakota points than for substantially equal distances between such South Dakota points and five named South Dakota cities, where such answer does not allege that all the intrastate rates to and from the five cities, which had been advanced, were so advanced in compliance with the order of the Commission, but merely alleges that the rates applied were those prescribed "for interstate traffic between points within and points without the state of South Dakota," and such special tariffs include advances of rates between the five cities and many points in the state to which the Commission's order did not apply.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1326.]

[No. 902.]

Argued April 13, 1917. Decided June 11, 1917.

IN ERROR to the Supreme Court of the State of South Dakota to review a decree which enjoined express companies from

advancing intrastate rates which the express companies attempted to justify by an order of the Interstate Commerce Commission directing them to remove an existing discrimination against interstate commerce by ceasing to charge higher rates between Sioux City, Iowa, and South Dakota points than for substantially equal distances between such South Dakota points and five named South Dakota cities. Modified by dissolving injunction so far as it extends to rates in the competitive territory, and as modified affirmed.

See same case below, — S. D. —, P.U.R. 1917C, 471, 161 N. W. 132.

The facts are stated in the opinion.

Messrs. C. O. Bailey, Branch P. Kerfoot, T. B. Harrison, J. H. Voorhees, and C. W. Stockton for plaintiffs in error.

Messrs. John Barton Payne, R. B. Scott, and A. P. Humburg, as amici curiæ, on behalf of Illinois Central Railroad Company.

Messrs. Oliver E. Sweet, Byron S. Payne, P. W. Dougherty, and Clarence C. Caldwell for defendants in error.

Messrs. Charles W. Needham and Joseph W. Folk, as amici curiæ, on behalf of the Interstate Commerce Commission.

*Mr. Justice Brandeis delivered the opinion of the court:

In 1912 the Interstate Commerce Commission entered upon a comprehensive investigation of express rates,*practices, accounts, and revenues. Its report¹ resulted in the establishment, on February 1, 1914, throughout the United States, of the so-called uniform zone and block system of rates in interstate transportation, and the prompt adoption, in forty states, of the same system in intrastate transportation.² South Dakota did not adopt the national system. It adheres to a schedule of maximum express charges, known as Distance Tariff No. 2, which was promulgated by its Board of Railroad Commissioners in 1911,

and which, on weighted average, is about 40 per cent lower than the Zone and block system. Shippers of Sioux City, Iowa, complained that the differences between these interstate and intrastate scales of rates resulted in unjust discrimination against them, to the advantage of their South Dakota competitors. Proceedings to secure relief were brought by them before the Interstate Commerce Commission; and on May 23, 1916, its report and order were filed. *Traffic Bureau v. American Exp. Co.* 39 Inters. Com. Rep. 703.

This order,³ couched in general terms, prohibited*charging after August 15, 1916 (later extended to September 15, 1916), "higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the state of South Dakota, than are contemporaneously . . . demanded . . . for transportation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, South Dakota, on the one hand, and said points in the state of South Dakota, on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory." The order made "the report containing its findings of fact and conclusions thereon" a part thereof; and the report makes clear that the order applied only to competitive territory, and that this is the southeastern section of South Dakota. The report also declared "that the South Dakota rates are too low to be made the measure of interstate rates between Sioux City and South Dakota points;" that the existing interstate rates "have not been shown to be unreasonable;" that no reason has been presented for modifying them; and that the Commission is "under no doubt as to how the unjust discrimination found to exist should be corrected;" but the report did not expressly state that the intrastate rates

¹ Re Express Rates, Practices, Accounts, & Revenues, 24 Inters. Com. Rep. 380; 28 Inters. Com. Rep. 132. The order was modified in some respects in 1915, 35 Inters. Com. Rep. 3.

² 28 Ann. Rep. of Interstate Commerce Commission, p. 26.

³ "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is ordered, That the above-named defendants, according as they participate in

the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 15, 1916, and thereafter to abstain, from publishing, demanding, or collecting higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the state of South Dakota, than are contemporaneously published, demanded, or collected for transportation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, South Dakota, on the one hand, and said points in the state of South Dakota, on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory."

should be raised, nor did it enumerate the competitive points in South Dakota to which the rate adjustment should apply.

In July, 1916, the express companies conferred informally with the Board of Railroad Commissioners about introducing in South Dakota complete intrastate tariffs corresponding with the zone and block system scale, and also about introducing special tariffs on that basis covering rates between the cities of Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton and all other points in the state. On August 5 the Board issued an order for a general investigation of express rates; and set for hearing on December 4, 1916, that investigation as well as the applications to put into effect these special or general tariffs. In an opinion then filed, it said:

"The rates which shall be put into effect to remove the discrimination found by the Interstate Commerce Commission to exist in favor of jobbers at Aberdeen, Watertown, Sioux Falls, Mitchell, and Yankton, and against Sioux City and its jobbers, have not yet been determined. As these rates are to apply on intrastate traffic and between stations and over lines wholly within this state, this commission [Board] is the proper tribunal to fix these rates. To permit the putting into effect of two systems of rates, one from the cities named and another from all other cities in the state, would create an intolerable situation."

On August 25, the express companies formally presented to the Board the special tariffs, to become effective September 15. And on September 12, the Board formally refused to allow the same to be filed, and rejected them, among other reasons, because the

"schedules have not been printed and published, and thirty days' notice of the time when the said proposed classifications, tariffs, tables, and schedules shall go into effect has not been given to the Board of Railroad Commissioners of the State of South Dakota, and to the public, as required by the provisions of § 10 of chapter 207 of the Laws of 1911."

On the same day the attorney general

of South Dakota and the Board of Railroad Commissioners brought an original proceeding in the supreme court of the state against the American Express Company and Wells Fargo & Company to enjoin them from putting into effect the special tariffs covering all their rates within the state to and from the five cities named; and a restraining order was issued. The defendants complied with the restraining order; but filed an answer in which they set up the order of the Interstate Commerce Commission, and alleged that about August 15 they published certain express rate tables, but that

"all rates for the carriage of express matter intrastate throughout the state of South Dakota were left the same as provided in the South Dakota Express Distance Tariff No. 2, Exhibit A hereto, excepting the rates to and from the cities of Sioux Falls, Aberdeen, Watertown, Mitchell, and Yankton, and other South Dakota points; that to the business between said cities . . . and other South Dakota points there were applied the rates prescribed by the Interstate Commerce Commission, as hereinbefore set forth, for interstate traffic, between points within and points without the state of South Dakota; that excepting for the application of the Interstate Commerce Commission rates to traffic to and from said cities . . . no changes were made in the express tariffs throughout the state of South Dakota, as the same had previously existed under the provisions of the South Dakota Distance Tariff No. 2 . . ."

There was in the answer no explicit allegation that no change in rates had been made except as required by the Commission's order.⁴

*The plaintiffs demurred to the answer upon the ground that it did not state facts sufficient to constitute a defense to the suit. The demurrer was sustained, and defendants having elected to stand on their answer, a perpetual injunction was granted on December 5, which enjoined the express companies from putting into effect the special tariffs presented on August 25, "or any of the rates, fares, or charges speci-

⁴The answer also alleged that shippers and organizations representing the merchants of the five South Dakota cities had brought suit against these and other express companies in the district court of the United States for the northern district of Iowa to enjoin the enforcement of the order of the Interstate Commerce Commission and the putting into effect of the special tariffs above referred to; that on filing the bill an order of notice issued; that the United States and the Interstate Commerce Commission appeared specially to object to the

jurisdiction of the court; and that on August 28, three judges sitting, an order was entered as follows:

"the plaintiffs, with leave of court, offer their evidence in support of the application for a temporary writ of injunction, and the court finds that upon the showing made the plaintiffs would not be entitled to a temporary writ of injunction, and therefore declines to pass on the plea to the jurisdiction . . ." See also *Brown Drug Co. v. United States*, 235 Fed. 603.

fied in said tables between the cities of Aberdeen, Mitchell, Sioux Falls, Watertown, or Yankton in the state of South Dakota and other stations of said express companies in said state . . . or . . . charges greater . . . than the maximum rates . . . of . . . Distance Tariff No. 2 . . . unless or until a schedule of express rates shall have first been submitted to the Board of Railroad Commissioners of the State of South Dakota and have been regularly approved and allowed by said board in conformity to the laws of the state of South Dakota."⁵

A petition for writ of error to this court was allowed December 11, 1916. The record was filed here January 27, 1917, and included in it is the opinion of the supreme court of South Dakota, filed in the cause January 20, 1917. The reasons there given for holding that the order of the Interstate Commerce Commission is no justification for disregarding the order of the Board of Railroad Commissioners of South Dakota embody, in substance, the argument made here on behalf of the state's officials.

*1. The nature of the Interstate Commerce Commission's order.

In its specific direction the order merely prohibits charging higher rates to and from Sioux City than to and from the five South Dakota cities. It could be complied with (a) by reducing the interstate rates to the South Dakota scale, or (b) by raising the South Dakota rates to the interstate scale, or (c) by reducing one and raising the other until equality is reached in an intermediate scale. The report (which is made a part of the order) contains, among other things, a finding that the interstate rate which was prescribed by the Commission was not shown to be unreasonable. This finding gives implied authority to the express companies both to maintain its interstate rates and to raise to their level the intrastate rates involved. The Shreveport Case (Houston, E. & W. T. R. Co. v. United States) 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833. For, if the interstate rates are maintained, the discrimination can be removed *only* by raising the intrastate rates.

But the finding that discrimination exists

⁵ On December 5, 1916, the defendants had also applied for dissolution of the restraining order, alleging, among other things, that the United States had instituted suit against them in the district court of the United States for the southern district of New York to recover the penalties prescribed by Congress, to wit, \$5,000 a day for failure to comply with the order of the Interstate Commerce Commission; and that they were liable to further suits.

and that the interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination. Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 277, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844. Proceedings to remove unjust discrimination are aimed directly only at the *relation of rates*. If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable, it is done as a means to the end of removing discrimination. The correction is an incident merely.

2. The power of the Interstate Commerce Commission.

The supreme court of South Dakota declares:

"If the purported order of the Commission does, in any respect, regulate intrastate commerce, it is to that extent void, owing to the Commission's want of jurisdiction over the subject-matter." [— S. D. —, P.U.R.1917C, 475, 161 N. W. 132.]

That court denies not only the intent of Congress to confer upon the Commission authority to remove an existing discrimination against interstate commerce by directing a change of an intrastate rate prescribed by state authority, but denies also the power of Congress under the Constitution to confer such power upon the Commission or to exercise it directly. The existence of such power and authority should not have been questioned since the decision of this court in the Shreveport Case.

It is also urged, that even if the Commission had power, under the circumstances, to order a change of the intrastate rates, the order in question was invalid, because the Commission, instead of specifically directing the change, undertook to give to the carrier a discretion as to how it should be done and as to the territory to which it should apply. The order properly left to the carrier's discretion to determine *how* the discrimination should be removed; that is, whether by lowering the interstate rates or by raising the intrastate rates, or by doing both. In its general form the order is identical with that under consideration in the Shreveport Case. Where a proceeding to remove unjust discrimination presents solely the question whether the carrier has improperly exercised its authority to initiate rates, the Commission may legally order, in general terms, the removal of the discrimination shown, leaving upon the carrier the burden of determining also the points to and from which rates must be changed, in order to effect a removal of the

discrimination. But where, as here, there is a conflict between the Federal and the state authorities, the Commission's order cannot serve as a justification for disregarding a regulation or order issued under state authority, unless, and except so far as, it is definite as to the territory or points to which it applies. For the power of the Commission is dominant*only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic. Still, "certum est quod certum reddi potest." Whether the order here involved is definite presents a question of construction which will be considered later.

3. The requirements of the state law.

The South Dakota statute (1911, chap. 207, § 10, as amended 1913, chap. 304) provides that no advance in intrastate rates may be made except after thirty days' notice to the Board of Railroad Commissioners by filing of schedules, and to the public by publication and posting in every office of the carrier in the state. The special tariff here in question, which was presented to the Board informally at conferences in July, was not formally offered for filing until August 25. It was, by its terms, to take effect September 15; and notice to the public was not made as provided in the statute. But these provisions cannot be held to apply to changes in intrastate rates over which the Board has no control. The proper conduct of business would suggest the giving of some notice (as was done by the express companies in the instant case); but a valid order of the Commission is, when applicable, a legal justification for disregarding a conflicting regulation of the state law—because the Federal authority is dominant.

4. The scope of the order.

If the general words of the order are read alone, they might perhaps be understood as applying to rates between the five named South Dakota cities and *all* other "points" in South Dakota. But the order explicitly makes the report which is filed therewith a part thereof; and the order itself also qualifies the general words used, by the clause: "Which said relation of rates has been found by the Commission to be unjustly discriminatory." The report makes it thus perfectly clear that the order applies only to the "points" in competitive territory, or,*as the supreme court expresses it, those "commercially tributary" both to the five cities and to Sioux City. That territory, as the report also shows, is the southeastern part of South Dakota; and as to this alone, the discrimination was found to exist. The express companies were not warranted by anything in the order in extending the

special tariffs of rates to and from the five cities to include "points" in every part of the state. As to all rate advances other than those in the competitive territory, their action was unauthorized.

It is urged on behalf of the state officials that the order does not show with the necessary precision to what "points" it applies; and that if not wholly void for indefiniteness, it at least cannot serve as a justification for failure to observe the regulations and orders imposed by authority of the state. In cases of this nature, where the dominant Federal authority is exerted to affect intrastate rates, it is desirable that the orders of the Interstate Commerce Commission should be so definite as to the rates and territory to be affected as to preclude misapprehension. If an order is believed to lack definiteness an application should be made to the Commission for further specifications. But the order, although less explicit than desirable, is, when read in connection with the railroad map, not lacking in the requisite definiteness. As the order is limited to the relation of rates to and from Sioux City and to and from the five South Dakota cities "under substantially similar circumstances and conditions, and for substantially equal distances," and the report states that the American Express Company operates "over the lines of the Chicago & Northwestern Railway Company and the Chicago, St. Paul, Minneapolis, & Omaha Railway Company," and that the Wells Fargo & Company operates "over the Chicago, Milwaukee, & St. Paul Railway Company," it furnishes the necessary data for adjusting the rates in controversy.

*5. The jurisdiction of the state court.

It is urged that the supreme court of South Dakota erroneously assumed jurisdiction, because this proceeding is an attack upon an order of the Interstate Commerce Commission; that by the Act of Congress (36 Stat. at L. 539, 540, 543, chap. 309, Comp. Stat. 1916, § 993) exclusive power "to enjoin, set aside, annul, or suspend in whole or in part any order of this Interstate Commerce Commission" was vested in the commerce court; and that by the Act of October 22, 1913, abolishing that court (38 Stat. at L. 219, chap. 32), the exclusive power was transferred to the several district courts. If this were a proceeding professedly "to enjoin, set aside, annul, or suspend" an order of the Commission "in whole or in part," a state court would obviously have no jurisdiction. The bill does not purport to attack, nor does it even refer to, any such order. It alleges only that the express companies propose "increases and advances" in charges for intrastate transportation, by introducing

"existing interstate rates." It is the answer which sets up the order of the Commission as a justification; and plaintiffs deny that it is such. Whether or not the state court has jurisdiction cannot, of course, depend upon the professed purpose of the proceeding nor upon the mere form of pleading. An order may be as effectively annulled by misconstruction as by avowedly setting it aside. But we have no occasion to determine in the instant case under what circumstances and to what extent the effect of orders of the Commission may be questioned in state courts. The answer does not allege that *all* the intrastate rates to and from the five cities which have been advanced were advanced in compliance with the order of the Commission. It alleges merely that the rates applied were those prescribed "for interstate traffic between points within and points without the state of South Dakota;"⁶ and it is clear that the special tariffs here in question include advances of rates between the five cities and many "points" in the state to which the Commission's order did not apply. It could not, therefore, afford a justification for putting into effect those intrastate rates without first making the publication required by the state law and securing the approval of the state board. These rates the supreme court of South Dakota had jurisdiction to enjoin, and the decree must be affirmed to that extent. It is also clear that the decree of the supreme court, in so far as it enjoined the express companies from advancing *any* intrastate rate to and from the five cities until the same shall have been approved by the South Dakota Board of Railroad Commissioners, was erroneous. So far as it extends to rates in the competitive territory as to which discrimination was found to exist, it must be modified and the injunction dissolved. With this modification the decree of the state court is affirmed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice McKenna dissents.

⁶ The claim that the express companies attempted to make *only* those changes which were required to comply with the order of the Commission was first explicitly made in the petition for writ of error to this court. There was, however, in the motion filed December 5, to dissolve the restraining order, a general allegation that the express companies "were ordered to put into effect the rates restrained" by the state court.

JOE ADAMS et al., Appts.,

v.

W. V. TANNER, Attorney General of the State of Washington, and George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington.

INJUNCTION $\S$ 105(2)—**RESTRAINING CRIMINAL PROCEEDINGS.**

1. The enforcement by the attorney general and county prosecuting attorney of the provisions of the Washington Employment Agency Law (Wash. Laws 1915, chap. 1), making it criminal to collect fees from workers for furnishing them with employment or with information leading thereto, may be restrained by a court of equity at the instance of persons conducting employment agencies under municipal licenses who assert that their business will be destroyed, contrary to U. S. Const. 14th Amend., by the enforcement of such statute.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. $\S$ 179.]

MASTER AND SERVANT $\S$ 10 $\frac{1}{2}$ —**EMPLOYMENT AGENCY—PROHIBITION OR REGULATION.**

2. Prohibition, not regulation, is what is accomplished by the provisions of the Washington Employment Agency Law (Wash. Laws 1915, chap. 1), making it criminal to collect fees from workers for furnishing them with employment or information leading to such employment, although fees may still be collected from those seeking workers.

CONSTITUTIONAL LAW $\S$ 275(1)—**DUE PROCESS OF LAW — PROHIBITING EMPLOYMENT AGENCIES.**

3. The right of the individual under U. S. Const. 14th Amend. to engage in a useful and lawful business is unwarrantably infringed by the provisions of the Washington Employment Agency Law (Wash. Laws 1915, chap. 1), enacted in the purported exercise of the police power, which make it criminal to demand or receive, either directly or indirectly, from any person seeking employment, or from any person on his or her behalf, any remuneration or fee for furnishing such person with employment or with information leading thereto.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. $\S\S$ 830, 839, 843.]

[No. 273.]

Argued May 7, 1917. Decided June 11, 1917.

A PPEAL from the District Court of the United States for the Eastern District of Washington to review a decree dismissing the bill in a suit to enjoin the enforcement of the Employment Agency Law of that state. Reversed and remanded for further proceedings.

See same case below, on motion for temporary injunction, 221 Fed. 694.

The facts are stated in the opinion.

Messrs. **Dallas V. Halverstadt**, George Ferris, Edward J. Cannon, and Samuel H. Piles for appellants.

Mr. L. L. Thompson and Mr. W. V. Tanner, Attorney General of Washington, for appellees.

*Mr. Justice **McReynolds** delivered the opinion of the court:

Initiative Measure Number 8—popularly known as “The Employment Agency Law”—having been submitted to the people of Washington at the general election, received a majority vote and was thereafter declared a law, effective December 3, 1914, as provided by the state Constitution. Wash Laws 1915, chap. 1. It follows:

“Be it enacted by the people of the state of Washington:

“Section 1. The welfare of the state of Washington depends on the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion.

“The state of Washington therefore exercising herein its police and sovereign power declares that the system of collecting fees from the workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state.

“Section 2. It shall be unlawful for any employment agent, his representative, or any other person to demand or receive either directly or indirectly from any person seeking employment, or from any person on his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.

“Section 3. For each and every violation of any of the provisions of this act the penalty shall be a fine or [of] not more than \$100 and imprisonment for not more than thirty days.”

In *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523, the supreme court held school-teachers were not “workers” within the quoted measure, and that it did not apply to one conducting an agency patronized only by such teachers*and their employers. And in *State v. Rossman*, 93 Wash. 530, L.R.A.1917B, 1276, 161 Pac. 349, the same court declared it did not in fact prohibit employment agencies, since they might charge fees against persons wishing to hire laborers; that it was a valid exercise of state power; that a stenographer and book-keeper is a “worker;” and that one who charged him a fee for furnishing information leading to employment violated the law.

As members of copartnerships and under municipal licenses, during the year 1914 and before, appellants were carrying on in the city of Spokane well established agencies for securing employment for patrons who paid fees therefor. November 25, 1914, in the United States district court, they filed their original bill against W. V. Tanner, attorney general of the state, and George H. Crandall, prosecuting attorney for Spokane county, asking that Initiative Measure Number 8 be declared void because in conflict with the 14th Amendment, Federal Constitution, and that the defendants be perpetually enjoined from undertaking to enforce it. On the same day they presented a motion for preliminary injunction, supported by affidavits which were subsequently met by countervailing ones. Appellees thereafter entered motions to dismiss the original bill because (1) “said bill of complaint does not state facts sufficient to warrant this court in granting any relief to the plaintiffs; (2) that plaintiffs have a plain, speedy, and adequate remedy at law; (3) this court has no jurisdiction over the persons of these defendants or either of them, or the subject-matter of this action.” A temporary injunction was denied. The motions to dismiss were sustained and a final decree to that effect followed.

Considering the doctrine affirmed in *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, and cases there cited, the record presents no serious question in respect of jurisdiction.

The bill alleges “that the employment business*consists in securing places for persons desiring to work,” and unless permitted to collect fees from those asking assistance to such end the business conducted by appellants cannot succeed and must be abandoned. We think this conclusion is obviously true. As paid agents their duty is to find places for their principals. To act in behalf of those seeking workers is another and different service, although, of course, the same individual may be engaged in both. Appellants’ occupation as agent for workers cannot exist unless the latter pay for what they receive. To say it is not prohibited because fees may be collected for something done in behalf of other principals is not good reasoning. The statute is one of prohibition, not regulation. “You take my house when you do take the prop that doth sustain my house; you take my life when you do take the means whereby I live.”

We have held employment agencies are subject to police regulation and control. “The general nature of the business is such that, unless regulated, many persons

may be exposed to misfortunes against which the legislature can properly protect them." *Brazee v. Michigan*, 241 U. S. 340, 343, 60 L. ed. 1034, 1036, 36 Sup. Ct. Rep. 561. But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand. In *Spokane v. Macho*, 51 Wash. 322, 324, 21 L.R.A.(N.S.) 263, 130 Am. St. Rep. 1100, 98 Pac. 755, the supreme court of Washington said: "It cannot be denied that the business of the employment agent is a legitimate business; as much so as is that of the banker, broker, or merchant; and under the methods prevailing in the modern business world it may be said to be a necessary adjunct in the prosecution of business enterprises." Concerning the same subject, *Ex parte Dickey*, 144 Cal. 234, 236, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428, the supreme court of California said: "The business in which this defendant is engaged is not only innocent and innocuous, but is highly beneficial, as tending the more quickly to secure labor for the unemployed. There is nothing in the nature of the business, therefore, that in any way threatens or endangers the public health, safety, or morals." And this conclusion is fortified by the action of many states in establishing free employment agencies charged with the duty to find occupation for workers.

It is alleged: "That plaintiffs have furnished positions for approximately ninety thousand persons during the last year, and have received applications for employment from at least two hundred thousand laborers, for whom they have been unable to furnish employment. . . . That such agencies have been established and conducted for so long a time that they are now one of the necessary means whereby persons seeking employment are able to secure the same." A suggestion in behalf of the state, that while a pursuit of this kind "may be beneficial to some particular individuals or in specific cases, economically it is certainly nonuseful, if not vicious, because it compels the needy and unfortunate to pay for that which they are entitled to without fee or price, that is, the right to work," while possibly indicative of the purpose held by those who originated the legislation, in reason, gives it no support.

Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an up-

right way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

The general principles by which the validity of the challenged measure must be determined have been expressed many times in our former opinions. It will suffice to quote from a few.

In *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427, we held invalid a statute of Louisiana which undertook to prohibit a citizen from contracting outside the state for insurance on his property lying therein because it violated the liberty guaranteed to him by the 14th Amendment. "The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

"If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but it a clear, unmistakable infringement of rights secured by the fundamental law." *Booth v. Illinois*, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425.

"It is also true that the police power of the state is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which

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such interference is warranted are as well settled as is the right of judicial interference itself. The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. . . . If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail." *McLean v. Arkansas*, 211 U. S. 539, 547, 548, 53 L. ed. 315, 319, 320, 29 Sup. Ct. Rep. 206.

"The 14th Amendment protects the citizens in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many nonuseful occupations which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted." *Murphy v. California*, 225 U. S. 623, 628, 56 L. ed. 1229, 1232, 41 L.R.A. (N.S.) 153, 32 Sup. Ct. Rep. 697.

1 "An Act to Prohibit the Collection of Fees for the Securing of Employment, or Furnishing Information Leading Thereto, and Fixing a Penalty for Violation Thereof.

"Be it enacted by the people of the state of Washington:

"Section 1. The welfare of the state of Washington depends on the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion.

"The state of Washington therefore exercising herein police and sovereign power declares that the system of collecting fees from the workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state.

"Section 2. It shall be unlawful for any

We are of opinion that Initiative Measure Number 8, as constructed by the supreme court of Washington, is arbitrary and oppressive, and that it unduly restricts the liberty of appellants, guaranteed by the 14th Amendment, to engage in a useful business. It may not therefore be enforced against them.

The judgment of the court below is reversed and the cause remanded for further proceedings in conformity with this opinion. Reversed.

Mr. Justice McKenna dissents upon the ground that, under the decisions of this court,—some of them so late as to require no citation or review,—the law in question is a valid exercise of the police power of the state, directed against a demonstrated evil.

Mr. Justice Brandeis, dissenting:

To declare the statute of a state, enacted in the exercise of the police power, invalid under the 14th Amendment, is a matter of such seriousness that I state the reasons for my dissent from the opinion of the court.

The statute of the state of Washington, commonly known as the "Abolishing Employment Offices Measure," was proposed by Initiative Petition No. 8, filed July 3, 1914, and was adopted November 3, 1914, at the general election; 162,054 votes being cast for the measure and 144,544 against it. In terms the act merely prohibits the taking of fees from those seeking employment.¹

*Plaintiffs, who are proprietors of private employment agencies in the city of Spokane, assert that this statute, if enforced, would compel them to discontinue business and would thus, in violation of the 14th Amendment, deprive them of their liberty and property without due process of law. The

employment agent, his representative, or any other person to demand or receive either directly or indirectly from any person seeking employment, or from any person in his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.

"Section 3. For each and every violation of any of the provisions of this act the penalty shall be a fine or [of] not more than \$100 and imprisonment for not more than thirty days."

The supreme court of Washington has twice passed upon the scope of the act; holding in *Huntsworth v. Tanner*, 87 Wash. 670, 152 Pac. 523, that it is not applicable to teachers, and in *State v. Rossman*, 93 Wash. 530, L.R.A. 1917B, 1276, 161 Pac. 349, that it is applicable to stenographers and bookkeepers.

act leaves the plaintiffs free to collect fees from employers; and it appears that private employment offices thus restricted are still carrying on business.² But even if it should prove, as plaintiffs allege, that their business could not live without collecting fees*from employees, that fact would not necessarily render the act invalid. Private employment agencies are a business properly subject to police regulation and control. *Brazee v. Michigan*, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561. And this court has made it clear that a statute enacted to promote health, safety, morals, or the public welfare may be valid, *although* it will compel discontinuance of existing businesses in whole or in part. Statutes prohibiting the manufacture and sale of liquor present the most familiar example of such a prohibition. But where, as here, no question of interstate commerce is involved, this court has sustained also statutes or municipal ordinances which compelled discontinuance of such business as (a) of manufacturing and selling oleomargarin (*Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257); (b) of selling cigarettes (*Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132); (c) of selling futures in grain or other commodities (*Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425); (d) of selling stocks on margin (*Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168); (e) of keeping billiard halls (*Murphy v. California*, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697); (f) of selling trading stamps (*Rast v. Van Deman & L. Co.* 240 U. S. 342, 368, 60 L. ed. 679, 691, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370).

These cases show that the scope of the police power is not limited to regulation as distinguished from prohibition. They show also that the power of the state exists equally, whether the end sought to be attained is the promotion of health, safety, or morals, or is the prevention of fraud or the prevention of general demoralization. "If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily

objectionable, the courts cannot interfere, unless in looking at the substance of the matter, they can see that it is a clear, unmistakable infringement of rights secured by the fundamental law." *Otis v. Parker*, 187 U. S. 606, 609, 47 L. ed. 323, 327, 23 Sup. Ct. Rep. 168; *Booth v. Illinois*, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425. Or, as it is so frequently expressed, the action of the legislature is final, unless the measure adopted appears clearly to be arbitrary*or unreasonable, or to have no real or substantial relation to the object sought to be attained. Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed, is obviously not to be determined by assumptions or by a priori reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law.

It is necessary to inquire, therefore: What was the evil which the people of Washington sought to correct? Why was the particular remedy embodied in the statute adopted? And, incidentally, what has been the experience, if any, of other states or countries in this connection? But these inquiries are entered upon, not for the purpose of determining whether the remedy adopted was wise, or even for the purpose of determining what the facts actually were. The decision of such questions lies with the legislative branch of the government. *Powell v. Pennsylvania*, 127 U. S. 678, 685, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257. The sole purpose of the inquiries is to enable this court to decide whether, in view of the facts, actual or possible, the action of the state of Washington was so clearly arbitrary or so unreasonable that it could not be taken "by a free government without a violation of fundamental rights." See *McCray v. United States*, 195 U. S. 27, 64, 49 L. ed. 78, 99, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561.

1. The evils.³

The evils with which the people of Washington were confronted arose partly from

² See Report of the State of Washington Bureau of Labor (1915, 1916), pp. 120, 121.

"The free agencies, we are pleased to be able to say, are growing in popularity, and while they do not advertise their business with the same thrift that the other fellows did, they are coming into general service. There are three services of this kind: The private agency that receives all compensation from employers, either by the month, year, or per the service rendered;

the Federal agency, and the municipal agency; these latter two have offices in the larger places and are doing good work and the service is free to both employee and the employer. In the smaller cities and towns the Federal is the prevailing agency and the postmaster of the place is usually the local representative."

³ The evils incident to private employment agencies first arrested public attention in America about 1890. During the fifteen years preceding the enactment of the Wash-

*the abuses incident to the system of private employment agencies and partly from its inadequacy.

(a) The abuses.

These are summarized in a report published by the United States Bureau of Labor in October, 1912,⁴ thus:

"Private employment agencies, which charge a fee for their services, are found in every city of any size in the United States. The nature of their business is such as to make possible most iniquitous practices. Their patrons are frequently men and women with only a dollar or two, which they are eager to give up for the opportunity of earning more. They are often of small intelligence and easily duped. Stories of how these agencies have swindled and defrauded those who sought employment through them are heard universally. Some of the more common of the fraudulent methods said to be used by these agencies are the following:

"1. Charging a fee and failing to make any effort to find work for the applicant.

"2. Sending applicants where no work exists.

"3. Sending applicants to distant points where no work or where unsatisfactory work exists, but whence the applicant will not return on account of the expense involved.

"4. Collusion between the agent and employer, whereby the applicant is given a few days' work and then discharged to make way for new workmen, the agent and employer dividing the fee.

"5. Charging exorbitant fees, or giving jobs to such applicants as contribute extra fees, presents, etc.

"6. Inducing workers, particularly girls, who have been placed, to leave, pay another fee, and get a "better job."

*"Other evils charged against employment agents are the congregating of persons for gambling or other evil practices, collusion with keepers of immoral houses, and the sending of women applicants to houses of prostitution; sometimes employment offices are maintained in saloons, with the resulting evils."

In the report to Congress of the United States Commission on Industrial Relations, created by Act of August 23, 1912 (chap. 351, 37 Stat. at L. 415, Comp. Stat. 1916,

§ 8913), which gave public hearings on the subject of employment offices in May, 1914, the abuses are found to be as follows:⁵

"23. There are many private employment agents who try to conduct their business honestly, but they are the exception rather than the rule. The business as a whole reeks with fraud, extortion, and flagrant abuses of every kind. The most common evils are as follows:

"Fees are often charged out of all proportion to the service rendered. We know of cases where \$5, \$9, \$10, and even \$16 apiece has been paid for jobs at common labor. In one city the fees paid by scrub-women is at the rate of \$24 a year for their poorly paid work. Then there is discrimination in the charges made for the same jobs. Often, too, men are sent a long distance, made to pay fees and transportation, only to find that no one at that place ordered men from the employment agent. A most pernicious practice is the collusion with foremen or superintendents by which the employment agent 'splits fees' with them. That is, the foreman agrees to hire men of a certain employment agent on condition that one fourth or one half of every fee collected from men whom he hires be given to him. This leads the foreman to discharge men constantly in order to have more men hired through the agent and more fees collected. It develops the 'three-gang' method so universally complained of by railroad and construction laborers, namely, one gang working, another coming to work from the employment agent, and a third going back to the city.

"Finally, there is the most frequent abuse,—misrepresentation of terms and condition of employment. Men are told that they will get more wages than are actually paid, or that the work will last longer than it actually will, or that there is a boarding house when there really is an insanitary camp, or that the cost of transportation will be paid, when it is to be deducted from the wages. They are not told of other deductions that will be made from wages; they are not informed about strikes that may be on at the places to which they are sent, nor about other important facts which they ought to know. These misrepresentations, it must be said,

ington law there were repeated investigations, official and unofficial, and there was much discussion and experimentation. See Free Public Employment Offices in the United States; U. S. Bureau of Labor, Bulletin No. 68, p. 1; Statistics of Unemployment and the Work of Employment Offices, U. S. Bureau of Labor Bulletin 109, p. 5; Subject Index of the U. S. Bureau of Labor Statistics, Bulletin No. 174, pp. 85-

87; Munro, Bibliography of Municipal Government, pp. 379-381.

⁴ United States Bureau of Labor Bulletin No. 109, p. 36.

⁵ Final Report and Testimony submitted to Congress by the Commission on Industrial Relations created by the Act of August 23, 1912, 64th Congress, 1st Session, Doc. 415, vol. 1, pp. 109-111. See also vol. 2, pp. 1165-1440.

are often as much the fault of the employer as of the labor agent. Also the employer will place his call for help with several agents, and each will send enough to fill the whole order, causing many to find no jobs. Labor agents and laborers alike are guilty of the misuse of free transportation furnished by employers to prospective help. And it is true also that many applicants perpetrate frauds on the labor agents themselves; as, for example, causing them to return fees when positions actually were secured. This is the result of the general feeling that the whole system of paying fees for jobs is unjust; and if they must pay in order to get work, then any attempt to get the fee back is justifiable."

(b) The inadequacy.

But the evils were not limited to what are commonly called abuses—like the fraud and extortion described above. Even the exemplary private offices charging fees to workers might prove harmful, for the reason thus stated in the report to Congress of the United States Commission on Industrial Relations, cited *supra*.

*18. . . . Investigations show, however, that instead of relieving unemployment and reducing irregularity, these employment agencies actually serve to congest the labor market and to increase idleness and irregularity of employment. They are interested primarily in the fees they can earn, and if they can earn more by bringing workers to an already overcrowded city, they do so. Again, it is an almost universal custom among private employment agents to fill vacancies by putting in them people who are working at other places. In this way new vacancies are created and more fees can be earned.

"19. They also fail to meet the problem because they are so numerous and are necessarily competitive. With few exceptions, there is no co-operation among them. This difficulty is further emphasized by the necessity of paying the registration fees required by many agencies; obviously the laborer cannot apply to very many if he has to pay a dollar at each one.

6 "It is not necessary here to enter into the relative merits of governmental regulation and governmental operation. Suffice it to say that twenty-four states and the District of Columbia have attempted to regulate private employment agencies and have made a miserable failure of it. The business lends itself easily to fraud and imposition, and it is far more true of the private agencies than of the public offices that they have been frauds as well as failures."

Public Employment Offices—W. M. Leiserson, 29 Political Science Quarterly (March, 1914), p. 36.

"The United States possesses at the pres-

"20. The fees which private employment offices must charge are barriers which prevent the proper flow of labor into the channels where it is needed and are a direct influence in keeping men idle. In the summer, when employment is plentiful, the fees are as low as 25 cents, and men are even referred to work free of charge. But this must necessarily be made up in the winter, when work is scarce. At such times, when men need work most badly, the private employment offices put up their fees and keep the unemployed from going to work until they can pay \$2, \$3, \$5, and even \$10 and more for their jobs. This necessity of paying for the privilege of going to work, and paying more the more urgently the job is needed, not only keeps people unnecessarily unemployed, but seems foreign to the spirit of American freedom and opportunity.

"21. An additional injustice inevitably connected with labor agencies which charge fees is that they must place the entire cost of the service upon those least able to bear it. Employment agents say that employers will not pay the fees; hence they must charge the employees. Among the wage earners, too, however, those who are least in need and can wait for work pay the least for jobs and even get them free, while those who are most in need make up for all the rest and pay the highest fees. The weakest and poorest classes of wage earners are therefore made to pay the largest share for a service rendered to employers, to workers, and to the public as well."

2. The remedies.

During the fifteen years preceding 1914 there had been extensive experimentation in the regulation of private employment agencies. Twenty-four states had attempted *direct* regulation under statutes, often supplemented by municipal ordinances.⁶ Nineteen states had attempted *indirect* regulation through the competition of state offices, and seven others through competition of municipal offices.⁷ Other experiments in indirect regulation through com-

ent time no adequate system, either state or national, for the regulation of private employment agencies, either from the point of view of the content of the laws, affording regulations of the business and restrictions as to how the business shall be carried on, or as to proper methods of enforcement." (Labor Laws and Their Enforcement, edited by Susan M. Kingsbury [Boston, 1911] p. 366. See chapter 6 of this work for a study of the regulation of private employment agencies by Mabelle Moses. See also chapter 663, Laws of 1913, state of Wisconsin.)

⁷ Proceedings of the Association of Pub-

petition were made by voluntary organizations, philanthropic, social, and industrial.⁸ The results of those experiments were unsatisfactory. The abuses continued in large measure; and the private offices survived to a great extent the competition of the free agencies, public and private. There gradually developed a conviction that the evils of private agencies were inherent and ineradicable, so long as they were permitted to charge fees to the workers seeking employment. And many believed that such charges were the root of the evil.

On September 25, 1914, the American Association of Public Employment Offices adopted at its annual meeting the following resolutions:

"Resolved, That this association go on record as favoring the elimination as soon as possible, of all private employment agencies operating for a profit within the United States, and that it recommends to the consideration of the United States Commission on Industrial Relations and Congress and the various state legislatures legislation having this end in view."

The United States Commission on Industrial Relations declared in its report to Congress:⁹

"24. Attempts to remove these abuses by regulation have been made in thirty-one states, but with few exceptions they have proved futile, and at most they have served only to promote a higher standard of honesty in the business and have not removed the other abuses which are inherent in the system. Where the states and cities have spent much money for inspectors and complaint adjusters there has been considerable improvement in the methods of private employment agencies, but most of the officers in charge of this regulation testify that the abuses are in 'the nature of the business' and never can be entirely eliminated. They therefore favor the total abolition of private labor agencies. This is also the common opinion among working people, and in the several states attempts have already been made to accomplish this by law."

But the remedies proposed were not limited to the suppression of private offices charging fees to workers, and the extension of the system of state and municipal offices. The conviction became widespread that, for the solution of the larger problem of unem-

ployment, the aid of the Federal government and the utilization and development of its extensive machinery was indispensable. During the seven years preceding 1914 a beginning had been made in this respect. The Immigration Act of February 20, 1907 (chap. 1134, 34 Stat. at L. 898, 909, Comp. Stat. 1916, §§ 4242, 960), created within the Bureau of Immigration and Naturalization a Division of Information, charged with the duty of promoting "a beneficial distribution of aliens." The services rendered by this division included, among others, some commonly performed by employment agencies. While it undertook to place in positions of employment only aliens, its operations were national in scope. The Act of March 4, 1913, creating the Department of Labor, resulted in a transfer of the Bureau of Immigration, including the Division of Information, to that department. 37 Stat. at L. 736, chap. 141, Comp. Stat. 1916, § 932. By this transfer the scope of the division's work was enlarged to correspond with the broad powers of the Labor Department. These were declared by Congress to be:

"to foster, promote and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment."

Then its efforts "to distribute" (that is both to supply and to find places for) labor were extended to include citizens as well as aliens; and much was done to develop the machinery necessary for such distribution. In the summer of 1914, and in part before the filing in the state of Washington of the proposal for legislation here in question, action had been taken by the Department of Labor which attracted public attention. It undertook to supply harvest hands needed in the Middle West and also to find work for the factory hands thrown out of employment by the great fire at Salem, Massachusetts, June 25, 1914.¹⁰ The division was strengthened by co-operation with other departments of the Federal government (Agriculture, Interior, Commerce, and the Post-office, with its 60,000 local offices) and with state and municipal employment offices. As early as June 13, 1914, the United States Department of Labor had also sought the co-operation in this work of all the leading

lie Employment Offices (September 25, 1914), U. S. Dep. of Labor, Bureau of Labor Statistics, Bulletin 192, p. 61.

⁸ Unemployment and Work of Employment Offices, Bulletin of U. S. Bureau of Labor No. 109, pp. 5, 37 (October, 1912).

⁹ Made in August, 1915, and cited supra, Note 4. Between 1914 and this date six

states had legislated on the subject. See Unemployment Survey, 1914, 1915. 5 American Labor Legislation Review, p. 560.

¹⁰ The fire was so extensive that the Congress appropriated \$200,000 for relief of all sufferers (Act of August 1, 1914, chap. 223, 38 Stat. at L. 681).

newspapers in America, including those printed in foreign languages.¹¹

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3. Conditions in the state of Washington.

The peculiar needs of Washington emphasized the defects of the system of private employment offices.

(a) The evils.

The conditions generally prevailing are described in a report recently published by the United States Department of Labor, thus: ¹²

"In no part of the United States perhaps is there so large a field for employment offices as in the Pacific states. As has been noted, industrial conditions there favor inconstancy of employment. Much of the business activity is based upon the casual, short-time job. This in itself means the frequent shifting of workers from place to place. And the shifting is the more difficult, as much of the work offered is in more or less remote districts of the country. . . .

The necessity laid upon so many workers of constantly seeking new jobs opens a peculiarly fertile field for their exploitation by unscrupulous private employment agencies. There is much testimony to the fact and frequency of such exploitation. The most striking evidence of this is that in the state of Washington private agencies made themselves so generally distrusted that in 1915 their complete abolition was ordered by popular vote. . . .

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Prior to 1914 there was practically no legislation regarding private employment agencies, and there had been no attempt at state supervision of their conduct. But distrust of such agencies was constantly increasing and culminated in the year mentioned in the passage by popular initiative of an act aiming at the total suppression of all private employment agencies of the commercial type."

The reports of the Washington State Bureau of Labor give this description:

"The investigations of the Bureau show that the worst labor conditions in the state are to be found on highway and railroad construction work, and these are largely because the men are sent long distances by the employment agencies, are housed and fed poorly at the camps, and are paid on an average of \$1.75 to \$2.25 a day, out of which they are compelled to pay \$5.50 to \$7 per week for board, generally a hospital fee of some kind, always a fee to the employment agency and their transportation to the point where the work is being done. The consequence is that they usually have but little money left when the work is finished, and if, as frequently happens, they work only a week or two and are then discharged, they are in as bad a situation as they were before they went to work, and sometimes worse, if they do not have enough money to get back to the place from which they started."¹³

"That the honest toiler was their victim there is no question: not alone of a stiff fee for the information given, but a systematic method was adopted in order to keep the business going. Managers of agencies and managers of jobs, their superintendents, foremen, or subforemen, were in this scheme for fleecing the workingman. Men in large numbers would be sent to contract jobs, and if on the railroads 'free fare' was part of the inducement, or perhaps the agency would charge a nominal fee if the distance was great, and this, too, would become a perquisite of the bureau, to finally go through the clearing house. In many cases men would be unsatisfactory; at least they would be told so, discharged in a few days and sent adrift as poor, may be poorer, than when they came there. New men would have to be secured, and thus the

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¹¹ Annual Report of the Secretary of Labor, 1914, pp. 48-55; Monthly Review of the U. S. Bureau of Labor Statistics, July, 1915, p. 8; see also Annual Report of the Secretary of Labor, 1915, p. 36; "Interdepartmental co-operation.—Through the co-operation of the Postoffice Department it became possible to bring to the aid of this labor-distribution service some 60,000 post-offices and thereby to create a network of communication between employers needing help without knowing where to get it and workers wanting employment without knowing where to find it. Either employer or workman may obtain at any postoffice in the United States a blank application supplied by this department, which, after filling out and signing it, he may deposit in the mails anywhere, free of postage." "Employment bulletins.—The bulletins contain a statement of unmatched applications, no

matter what part of the country they may come from. It is not expected, of course, that applications for work of a minor character will ordinarily be matched by applications for workers of that kind from distant stations. It is assumed, however, that bulletined applications may possibly be matched through the co-operation of near-by stations within a reasonable radius. The bulletins are also systematically sent to such newspapers as have indicated their desire to receive them for possible publication as news matter of interest to their respective readers."

¹² Labor Laws and their Administration in the Pacific States. United States Department of Labor, Bureau of Labor Bulletin No. 211 (1917), pp. 17, 18.

¹³ Washington State Bureau of Labor. Report 1913, 1914, pp. 27, 28.

thing would go on revolving. So it went until at last it became so obnoxious that the public indignation was at length aroused, resulting in the passing of a law doing away with them."¹⁴

The abuses and the inadequacy of the then existing system are also described by state officials in affidavits included in the record.

(b) The remedies.

Washington had not tried direct regulation of private employment offices, but that method was being considered as late as 1912.¹⁵ Its people had had, on the other hand, exceptional opportunities of testing public employment offices. The municipal employment office established at Seattle in 1894 under an amendment of the city charter is among the oldest public offices in the United States. Takoma established a municipal office in 1904, Spokane in 1905, and Everett in 1908.¹⁶ The continuance and increase of these municipal offices indicate that their experience in public employment agencies was at least encouraging. And the low cost of operating them was extraordi-

nary. In Spokane the fees charged by private agencies ranged from \$1 upward, and were usually about \$2.17 In the Seattle free municipal agency the cost of operation, per position filled, was reduced to a trifle over 4 cents.¹⁸ The preliminary steps for establishing "Distribution Stations" under the Federal system, including one at Seattle, had been taken before the passage of the Washington law.¹⁹ Later branch offices were established in thirteen other cities.²⁰

*4. The fundamental problem.

The problem which confronted the people of Washington was far more comprehensive and fundamental than that of protecting workers applying to the private agencies. It was the chronic problem of unemployment,—perhaps the gravest and most difficult problem of modern industry,—the problem which, owing to business depression, was the most acute in America during the years 1913 to 1915.²¹ In the state of Washington the suffering from unemployment was accentuated by the lack of staple industries operating continuously through-

¹⁴ Washington State Bureau of Labor. Report 1915, 1916, p. 120.

¹⁵ Washington State Bureau of Labor, 1911-1912. Report of Commissioner, p. 16: "It has been demonstrated that state control of employment agencies is the most effective way to properly regulate them. I would earnestly recommend a state law similar to the one in Illinois that went into effect July 1, 1911, and has proven to be the best law for this purpose in this country."

¹⁶ The first free public employment office in the United States was the municipal agency established in Cleveland in 1890. Then followed (in 1893) the Los Angeles office. Bulletin of United States Bureau of Labor No. 68, p. 1 (Jan. 1907).

¹⁷ Washington State Bureau of Labor Report 1913, 1914, p. 291.

W. D. Wheaton, Labor Agent.—"The complaint against the private office is almost universal. The experience of this office is that private agencies charge all that the traffic will bear and that in hard times, when work is scarce and the worker poverty-stricken, the fee is placed so high as to be almost prohibitive, and the agencies take longer chances, sometimes sending men on only a rumor, depending on their financial straits to make it impossible to return."

"The fees charged run from \$1 for the poorest job of uncertain duration to as high as 10 per cent of the first year's salary in educational lines, and 30 per cent of the first month's salary in office or mercantile lines. Most of the agencies catering to the better class of positions charge a registration fee which is worked to the limit—or rather without limit. Advertisements for attractive positions are placed with the

newspapers and registration is made of all that apply, irrespective of whether the position has been filled or not, and generally at a fee of \$2 or more. This registration fee is always followed by a percentage of the earnings when a position is secured, but only a small proportion of those registering are placed in positions.

"The average charge per position in all agencies will run high, and yet the applicant cannot have a feeling of security in the position obtained for the reason that the great majority of private agencies are primarily interested in the fee, and are not as careful in placing applicants as they would be did the possibility of another fee not exist."

¹⁸ United States Bureau of Labor Bulletin No. 109, p. 136.

"The extremely low cost of each position filled is noteworthy, as is the large number of positions secured. A total of 37,834 positions were filled in 1906, and in 1909, 38,846. The cost per position was lowest in 1906, only 4.03 cents. Only twice since 1897 has the average cost gone above 6 cents."

¹⁹ See Report of Secretary of Labor, 1914, p. 51.

²⁰ "Aberdeen, Bellingham, Custer, Everett, Friday Harbor, Lynden, Noosack, North Yakima, Port Angeles, Port Townsend, Spokane, Takoma, Walla Walla. Monthly Review of U. S. Labor Statistics, July, 1915, p. 9. See Report of Secretary of Labor, 1915, p. 36; 1916, p. 54. Hearings Committee on Labor, on H. R. 5783, to establish a National Employment Bureau. 64th Cong. 1st Session, February, 1916, p. 49.

²¹ The Unemployment Crisis of 1914, 1915, 5 American Labor Legislation Review, p. 475.

out the year and by unusual fluctuations in the demand for labor, with consequent reduction of wages and increase of social unrest.²² Students of the larger problem of unemployment appear to agree that establishment of an adequate system of employment offices or labor exchanges²³ is an indispensable first step toward its solution.

²² Washington State Bureau of Labor Report, 1913, 1914, pp. 13, 16, 17. Unemployment Survey, 5 American Labor Legislation Review, 482, 483 (1915).

²³ Recent Advances in the Struggle against Unemployment, by Prof. Charles R. Henderson, 2 American Labor Legislation Review, 105, 106 (1911). "The point of starting ameliorative effort is the employment agency or 'labor exchange.'"

"When we compare the ordinary employment office with the board of trade for cotton or grain, or with the bankers' clearing house, we begin to realize how belated, rudimentary, and primitive our present labor exchange is. Yet the issues at stake are quite as vital in the case of demand and supply in the labor market as in the stock and grain exchange."

A Problem of Industry, 4 American Labor Legislation Review, p. 211:

"The labor market is unorganized, resulting in confusion, waste, and loss to employers and employees. It means suffering to individual workers and their families, a lowering of the standard of living, impaired vitality and efficiency, and a tendency for the unemployed to become unemployable, dependent, degraded. In fact, the demoralizing effect of unemployment upon the individual is matched only by its wastefulness to society."

The Prevention of Unemployment, 5 American Labor Legislation Review, p. 176:

"An essential step toward a solution of the problem of unemployment is the organization of the labor market through a connected network of public employment exchanges. This is vitally important as a matter of business organization, and not of philanthropy. It is of as much importance for the employer to find help rapidly and efficiently as it is for the worker to find work without delay. The necessity of organized markets is recognized in every other field of economic activity, but we have thus far taken only timid and halting steps in the organization of the labor market. The peddling method is still, even in our 'efficient' industrial system, the prevalent method of selling labor. Thus a purely business transaction is carried on in a most businesslike, not to say medieval, manner."

Public Employment Bureaus, Charles B. Barnes, 5 American Labor Legislation Review, p. 195:

"Unemployment is no longer intermittent in this country; it has come to be a chronic condition which needs to be dealt with in a regular and systematic manner. The first step in properly dealing with this situation is the establishing of a se-

There is reason to believe that the people of Washington not only considered the collection by the private employment offices of fees from employees a social injustice,²⁴ but that they considered the elimination of the practice a necessary preliminary to the establishment of a constructive policy for dealing with the subject of unemployment.²⁵

ries of co-operating public employment bureaus."

The unemployed in Philadelphia, Department of Public Works (1915) p. 113.

What is done for the Unemployed in European Countries, U. S. Bureau of Labor Bulletin, No. 76, pp. 741-934; The British System of Labor Exchanges, U. S. Bureau of Labor Statistics, No. 206.

²⁴ Washington State Employment Agency Referendum, by W. M. Leiserson, 33 Survey, 87 (October 24, 1914):

"Anyone who knows the employment agency business and everyone who has tried earnestly to regulate private agencies will testify to the futility of regulation.

"But the inherent justice of the proposed Washington act can be shown in a better way. Ask the employment agent to whom he rendered the service, and he will answer 'to employer and to employee.'

"Then why don't you charge the employer?"

"It is impossible. If we depended upon employers for our fees, we would have to go out of business. They simply will not pay."

"Every time this question is put to employment agents the answer is the same: 'We charge the worker because we can get the fee from him and we cannot get it from the employer.'

"This is the downright wrong against which Washington Initiative No. 8 is directed."

²⁵ General Discussion on Unemployment, 5 American Labor Legislation Review, p. 451; T. S. McMahon, Univ. of Washington.

"The people of the state of Washington are not indifferent to the problem of unemployment, nor do they show any tendency to offer charitable panaceas as a permanent remedy. They are trying to work out some constructive policy, and as a preliminary step have made it illegal for employment offices to charge fees for jobs.

"A bill will be presented to the next legislature for the establishment of a network of public employment offices all over the state. This will make possible the complete organization of the labor market, which we hope is the first step toward the organization of industry itself.

"The aggressive attitude of the leaders among the workers has impressed upon the mind of the people the fact that the problem will have to be met in another way than by providing food and clothing for a period of distress such as we are passing through at the present time.

"I believe that this attitude on the part of the working people, which is character-

(244 U. S. 499)

It is facts and considerations like these which may have led the people of Washington to prohibit the collection by employment agencies of fees from applicants for work. And weight should be given to the fact that the statute has been held constitutional by the supreme court of Washington and by the Federal district court (three judges sitting),—courts presumably familiar with the local conditions and needs.

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In so far as protection of the applicant is a specific purpose of the statute, a precedent was furnished by the Act of Congress, December 21, 1898, 30 Stat. at L. 755, 763, chap. 28, Comp. Stat. 1916, §§ 8306, 8323 (considered in *Patterson v. The Eudora*, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821), which provides, among other things:

"If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be liable to a penalty of not more than \$100."

In so far as the statute may be regarded as a step in the effort to overcome industrial maladjustment and unemployment by shifting to the employer the payment of fees, if any, the action taken may be likened to that embodied in the Washington Workmen's Compensation Law (sustained in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260), whereby the financial burden of industrial accidents is required to be borne by the employers.

As was said in *Holden v. Hardy*, 169 U. S. 366, 387, 42 L. ed. 780, 789, 18 Sup. Ct. Rep. 383.

"In view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employees as they arise."

In my opinion, the judgment of the District Court should be affirmed.

Mr. Justice Holmes and Mr. Justice Clarke concur in this dissent.

istically western, will do more towards the solution of this problem than perhaps we, who discuss it in a theoretical way, can accomplish. They do have some plan of action, and some definite program. Either we shall have to work out some program of ultimate solution of unemployment, or we will have to accept the solution they are offering us. The one they are offering us is socialism."

ROBERT L. GREENE, Auditor, Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of State, Constituting the Board of Valuation and Assessment for the State of Kentucky, et al., Appts.,
v.

LOUISVILLE & INTERURBAN RAILROAD COMPANY. (No. 617.)

ROBERT L. GREENE, Auditor, Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of State, Constituting the Board of Valuation and Assessment for the State of Kentucky, et al., Appts.,
v.

LOUISVILLE RAILWAY COMPANY.
(No. 618.)

TAXATION ⇐608(5) — INJUNCTION—RESTRAINING ENFORCEMENT OF ILLEGAL TAXES—JURISDICTION.

1. A court of equity has jurisdiction of suits to enjoin action looking to the enforcement of taxes upon the intangible property of public service corporations assessed under state authority, upon the ground of discrimination in valuation arising out of systematic undervaluation of other taxable property, where the bills assert that the unauthorized illegal valuation constitutes a cloud and a lien upon the plaintiff's property, and that, unless restrained, numerous and vexatious suits will be instituted to foreclose such lien, together with civil, penal, or criminal proceedings based upon plaintiff's supposed delinquency in the payment of taxes.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1234.]

STATES ⇐191(2)—IMMUNITY FROM SUIT—SUIT AGAINST STATE OFFICERS—ENJOINING ILLEGAL TAXES.

2. State officers charged with the duty of enforcing the tax laws of the state may be enjoined by a Federal court of equity from taking steps looking to the enforcement of state and local taxes upon the intangible property of a public service corporation, assessed under state authority, which are asserted to violate the Federal Constitution because of a discrimination in the valuation of the property upon which the taxes are based, arising out of systematic undervaluation of other taxable property, although the state laws under the sanction of which the officers assumed to act in making the assessment do not contemplate any unlawful discrimination.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 181.]

COURTS ⇐282(3)—FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

3. A Federal district court has jurisdiction, irrespective of the citizenship of the parties, of the controversy presented by bills which seek to enjoin state officers from taking steps looking to the enforcement of state and local taxes upon the intangible property of a public service corporation, assessed under state authority, upon the ground that the action of those officers in making the assessments, and their threatened action in respect of carrying them in-

to effect, constitute action by the state which, if carried out, will violate U. S. Const. 14th Amend., as denying the equal protection of the laws.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 822, 823.]

COURTS ⇨263—**FEDERAL COURTS—JURISDICTION—QUESTIONS NOT ALL FEDERAL—APPEAL—EXTENDING REVIEW BEYOND FEDERAL QUESTION.**

4. The jurisdiction of a Federal district court in a suit presenting a Federal question, and that of the Federal Supreme Court on appeal, extends to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the Federal question, or whether it be found necessary to decide it at all.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800.]

TAXATION ⇨45—**UNIFORMITY—CORPORATE AND INDIVIDUAL PROPERTY.**

5. A departure from the requirement of Ky. Const. §§ 171, 174, of uniform taxation in proportion to value, and of an identical rate as between corporate and individual property, is not permitted as to railway companies by the provision of § 182, that the general assembly shall provide by law "how railroads and railroad property shall be assessed and how taxes thereon shall be collected," but the latter provision relates merely to the mode of assessment and collection.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 100-103.]

TAXATION ⇨608(5) — **RESTRAINING ILLEGAL TAXATION—UNEQUAL ASSESSMENT.**

6. Discriminatory taxation contravening the express requirements of a state Constitution is not beyond redress by injunction in the Federal courts, their jurisdiction being properly invoked, when the discrimination results from divergent action by different assessing boards whose assessments are not subject to any process of equalization established by the state, and where the diverse results are the outcome of the intentional, systematic, persistent undervaluation by one body of officials, presumably known to and ignored by the other body, so that the two bodies act in effect in concert.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1234.]

TAXATION ⇨608(5) — **RESTRAINING ILLEGAL TAXATION—UNEQUAL ASSESSMENT.**

7. The requirement of Ky. Const. § 172, that all property "shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale," will not prevent injunctive relief against steps looking to the enforcement of certain state and local so-called franchise taxes, based upon an assessment of the intangible property of a public service corporation by the State Board of Valuation and Assessment at not more than its fair cash value, where the local assessing officers charged with valuing other classes of property systematically undervalue such

property, since to apply to one class of property the standard of fair cash value, systematically departed from with respect to other classes of property, would frustrate the principal object of that section, which, in view of the provisions of §§ 171 and 174, requiring uniformity of taxation in proportion to value, and an identical rate as between corporate and individual property, must be deemed to be equal taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1234.]

TAXATION ⇨608(5) — **RESTRAINING ILLEGAL TAXATION—REMEDY AT LAW.**

8. A public service corporation may sue in equity to restrain state officers from taking steps looking to the enforcement of certain state and local so-called franchise taxes on the ground of discrimination in valuation of the intangible property upon which such taxes are based, notwithstanding the remedy afforded by Ky. Stat. § 162, directing the state auditor to refund taxes unlawfully collected, such remedy being inadequate to prevent equitable relief for two reasons: (a) by the decisions of the Kentucky courts this section is confined to cases where the taxes paid were wholly without warrant in law, or based upon a mistake as to the rate of taxation upon the amount assessed; (b) the bills deal with both state and local taxes, while this section applies to state taxes alone.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1234.]

TAXATION ⇨608(5) — **RESTRAINING ILLEGAL TAXATION—REMEDY AT LAW.**

9. Equitable relief to public service corporations against the certification and enforcement by state officers of state and local so-called franchise taxes upon the ground of a discrimination in the valuation of the intangible property of the corporations upon which the taxes are based, arising out of systematic undervaluation of other taxable property, may not be denied upon the theory that, under Ky. Stat. §§ 4115-4120, 4123, a method is provided by which, instead of lowering the assessments upon their property, they could, by proper procedure, compel the assessment of the property of other taxpayers to be increased, so as to come within the requirement of Ky. Const. § 172 as to fair cash value, where there is nothing in these provisions to indicate that parties situated as are these corporations, who have no different interests in the undervaluation by the local assessors from that which might be possessed by any other citizens, are entitled to be heard to complain that such assessments are too low, nor is any case cited where such a complaint has been entertained, the remedy of reassessment being a public, not a private, remedy.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1234.]

[Nos. 617 and 618.]

Argued January 16, 17, and 18, 1917. Decided June 11, 1917.

TWO APPEALS from the District Court of the United States for the Eastern District of Kentucky to review decrees enjoining state officers from taking action looking to the enforcement of certain state and local so-called franchise taxes assessed against public service corporations under state authority upon the ground of a discrimination in valuation of the intangible property upon which the taxes are based, arising out of systematic undervaluation of other taxable property. Affirmed.

The facts are stated in the opinion.

Mr. Marvel M. Logan, Attorney General of Kentucky, and Messrs. Charles Carroll and John L. Rich, for appellants.

Messrs. Alexander Pope Humphrey and Edward P. Humphrey for appellees.

*Mr. Justice Pitney delivered the opinion of the court:

These are companion cases, involving similar questions, were argued together, and may be disposed of in a single opinion. Appellees are corporations organized under the laws of the state of Kentucky, one of which (the Louisville & Interurban Railroad Company) operates, as a common carrier, passenger and freight lines of railroad in three of the counties of that state and in various municipalities and taxing districts in those counties; while the other (the Louisville Railway Company) operates, as a common carrier, passenger and freight lines of street railway in the city of Louisville and in Jefferson county, outside of that city. They filed their several bills of complaint in the district court against Henry M. Bosworth and others, then constituting the Board of Valuation and Assessment of the State of Kentucky (Bosworth being also auditor of public accounts), and against the attorney general of the state and his assistants, suing them all, both individually and in their official capacities, for an injunction to restrain steps looking to the certification and enforcement of what are called "franchise taxes" attempted to be assessed upon the respective complainants for the year 1915 under § 4077 and succeeding sections of the Kentucky Statutes, upon the ground of discrimination in the valuation of the franchises; they having been assessed, as alleged, on the basis of 75 per cent of actual values, while taxable property in general was assessed systematically and intentionally at not more than 52 per cent of actual values. There being no diversity of citizenship, the jurisdiction of the district court was invoked, under the first paragraph of § 24, Judicial Code [36 Stat. at L. 1091, chap. 231, Comp. Stat. 1916, § 991 (1)], upon the ground that the suits arose under the

"due process" and "equal protection" clauses of the 14th Amendment of the Constitution of the United States, and that the matter in dispute in each case was in excess of the jurisdictional amount. Plaintiffs also relied upon certain provisions of the Constitution of the state that require uniform taxation of property according to value and at the same rate for corporate as for individual property. By supplemental bills the successors in office of the original defendants were made parties, in both their individual and official capacities. In each case there was a motion to dismiss, equivalent to a general demurrer to the bill, upon the following grounds: (1) that there was no Federal question involved, and therefore the court was without jurisdiction; (2) that the bills stated no cause of action under the laws of the state or of the United States; (3) that the plaintiffs had an adequate remedy at law; (4) that the bills showed no equity on their face; and (5) that the suits were suits against the state of Kentucky. After a hearing, the court overruled these motions, defendants declined to plead further and made no objection to the submission of the cases for final decrees, the allegations of the bills, not being denied, were taken as true, and final decrees were made granting relief against the enforcement of the disputed assessments, and restraining the imposition of franchise taxes upon plaintiffs for the year 1915, based on assessments to their franchises at greater values than those conceded in the respective bills of complaint, which were 60 per cent of actual values. The court, in reaching this conclusion, followed its own previous decisions in *Louisville & N. R. Co. v. Bosworth*, 209 Fed. 380, 230 Fed. 191. Defendants appealed directly to this court, under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1916, § 1215].

The cases were submitted here at the same time with cognate cases this day decided, viz.: Nos. 778 and 779, *Louisville & N. R. Co. v. Greene* [244 U. S. 522, 61 L. ed. —, 37 Sup. Ct. Rep. 683] and Nos. 642-645, *Illinois C. R. Co. v. Greene* [244 U. S. 555, 61 L. ed. —, 37 Sup. Ct. Rep. 697].

In the present cases, the assignments of error and the argument for appellants are based upon the refusal to dismiss the bills of complaint, no criticism being made as to the particular relief granted by the final decrees.

The bills are substantially identical in form, and an outline of the one filed by the Louisville & Interurban Railroad Company (No. 617) will suffice. Following a prefatory statement of jurisdictional matters and a description of the parties, it avers in

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substance that the State Board of Valuation and Assessment, having ascertained by a process not here criticized what, in their judgment, was the fair cash value of plaintiff's "capital stock," took 75 per cent of the result, and thus fixed the valuation of the capital stock for the purposes of the assessment for the year 1915 at \$2,250,000; deducted therefrom the amount of plaintiff's tangible property assessed for state taxes,—\$813,619,—thus fixing the value of the "franchise" at \$1,436,381; and ascertained the state taxes thereon as follows: state tax, generally, at 50 cents, \$7,181.90; state road tax, at 5 cents, \$718.19; a total of \$7,900.09. That plaintiff protested, but to no avail. That the assessment subjects plaintiff to state taxes upon the whole of its capital stock, and to county taxes in the three counties on proportionate parts of it, and to additional taxes in the cities and other municipalities and taxing districts through which its railroad runs. Plaintiff avers that for many years past, including the taxing year 1914-1915, the taxes for which are here in controversy, the local assessors and other assessing officers of the state of Kentucky have habitually, intentionally, systematically, and generally assessed the property of individuals and of corporations within their sphere of duty, comprising 80 per cent of the total taxable property, at not exceeding 52 per cent of its fair cash value, estimated at the price which it would bring at a fair and voluntary sale; that the fact of such systematic assessment upon that basis annually for many years past has been a matter of public notoriety in the state; "whereas the said Bosworth, Rhea, and Crecilius, acting as the State Board of Valuation and Assessment, after ascertaining what, in their judgment, was the fair cash value of plaintiff's capital stock, reduced said value only to the extent of taking 75 per cent thereof, instead of taking 52 per cent, the average rate applied by assessing officers to the vast body of property in this state." It is averred that Bosworth, Rhea, and Crecilius have denied to plaintiff the benefit of equalization, and that thereby plaintiff has been deprived of its property without due process of law and denied the equal protection of the laws, in violation of the 14th Amendment and the Constitution and laws of the state; that plaintiff has paid the state and county taxes upon its tangible property for the year in controversy so far as they have been demanded, and also has paid the state taxes upon its franchise as arrived at by taking the value of its capital stock and taking 60 per cent of such valuation and deducting therefrom the valuation of plaintiff's tangible property; that Bosworth, Rhea, and

Crecilius, unless enjoined, will certify to the county clerks of the three counties mentioned the amounts claimed to be due to said counties and the taxing districts thereof by reason of the valuation they have assumed to make as above stated; the county clerks will thereupon certify said assessments respectively to the tax collectors for the said counties and the taxing districts therein for collection; and said collecting officers will proceed to make collections and to institute unwarranted, vexatious, and multitudinous suits and proceedings at law against plaintiff; that unless enjoined the said Bosworth or his deputy will enter in account with the treasurer of the state the amount of taxes based upon the valuation aforesaid, and the said attorney general and his assistants will institute civil or penal actions or procure indictments against plaintiff, based upon its supposed delinquency in the payment of taxes; and that the unauthorized and illegal valuation constitutes a cloud and, as claimed by defendants, constitutes a lien upon plaintiff's property in the commonwealth, and unless defendants are enjoined numerous and vexatious suits will be instituted to enforce or foreclose such lien. There is an appropriate prayer for injunction and for general relief.

It does not appear, from any express averment in the bills, that other property owners have been subject to discrimination precisely like that of which plaintiffs complain; but the entire argument for defendants, in these cases and others argued with them, proceeds upon the theory that the Board of Valuation and Assessment treated all taxpayers alike over whom they had jurisdiction; hence, it is fair to assume that plaintiff's franchises were assessed on the same basis of valuation applied by the Board to other property generally that came within the range of their official duty.

(1) It is convenient to state at this point what, indeed, is not controverted, that, if the suits be otherwise maintainable, the last-mentioned averments of the bills show sufficient special grounds for invoking the equity jurisdiction, under the rule established by repeated decisions of this court. *Dows v. Chicago*, 11 Wall. 108, 110, 112, 20 L. ed. 65-67; *Hannewinkle v. Georgetown*, 15 Wall. 547, 21 L. ed. 231; *Union P. R. Co. v. Cheyenne* (*Union P. R. Co. v. Ryan*) 113 U. S. 516, 525, 526, 28 L. ed. 1098, 1101, 1102, 5 Sup. Ct. Rep. 601; *Ohio Tax Cases*, 232 U. S. 576, 587, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372.

(2) A fundamental contention of appellants is that the present actions, brought to restrain them in respect of the performance of duties they are exercising under the authority of the state of Kentucky, are

in effect suits against the state. Questions of this sort have arisen many times in this court, but the matter was set at rest in *Ex parte Young*, 209 U. S. 123, 150, 155, 52 L. ed. 714, 725, 727, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, where it was held that a suit to restrain a state officer from executing an unconstitutional statute, in violation of plaintiff's rights and to his irreparable damage, is not a suit against the state, and that "individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

* In repeated decisions since *Ex parte Young*, that case has been recognized as setting these questions at rest. *Western U. Teleg. Co. v. Andrews*, 216 U. S. 165, 166, 54 L. ed. 430, 431, 30 Sup. Ct. Rep. 286; *Herndon v. Chicago, R. I. & P. R. Co.* 218 U. S. 135, 155, 54 L. ed. 970, 976, 30 Sup. Ct. Rep. 633; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 621, 56 L. ed. 570, 577, 32 Sup. Ct. Rep. 340; *Home Teleph. & Teleg. Co. v. Los Angeles*, 227 U. S. 278, 293, 57 L. ed. 510, 517, 33 Sup. Ct. Rep. 312; *Truax v. Raich*, 239 U. S. 33, 37, 60 L. ed. 131, 133, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7. And see *Hopkins v. Clemson Agri. College*, 221 U. S. 636, 642-644, 55 L. ed. 890, 894, 895, 35 L.R.A. (N.S.) 243, 31 Sup. Ct. Rep. 654.

The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which, as enacted by the state legislature, are in themselves unconstitutional. *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 390, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, was a case not of an unconstitutional statute, but of confiscatory, and therefore unconstitutional, action taken by a state commission under a constitutional statute. The court, by Mr. Justice Brewer, said: "Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual." In *Raymond v. Chicago Union Traction Co.* 207 U. S. 20,

38, 52 L. ed. 78, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757, the court upheld the right of action in a Federal court to restrain the collection of taxes that had been assessed at a different rate and by a different method from that employed with respect to other taxpayers of the same class, in defiance of the provisions of a constitutional statute that required equalization, and also in denial of the equal protection of the laws within the meaning of the 14th Amendment.

* (3) The contention of plaintiffs, set forth in their respective bills of complaint, that the action of the Board of Valuation and Assessment in making the assessments under consideration and the threatened action of defendants in respect of carrying those assessments into effect constituted action by the state, and if carried out would violate the equal protection provision of the 14th Amendment, presents, without question, a real and substantial controversy under the Constitution of the United States, which (there being involved a sum and value in excess of the jurisdictional amount) conferred jurisdiction upon the Federal court, irrespective of the citizenship of the parties. This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the Federal question, or whether it be found necessary to decide it at all. *Siler v. Louisville & N. R. Co.* 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451; *Ohio Tax Cases*, 232 U. S. 576, 586, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372.

(4) Taking up first the question of state law, we should at the outset briefly consider the pertinent provisions of the Constitution and laws of the state. By § 171 of the Constitution it is prescribed: "The general assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws." By § 172: "All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person, authorized to assess values for taxation, who shall commit any wilful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction

thereof shall forfeit his office, and be otherwise punished, as may be provided by law." By § 174: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses, or franchises." Section 181 provides as follows: "The general assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations, and professions, or a special or excise tax;" etc. And § 182 declares: "Nothing in this Constitution shall be construed to prevent the general assembly from providing, by law, how railroads and railroad property shall be assessed and how taxes thereon shall be collected."

*510 Under statutory provisions, property is valued for purposes of taxation, both state and local, in the following manner: All property in the state, real and personal, tangible and intangible, except the property of railroads, the franchises of certain corporations, shares of stock in banks, and distilled spirits, is assessed by county assessors, subject to the review of county boards of supervisors and a State Board of Equalization. Tangible railroad property is assessed by the State Railroad Commission. Bank shares and distilled spirits are assessed by the Board of Valuation and Assessment, composed of the auditor of public accounts, the treasurer of state, and the secretary of state. And, by § 4077, Ky. Stat. it is provided: "Every railway company or corporation . . . also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any*public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised." The values of such franchises (except as to turnpike companies, otherwise provided for) are to be fixed by the Board of Valuation and Assessment. By § 4078, verified statements are to be delivered annually to the auditor, showing certain facts respecting the company, including the amount of capital stock, with its par and real value, and the highest price at which it was sold within twelve months preceding, the amount of surplus funds and undivided profits, the value of all other assets, the amount of indebtedness, the gross or net earnings or

income, the amount and kind of tangible property in the state, the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require. Section 4079 provides that "where the line or lines of any such corporation, company or association extend beyond the limits of the state or county," the statement shall, in addition to other facts, show the length of entire lines operated, owned, leased or controlled in the state and in each county, incorporated city, town, or taxing district, and the entire line operated, etc., elsewhere. There is a proviso that the Board, from the statement furnished to it by the corporation, and from such other evidence as it may have, is to "fix the value of the capital stock of the corporation . . . and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid."¹ It has been held by the Kentucky court of appeals, and by this court, that the "capital stock of the corporation," here referred to, includes its entire property, of every kind and description, tangible and intangible, and that what is called a "franchise tax" is nothing else than a tax upon the intangible property of the company in Kentucky. *Henderson Bridge Co. v. Com.* 99 Ky. 623, 639, 641, 29 L.R.A. 73, 31 S. W. 486; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 154, 41 L. ed. 953, 954, 17 Sup. Ct. Rep. 532; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 180, 41 L. ed. 960, 963, 17 Sup. Ct. Rep. 527; *Louisville Tobacco Warehouse Co. v. Com.* 106 Ky. 165, 167, 57 L.R.A. 33, 49 S. W. 1069; *Marion Nat. Bank v. Burton*, 121 Ky. 876, 888, 10 L.R.A.(N.S.) 947, 90 S. W. 944. In view of these decisions, no serious attempt is made to sustain the assessments in question as a taxation of franchises, under §§ 174 or 181 of the Constitution. There seems to be no provision of law for taxing franchises under either of those sections. *Marion Nat. Bank v.*

¹ The particular method of fixing the value of "capital stock" and of "corporate franchise" is not in issue in the present cases. The district court, in *Louisville & N. R. Co. v. Bosworth*, 209 Fed. 380, 409-411, reading §§ 4077-4079 together, seems to have considered that the method prescribed by the proviso in § 4079 was applicable to all public service corporations organized in Kentucky, including those which operate and conduct their business and have their property wholly in that state. And this appears to have been the view of the Kentucky court of appeals in *Louisville R. Co. v. Com.* 105 Ky. 710, 714, 49 S. W. 486.

Burton, 121 Ky. 876, 885, 10 L.R.A. (N.S.) 941, 90 S. W. 944.

To recapitulate: Real estate and personal property of individuals and of nonfranchise corporations are assessed by the county assessors, both for state and county purposes; tangible railroad property by the Railroad Commission; bank shares, distilled spirits, and corporate franchises by the Board of Valuation and Assessment. It is important to be observed that the latter board has no authority or control over the actions of the county assessors, the county boards of supervisors, or the State Board of Equalization; and, on the other hand, these officials have no authority or control over the actions of the Board of Valuation and Assessment. Nor is there any statutory provision for equalizing assessments, as between the property which is assessed by the county assessors and that which is assessed by the Railroad Commission and the Board of Valuation and Assessment.

It hardly is open to serious dispute that if the legislature had confided to a single body the determination of the basis of assessment of the real estate and personal property of individuals and nonfranchise corporations, on the one hand, and of the tangible and intangible property of public service corporations, on the other, a valuation of property of the latter class on the basis of 75 per cent of its actual value, while property of the former class was assessed systematically at 52 per cent, or not more than 60 per cent, of its actual value, would be inconsistent with the sections we have quoted from the Kentucky Constitution. For the provision of § 182, permitting the general assembly to provide by law "how railroads and railroad property shall be assessed, and how taxes thereon shall be collected," relates merely to the mode of assessment and collection, and manifestly does not permit a departure from the requirements of uniform taxation in proportion to value, and an identical rate as between corporate and individual property, contained in §§ 171 and 174. The latter section permits the general assembly to provide for taxation based on income, licenses, or franchises. But, as already stated, at least at the time these suits arose, there was no provision of law for a taxation of franchises in any other sense than that already explained. *Marion Nat. Bank v. Burton*, supra.

The fact should be emphasized that the Kentucky court of last resort, far from holding that discrimination such as is here complained of is in accord with the Constitution and laws of the state, has recognized distinctly that it is not; but has felt constrained to hold that, under circum-

stances similar to those of the present cases, there is no redress in the courts of the state; and that the constitutional provisions for equality and uniformity are capable of being put into execution only through the selection of proper assessing officers. *Louisville R. Co. v. Com.* 105 Ky. 710, 719, 49 S. W. 486. This, while admitting the wrong, merely denies judicial relief, and is not binding upon the Federal courts.

In *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903, the bank brought its bill in equity in a circuit court of the United States to enjoin the collection of a tax assessed against the shares of its stockholders not because of inconsistency with the act of Congress relating to the taxation of such shares (Rev. Stat. § 5219, Comp. Stat. 1916, § 9784), but upon the ground of a violation of the Constitution and laws of the state of Ohio, which required the taxation of all moneys, credits, and investments, and also all real and personal property, to be by a uniform rule and according to its true value in money. The supreme court of the state (*Exchange Bank v. Hines*, 3 Ohio St. 1, 15) had held that they required uniformity not only in the rate of taxation, but also in the mode of the assessment upon the taxable valuation. But the legislature had adopted a system of valuation under which there were different bodies acting independently of one another in regard to different classes of property in the process of estimating values for taxation, with one Board of Equalization having charge of the valuation of the real estate of the whole state once in every ten years, another having charge of the valuation of railroad property every year, a third of the valuation of shares of incorporated banks every year, but with no common superior to secure equalization as between the different classes of property. The evidence showed that in the county where complainant's bank was situate the assessors of real property, the assessors of personal property, and the county auditor (who was the assessing officer for bank shares) concurred in establishing a rule of valuation by which real and personal property, except money, were assessed at one third of actual values, and money or invested capital at six tenths of its value; that this rule was followed; and that for the year in question the State Board of Equalization increased the assessment upon the bank shares to their full cash value. This court held (p. 157) that "when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the [state] Constitution, and when this rule is

applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power;" and that this being the case made by the bill, and being supported by the evidence, while the statute could not be declared unconstitutional, the discriminatory rule must be held void and the injustice produced under it remedied so far as the judicial power could give remedy.

(5) Is discriminatory taxation, contravening the express requirements of the state Constitution, beyond redress in the courts of the United States, their jurisdiction being properly invoked, when the discrimination results from divergent action by different assessing boards whose assessments are not subject to any process of equalization established by the state, and where the diverse results are the outcome, not, indeed, of any express agreement among the officials concerned, but of intentional, systematic, and persistent undervaluation by one body of officials, presumably known to and ignored by the other body, so that in effect the two bodies act in concert? In our opinion, the answer must be in the negative.

Appellants' contention that there is no remedy by injunction against the assessments imposed by the Board of Valuation and Assessment places undue emphasis upon the requirement contained in § 172 of the Constitution, that all property shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale,—a provision that is repeated in § 4020, Ky. Stat., which deals with the duties of assessing officers. The averments of the bills of complaint, admitted on this record, are that the Board did not assess the property of plaintiffs at fair cash value, but at 75 per cent thereof; and that this resulted in unequal taxation only because the county assessments were at a still lower percentage. But, laying this aside, and assuming for the moment that the Board performed its duty strictly in accordance with § 172, by assessing plaintiff's properties at fair cash value, what is the effect of that action, in view of the systematic undervaluations by the assessing officers charged with valuing other classes of property? This question cannot be answered without considering the relation of § 172 to §§ 171 and 174, which require uniform taxation according to value, and an identical rate as between corporate and individual property. The operation and effect of such a taxing system, both in respect to raising the necessary moneys and in distributing the burden among the taxpayers, depend upon two considerations: first, the rate of taxation, and, secondly, the

basis of valuation of the property to be taxed. Plainly, the provision of § 174 that "all corporate property shall pay the same rate of taxation paid by individual property" means that not only the percentage of the rate, but the basis of the valuation, shall be the same. "Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of the assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation; and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation." *Exchange Bank v. Hines*, 3 Ohio St. 1, 15, quoted in *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 158, 25 L. ed. 903, 905.

It is equally plain that it makes no difference what basis of valuation—that is, what percentage of full value—may be adopted, provided it be applied to all alike. The adoption of full value has no different effect in distributing the burden than would be gained by adopting 75 per cent, or 50 per cent, or even 10 per cent as the basis—so long as either was applied uniformly.² The only difference would be that, supposing the requirements of the treasury remained constant, the rate of taxation would have to be increased as the percentage of valuation was reduced. (Under § 171 of the Constitution, the rate of taxation may be varied by the general assembly from year to year, according to requirements.) Therefore, the principal if not the sole reason for adopting "fair cash value" as the standard for valuations is as a convenient means to an end,—the end being equal taxation. But if the standard be systematically departed from with respect to certain classes of property, while applied as to other property, it does not serve, but frustrates the very object it was designed to accomplish. It follows that the duty to assess at full value cannot be supreme in all cases, but must yield where necessary to avoid defeating its own purpose.

A substantially identical question was presented to the circuit court of appeals for the sixth circuit in *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, where the Constitution of Tennessee declared that all property should

² A few of the states have enacted laws adopting percentages of full value as bases of taxation; Iowa, 25 per cent (Code Supp. 1907, § 1305); Illinois, 20 per cent (Hurd's Stat. 1898, p. 1365e), afterwards 33½ per cent (Hurd's Stat. 1909, p. 1882, § 312; Hurd's Stat. 1912, p. 1963, § 312); Nebraska, 20 per cent (Rev. Stat. 1913, § 6300); Alabama, 60 per cent (Gen. Acts 1915, p. 393, § 9).

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be taxed according to its value, to be ascertained as the legislature should direct, "so that taxes shall be equal and uniform throughout the state," and the statutes required that the real value of the property be adopted, and where, as here, railroad property and some other kinds were valued by one set of officials, and property in general by another, without provision for equalization as between the two classes. The court, by Circuit Judge Taft, said (p. 364): "The sole and manifest purpose of the Constitution was to secure uniformity and equality of burden upon all the property in the state. As a means of doing so (conceding that defendant's construction is the correct one), it provided that the assessment should be according to its true value. It emphasized the object of the section by expressly providing that no species of property should be taxed higher than any other species. We have before us a case in which the complaining taxpayer, and other taxpayers owning the same species of property, are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and its fellows of the same class. . . . [p. 365]. The question presented is, then, whether, when the sole object of an article of the Constitution is being flagrantly defeated, to the gross pecuniary injury of a class of litigants, and one of them appeals to a court of equity for relief, it must be withheld because the only mode of granting it will involve an apparent departure from the method marked out by the Constitution and the law for attaining its sole object. We say 'apparent' departure from the constitutional method, because that instrument contemplated a system in which all property should be assessed at its real value. . . . The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the Constitution. To hold otherwise is to make the restrictions of the Constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident."

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After pointing out the similarity of the case to *Cummings v. Merchants' Nat. Bank*, supra, and declaring (p. 372): "An intentional undervaluation of a large class of property, when the law enjoins assessment

at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law," the court further said (p. 374): "The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination."

The justice of this view has been recognized by the state courts of last resort in many cases. *Bureau County v. Chicago, B. & Q. R. Co.* 44 Ill. 229, 239; *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455, 482; *Manchester Mills v. Manchester*, 58 N. H. 38; *Randell v. Bridgeport*, 63 Conn. 321, 324, 28 Atl. 523; *Chicago, B. & Q. R. Co. v. Atchison County*, 54 Kan. 781, 792, 39 Pac. 1039; *Ex parte Ft. Smith & V. B. Bridge Co.* 62 Ark. 461, 468, 36 S. W. 1060; *Burnham v. Barber*, 70 Iowa, 87, 90, 30 N. W. 20; *Barz v. Board of Equalization*, 133 Iowa, 563, 565, 111 N. W. 41; *Iowa C. R. Co. v. Board of Review** (1916) — Iowa, —, 157 N. W. 731; *Lehigh & W. B. Coal Co. v. Luzerne County*, 225 Pa. 267, 271, 74 Atl. 67; *People v. Illinois C. R. Co.* 273 Ill. 220, 244-250, 112 N. E. 700. There are declarations to the contrary (*State, Central R. Co., Prosecutor, v. State Assessors*, 48 N. J. L. 1, 7, 57 Am. Rep. 516, 2 Atl. 789; *Lowell v. Middlesex County*, 152 Mass. 372, 375, 9 L.R.A. 356, 25 N. E. 469), but they take little or no account of the rights of aggrieved taxpayers.

(6) The next question is order is whether the assessments have the effect of denying to plaintiffs the equal protection of the laws, within the meaning of the 14th Amendment. It is obvious, however, in view of the result reached upon the question of state law, just discussed, that the disposition of the cases would not be affected by whatever result we might reach upon the Federal question; for no other or greater relief is sought under the "equal protection" clause than plaintiffs are entitled to under the provisions of the Constitution

and laws of the state to which we have referred. Therefore, we find it unnecessary to express any opinion upon the question raised under the 14th Amendment.

(7) It is objected that appellees had an adequate remedy at law, and *Singer Sewing Mach. Co. v. Benedict*, 229 U. S. 481, 57 L. ed. 1288, 33 Sup. Ct. Rep. 941, is cited as a controlling authority. There the suit was brought to enjoin the collection of taxes levied by the city and county of Denver, in the state of Colorado, and because of the act of Congress (Rev. Stat. § 723, Comp. Stat. 1916, § 1244) and familiar decisions applying and enforcing it, since it appeared that a local statute required the board of county commissioners to refund taxes paid and thereafter found to be erroneous or illegal, "whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or other errors of omission," with a correlative right on the part of the taxpayer to enforce that duty by action at law, and the decisions of the supreme court of the state interpreted the statute so as to give an adequate remedy at law, this court affirmed a decree dismissing the bill.

* The statute that is here invoked is § 162, Ky. Stat., which reads as follows: "§ 162. Taxes wrongfully collected refunded.—When it shall appear to the auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. . . ." But, by a line of recent decisions in the Kentucky court of appeals, the effect of this section has been confined to cases where the taxes paid either were wholly without warrant in law or were based upon a mistake as to the rate of taxation upon the amount assessed; and it has been held not to authorize the auditor to correct erroneous assessments, since that official is not intrusted with authority to make assessments. *German Secur. Bank v. Coulter*, 112 Ky. 577, 584, 587, 66 S. W. 425, 427; *Couty v. Bosworth*, 160 Ky. 312, 169 S. W. 742; *Bosworth v. Metropolitan L. Ins. Co.* 162 Ky. 344, 348, 172 S. W. 661; *Louisville Gas & E. Co. v. Bosworth*, 169 Ky. 824, 829, 830, 185 S. W. 125.

But, were it otherwise, § 162 clearly applies to state taxes alone, while the bills of complaint herein have to do with both state and local taxes. A remedy at law cannot

be considered adequate, so as to prevent equitable relief, unless it covers the entire case made by the bill in equity. Were we to require a dismissal of these bills as to the state taxes, retaining them as to the local taxes, we should multiply suits, instead of preventing a multiplicity of suits. It is a familiar maxim that "a court of equity ought to do justice completely, and not by halves;" and to this end, having properly acquired jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law. *Camp v. Boyd*, 229 U. S. 530, 551, 552, 57 L. ed. 1317, 1326, 1327, 33 Sup. Ct. Rep. 785; *McGowan v. Parish*, 237 U. S. 285, 296, 59 L. ed. 955, 963, 35 Sup. Ct. Rep. 543.

(8) It is contended that appellees, if aggrieved, had another and more equitable remedy than a suit for injunction; that the law of the state provides a method by which, instead of lowering the assessments upon the property of appellees, they could by proper procedure compel the assessment of the property of other taxpayers to be increased so as to come within the constitutional requirement as to fair cash value, and hence that it was the duty of appellees to adopt that method. The reference is to §§ 4115-4120, Ky. Stat., which require the county board of supervisors to convene annually and make a careful examination of the assessor's books and each individual list thereof, empowering them to increase or decrease any list; "but the board shall not reduce or raise any assessment unless the evidence be clear and unmistakable that the valuation is not a fair cash value." By § 4123, they may hear complaints, summon and swear witnesses, and require them to testify. There is nothing in these provisions to indicate that parties in the situation of the present appellees, who have no different interest in the undervaluation by the county assessors than that which might be possessed by any other citizens of the state, are entitled to be heard to complain that the county assessments are too low. Nor is any case cited where such a complaint has been entertained. The remedy of reassessment appears to be a public, not a private, remedy.

We conclude that the decrees of the District Court must be and they are affirmed.

Mr. Justice Holmes, Mr. Justice Brandeis, and Mr. Justice Clarke dissent.

(244 U. S. 522)

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

ROBERT L. GREENE, Auditor of Public Accounts, et al., Individually and as Constituting the Board of Valuation and Assessment of the State of Kentucky, et al. (No. 778.)

ROBERT L. GREENE, Auditor of Public Accounts, et al., Individually and as Constituting the Board of Valuation and Assessment of the State of Kentucky, et al., Appts.,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY. (No. 779.)**COURTS ⇨263—FEDERAL COURTS—JURISDICTION—QUESTIONS NOT ALL FEDERAL.**

1. Federal jurisdiction, having been invoked upon substantial grounds of Federal law, extends to the determination of all questions involved in the case, whether resting upon state or Federal law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800.]

STATES ⇨191(2)—IMMUNITY FROM SUIT—SUIT AGAINST STATE OFFICERS—ENJOINING ILLEGAL TAXES.

2. State officers charged with the duty of enforcing the tax laws of the state may be enjoined by a Federal court of equity from taking steps looking toward the enforcement of state and local taxes upon the intangible property of a public service corporation, assessed under state authority, which are asserted to violate the Federal Constitution because of a discrimination in the valuation of the property upon which the taxes are based, arising out of systematic undervaluation of other taxable property, although the state laws under the sanction of which the officers assumed to act in making the assessment do not contemplate any unlawful discrimination.

[Ed. Note.—For other cases, see States, Cent. Dig. § 181.]

TAXATION ⇨608(5) — RESTRAINING ILLEGAL TAXATION—REMEDY AT LAW.

3. A public service corporation may sue in equity to restrain state officers from taking steps looking to the enforcement of certain state and local so-called franchise taxes on the ground of discrimination in valuation of the intangible property upon which such taxes are based, notwithstanding the remedy afforded by Ky. Stat. § 162, directing the state auditor to refund taxes unlawfully collected, such remedy being inadequate to prevent equitable relief for two reasons: (a) by the decisions of the Kentucky courts this section is confined to cases where the taxes paid were wholly without warrant in law, or based upon a mistake as to the rate of taxation upon the amount assessed; (b) the bills deal with both state and local taxes, while this section applies to state taxes alone.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1234.]

TAXATION ⇨608(5) — RESTRAINING ILLEGAL TAXATION—UNEQUAL ASSESSMENT.

4. The requirement of Ky. Const. § 172, that all property "shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale," will not prevent injunctive relief against steps looking to the enforcement of certain state and local so-called franchise taxes based upon an assessment of the intangible property of a public service corporation by the State Board of Valuation and Assessment at not more than its fair cash value, where the local assessing officers, charged with valuing other classes of property, systematically undervalue such property, since to apply to one class of property the standard of fair cash value, systematically departed from with respect to other classes of property, would frustrate the principal object of that section, which, in view of the provisions of §§ 171 and 174, requiring uniformity of taxation in proportion to value, and an identical rate as between corporate and individual property, must be deemed to be equal taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1234.]

TAXATION ⇨608(5)—RESTRAINING STATE TAXATION — INEQUALITY OF VALUATION.

5. State as well as local so-called franchise taxes based upon an assessment of the intangible property of a public service corporation, made by the State Board of Valuation and Assessment, may be enjoined by a Federal court for discrimination arising out of systematic undervaluation of other taxable property, where the proper state officers charged with the enforcement of the tax law of the state are made parties.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1234.]

TAXATION ⇨319(2)—EVIDENCE — WEIGHT — SYSTEMATIC UNDERVALUATION OF TAXABLE PROPERTY.

6. General presumptions arising from the statutory duty of assessors to assess at fair cash value, and from the oath customarily required of individual taxpayers, together with stereotyped affidavits of former assessors to the effect that they endeavored to follow the law and assess all property at its fair cash value, and that if any property was otherwise assessed, it was unintentional, and not pursuant to any agreement between assessor and taxpayer, do not necessarily impair the probative effect of official admissions and direct and circumstantial evidence from unimpeached private and public sources that the great mass of property in the state was intentionally, systematically, and notoriously assessed far below its actual value.

TAXATION ⇨493(8)—REVIEW OF FINDING OF OFFICIAL BODY—VALUATION FOR TAX PURPOSES.

7. The findings of an official body, such as the State Board of Valuation and Assessment, created by Ky. Stat. §§ 4077-

4081, to fix the value of the intangible property of public service corporations for so-called state and local franchise taxes, when made after a hearing and notice to the taxpayer, are quasi judicial in their character, and are not to be set aside or disregarded by the courts unless it is made to appear that the board proceeded upon an erroneous principle or adopted an improper mode of estimating the value of the property, or unless fraud appears.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 882.]

TAXATION ⚡379—VALUATION OF CAPITAL STOCK FOR TAX PURPOSES—DEDUCTIONS.

8. The method of deducting nontaxable assets adopted by a State Board of Valuation and Assessment when fixing the value of the capital stock of a railway company upon the capitalization-of-income plan, pursuant to Ky. Stat. §§ 4077-4081, for the purpose of ascertaining the value for taxing purposes of its intangible property, cannot be said by the courts to be fundamentally erroneous merely because there was deducted from total net income the net income only of nontaxable securities owned by the corporation, although much of the stock of other corporations thus held, while paying no dividends, or dividends of low rate, may have had large intrinsic value by reason of the control it gave over other lines and the increment it brought to the aggregate income of the company.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 629.]

TAXATION ⚡493(4)—REVIEW OF FINDINGS OF OFFICIAL BODY—VALUATION OF CAPITAL STOCK FOR TAXING PURPOSES—INTEREST RATE AS BASIS OF CAPITALIZATION.

9. The objection that a state board, when fixing the value of the capital stock of a railway company upon the capitalization-of-income plan, pursuant to Ky. Stat. §§ 4077-4081, for the purpose of ascertaining the value for taxing purposes of its intangible property, adopted a 6 per cent interest rate as the basis of capitalization instead of the higher rate reached by taking the railway company's mileage in each of the states in which it operates, multiplying this by the legal rate of interest in that state, and dividing the total of the products by the total mileage, is a criticism merely of the conclusion of the board upon a question of fact which is not properly subject to review by the courts.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 879.]

COURTS ⚡366(6)—FEDERAL COURTS—FOLLOWING DECISIONS OF STATE COURTS—METHOD OF VALUATION FOR TAX PURPOSES—INTANGIBLE PROPERTY OF INTERSTATE RAILWAY COMPANY.

10. Federal courts will follow the decision of the highest state court of Kentucky that Ky. Stat. §§ 4077-4081, governing the valuation of the intangible property of an interstate railway company for tax purposes, properly construed, require first an apportionment to Kentucky of the proper share of the entire value of the capital stock, having regard to the relation of state mileage to system mileage, followed

by a deduction from the state's proportion of the capital stock value of the assessed value of the company's tangible property within the state, rather than a deduction of the total tangible property in and out of the state from the total capital stock value before apportionment to the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 961.]

TAXATION ⚡376(1)—VALUATION OF INTANGIBLE PROPERTY OF INTERSTATE RAILWAY COMPANY—RATIO OF STATE MILEAGE TO SYSTEM MILEAGE—CONTROLLED OR OPERATED MILEAGE.

11. The controlled mileage within and without the state, and not merely the operated mileage, is what the State Board of Valuation and Assessment must take into consideration when fixing the value of the intangible property of an interstate railway company for tax purposes, conformably to Ky. Stat. § 4081, which requires that "that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this state bears to the total length of the lines owned, leased, or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629-631.]

TAXATION ⚡376(1)—VALUATION OF INTANGIBLE PROPERTY OF INTERSTATE RAILWAY COMPANY — CONTROLLED MILEAGE NOT REPRESENTED BY STOCK HOLDINGS.

12. The value of so much of the railway mileage controlled by an interstate railway carrier as is not represented by the latter's stock holdings should be included by the State Board of Valuation and Assessment when fixing the value of the intangible property of such company for tax purposes, conformably to Ky. Stat. § 4081, which requires that "that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this state bears to the total length of the lines owned, leased, or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629-631.]

TAXATION ⚡376(1)—VALUATION OF INTANGIBLE PROPERTY OF INTERSTATE RAILWAY COMPANY—DEDUCTIONS — DOUBLE ASSESSMENT.

13. To avoid a double assessment there must be deducted from the Kentucky apportionment of the value of the capital stock of an interstate railway company, the value of the Kentucky portion of the mileage controlled by it (in addition to the authorized deduction of the assessed value of the property there situated) when fixing, conformably to Ky. Stat. § 4081, the value of the intangible property of such company for tax purposes, since the local franchise would be assessed against each of the separate organizations.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629-631.]

TAXATION—500—SUIT ATTACKING VALUATION—BASING JUDGMENT UPON FAILURE OF PROOF—ADMISSIONS.

14. A suit attacking the valuation of intangible corporate property for tax purposes should not have been in effect decided against the plaintiff because there was nothing in the record to show the truth of certain averments in a supplemental bill, filed with the court's permission after the hearing and decision of the cause, but before entry of the final decree, even though it cannot be said that defendants, by not answering, admitted such averments, or that the court erred in failing to give effect to them, there being nothing in the record to show that defendants were ordered to answer, or to show why the averments were ignored, since plaintiff could not be held in default for omitting to introduce evidence at the hearing respecting these matters, they not having been considered by the state board which made the valuation, nor set up in the original pleadings, nor, so far as appears, deemed by any of the parties to be material until the court rendered its decision.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 925-930.]

TAXATION—319(2)—EVIDENCE—PRESUMPTION—OFFICIAL ACTION—TAX MATTERS—VALUATION.

15. A valuation for tax purposes having been shown to be the result of following a method substantially erroneous because not in accordance with the controlling statutes, there is no presumption that a like valuation would have been reached by following a correct method, and when the difference in result is very great, there is a strong presumption to the contrary.

[Nos. 778 and 779.]

Argued January 16, 17, and 18, 1917. Decided June 11, 1917.

CROSS APPEALS from the District Court of the United States for the Eastern District of Kentucky to review a decree enjoining state officers from enforcing so-called franchise taxes on the basis of valuation of the intangible property of an interstate railway carrier on condition that plaintiff should pay taxes on a certain amount in excess of the amount upon which payment was made at the beginning of the suit. Reversed on appeal of the railway company; affirmed on cross appeal.

See same case below, 230 Fed. 191.

The facts are stated in the opinion.

Messrs. **Helm Bruce**, Edward S. Jouett, William A. Colston, and Henry L. Stone for the Louisville & Nashville Railroad Company.

Mr. **Marvel M. Logan**, Attorney General of Kentucky, and Messrs. **John L.**

Rich, Charles Carroll, and Charles H. Morris for Robert L. Greene et al.

* Mr. Justice Pitney delivered the opinion of the court:

These cases are an appeal and a cross appeal from a final decree of the district court in a suit that was commenced by the Louisville & Nashville Railroad Company, a Kentucky corporation, against Henry M. Bosworth and others, then constituting the Board of Valuation and Assessment of that state (Bosworth being also auditor of public accounts), and against the attorney general of the state and his assistants, seeking to restrain the taking of any steps toward enforcing state and local taxes upon the basis of an assessment of the "franchise" of the company for the year 1913, made by the Board of Valuation and Assessment at the sum of \$45,658,630, or upon the basis of any greater valuation than \$22,899,200; and this upon the ground that the assessment was unlawful and not in accordance with the statute, was the result of an abuse of power by the Board of Valuation and Assessment, and if enforced would result in a taking of plaintiff's property without due process of law and a denial of the equal protection of the laws, contrary to § 1 of the 14th Amendment. By a supplemental bill, Robert L. Greene and others were brought in as successors in office of the original defendants. There being no diversity of citizenship, the jurisdiction was rested upon the ground that the suits arose under the cited provisions of the Federal Constitution; but plaintiff relied also upon the provisions of the Constitution and laws of the state. A chief ground of complaint, based upon the equal protection provision of the 14th Amendment, and also upon the requirement of equal taxation prescribed by §§ 171, 172, and 174 of the state Constitution,¹ was that the plaintiff had been subjected to illegal discrimination, in that its property had been assessed at more than its actual value, whereas the property of all other taxpayers in the state was assessed uniformly and intentionally at much less than actual value; in fact, at not exceeding 60 per cent thereof. It was alleged, besides, that the method of assessment followed by the Board of Valuation was inconsistent with the provisions of the statutes of Kentucky, and for that further reason the assessment was illegal.

A previous suit of the same character had been brought by the same plaintiff in the same court for relief against the assessment

¹Set forth in full in the opinion in *Greene v. Louisville & Interurban R. Co.* 244 U. S. 499, 61 L. ed. —, 37 Sup. Ct. Rep. 673.

for the year 1912, in which, after a hearing on motion for preliminary injunction and demurrer to the bill, the court delivered a very elaborate opinion, allowing a temporary injunction upon condition that plaintiff should pay franchise taxes to the state and subordinate taxing districts upon a valuation of \$22,899,200. *Louisville & N. R. Co. v. Bosworth*, 209 Fed. 380, 465.

Following this precedent, the court, upon the filing of the bill in the present case, allowed a preliminary injunction upon the payment of taxes, based upon the same valuation. The cause proceeded to final hearing, and the court, having found plaintiff to have been subjected to discrimination by the valuing of other property at approximately 60 per cent of actual values, but having overruled the other grounds of relief asserted, applied an equalizing factor to the valuation of plaintiff's franchise, with the result of finding \$25,808,493.60 to be the amount at which it was legally taxable, or \$2,909,293.60 in excess of the amount upon which payment was made at the inception of the suit. Therefore a final decree was made enjoining defendants from enforcing the assessment complained of, on condition that plaintiff should pay taxes, state and local, on the excess amount named. 230 Fed. 191, 232.

Plaintiff appealed to this court upon the ground that it ought not to be required to pay franchise taxes upon any amount in excess of \$22,899,200. Defendants took a cross appeal upon the ground that plaintiff was entitled to no relief. The cases were argued together with kindred cases this day decided, viz., Nos. 617 & 618, *Greene v. Louisville & Interurban R. Co.* 244 U. S. 499, 61 L. ed. —, 37 Sup. Ct. Rep. 673, and Nos. 642-645, *Illinois C. R. Co. v. Greene*, 244 U. S. 555, 61 L. ed. —, 37 Sup. Ct. Rep. 697.

There are numerous assignments of error by each party, but, without specifying these, the questions raised will be disposed of in the order of convenience. Of course, the Federal jurisdiction, having been invoked upon substantial grounds of Federal law, extends to the determination of all questions involved in the case, whether resting upon state or Federal law. *Siler v. Louisville & N. R. Co.* 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451; *Ohio Tax Cases*, 232 U. S. 576, 586, 58 L. ed. 737, 743, 34 Sup. Ct. Rep. 372.

It may be premised that plaintiff owns and operates a great system of railroads extending throughout Kentucky and twelve other states, embracing (in the year in question) roads operated on its own account to the extent of 4,478.61 miles, of which 1,574.47 miles, or 35.15 per cent, were in Kentucky, and an aggregate of roads owned,

operated, and controlled, extending to 7,907.83 miles, of which 1,952.45 miles, or 24.69 per cent, were in Kentucky. It is subject to taxation in Kentucky upon its tangible property as assessed by the State Railroad Commission, and, in addition, to taxation, state and local, upon its intangible property or "franchise" under § 4077, Ky. Stat. and succeeding sections (set forth below in margin), the valuation to be fixed by the Board of Valuation and Assessment.

(1) Defendants contend that the District court was without jurisdiction because the suit was in effect a suit against the state of Kentucky. It is said that the sole basis of a suit to enjoin state officers from the performance of duties pursuant to a statute must be that the statute itself is unconstitutional; that, since the statute in question here is constitutional, an action may not be maintained in a court of the United States (there being no diversity of citizenship) for what is done by subordinate officers of the state in executing the statute in an unconstitutional manner; and that for misconduct of this sort there is no remedy except in the state courts. These contentions are disposed of adversely in *Greene v. Louisville & Interurban R. Co.* supra.

(2) It is contended that the plaintiff has an adequate remedy at law under § 162, Ky. Stat. This likewise is negatived by the case just mentioned.

(3) It is urged that, although it be true that the local assessors in each county assessed other property at less than its cash value, plaintiff is not entitled to relief for this reason if its property was not assessed at more than its fair cash value, even though it was assessed at a higher percentage than other property. To this the same answer may be made. The facts found in this case bring it within the ruling that, in the case last mentioned, was made upon admitted facts, because of the provisions of the Constitution and laws of the state. In this case, as in that, we find it unnecessary to pass upon the merits of the question whether a like result would be reached by the application of the "equal protection" clause of the 14th Amendment.

(4) It is contended that although there be jurisdiction to enjoin the apportioning of the assessment among the counties, cities, and towns for the purpose of local taxation, it was erroneous to enjoin state taxation based upon the same assessment. So far as this is bottomed upon the theory that the suit is a suit against the state, it is disposed of by the decision cited. It is argued, however, that while this court has held that in a proper case a bill may be brought to restrain apportionment and cer-

tification to the counties of a tax imposed by a state board in violation of Federal rights (*Fargo v. Hart*, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498), yet *Coulter v. Weir*, 62 C. C. A. 429, 127 Fed. 897, 906, 912,—a case that arose out of the same provisions of the Kentucky statutes that are here involved,—is an authority in opposition to granting relief against the state taxes, and that it was approved by this court in *Coulter v. Louisville & N. R. Co.* 196 U. S. 599, 608, 49 L. ed. 615, 617, 25 Sup. Ct. Rep. 342. What was said upon the subject in the case last mentioned was not a part of the matter decided, as a reference to the opinion clearly shows; for the decision in favor of defendants proceeded upon the ground that the evidence was insufficient to sustain the bill. *Coulter v. Weir*, supra, is easily distinguishable. There, the auditor of public accounts was the sole defendant. The circuit court of appeals, after citing *Poindexter v. Greenhow*, 114 U. S. 270, 286-288, 29 L. ed. 185, 191, 192, 5 Sup. Ct. Rep. 903, 962; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 390, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Scott v. Donald*, 165 U. S. 107, 112, 41 L. ed. 648, 653, 17 Sup. Ct. Rep. 262; *Smyth v. Ames*, 169 U. S. 466, 518, 42 L. ed. 819, 839, 18 Sup. Ct. Rep. 418; *Fitts v. McGhee*, 172 U. S. 516, 529, 43 L. ed. 535, 541, 19 Sup. Ct. Rep. 269; and *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, and quoting from the opinion in the *Taylor* Case to the effect* that a suit against individuals, seeking to enjoin them from doing certain acts which they assert to be by authority of the state, but which complainants have to be without lawful authority, is not a suit against the state, and from *Fitts v. McGhee* to the effect that a suit against state officers not holding any special relation to the particular statute alleged to be unconstitutional, nor charged with its enforcement, is a suit merely to test the constitutionality of a state statute, and therefore is a suit against the state, proceeded (p. 906) to sustain the action only so far as it sought to enjoin the defendant from certifying to the county clerks the assessment complained of. The contrary result reached with respect to the tax due to the state went solely upon the ground that, as to this tax, the auditor had no act to perform under the statute and no authority to enforce collection; the court proceeding to say further (p. 907): "If the defendant had been about to take some step under color of the law, tending to complete the assessment, or if he had been authorized to seize property and was about to do so, then he was, assuming the case to be with

the complainants on the merits, about to commit a trespass for which he would be individually liable, and in a proper case equity might enjoin his proposed action upon the ground of his want of legal authority. But this is not the case made in respect to the tax due the state, and the bill, so far as it sought relief against the state tax, must be dismissed without regard to the merits." It would seem that the court overlooked §§ 144, 145, and 152, Ky. Stat., which require the auditor to keep account of taxes collected, keep a correct list of balances due by individuals to the commonwealth, audit and enter in account all demands payable at the treasury, report to the attorney general all public debtors who fail to render their accounts at the proper time or to pay the money in their hands due the commonwealth into the treasury, and grant written authority to the treasurer to receive money¹²³ from public officers or other persons, due* to the commonwealth. However, we need not rest upon this point, since in the present case the attorney general and his assistants are joined as parties, and the final decree under review restrains all of the defendants from taking any steps to collect the excessive taxes due to the state or to any of its subdivisions, and from instituting or prosecuting any proceedings against the plaintiff, either by indictment or civil action, because of any alleged delinquency or failure of the plaintiff to pay taxes upon its franchise on a valuation above the amount found by the court to be proper. The decree, with respect to the state as well as the local taxes, is clearly within the authority of *Ex parte Young*, 209 U. S. 123, 156, 52 L. ed. 714, 727, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, where *Fitts v. McGhee*, 172 U. S. 516, 530, 43 L. ed. 535, 541, 19 Sup. Ct. Rep. 269, was distinguished upon the ground that in that case no state officer who was made a party had to do with the enforcement of the statute alleged to be unconstitutional.

If what was said in *Coulter v. Louisville & N. R. Co.* 196 U. S. 599, 608, 49 L. ed. 615, 617, 25 Sup. Ct. Rep. 342, imports that an injunction can, under no circumstances, be awarded with respect to state taxes, it must be deemed to have been overruled by *Raymond v. Chicago Union Traction Co.* 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757, where the collection of taxes based upon an unconstitutional assessment was enjoined, a part of these being state taxes, as appears by the report, pp. 22, 27.

(5) It is contended by defendants that the evidence was insufficient to warrant the conclusion of the learned district judge that in fact property in general in the

state of Kentucky was systematically undervalued. A similar question of fact was involved in *Coulter v. Louisville & N. R. Co.* and this court (p. 609) held the evidence to be insufficient. In the present case, besides much to the same effect as that presented in the *Coulter* Case, a mass of additional evidence was introduced, including extracts from the United States Census Report for the year 1910; reports of the State Board of Equalization for the years 1910, 1911, 1912, and 1913; report of the State Tax Commission of 1913; testimony of a member of the State Board of Equalization who served in the years 1908 to 1911, inclusive; affidavits of nearly 200 individuals from 47 counties in different parts of the state; and much besides. The evidence is too voluminous to be adequately reviewed within reasonable limits of space, and we content ourselves with saying that it comprises a body of official admissions and direct and circumstantial evidence from private and public sources that are unimpeached, fully sustaining the finding of the trial court that the great mass of property in the state, so far as assessed by the county assessors under the review of the county boards of supervisors and the State Board of Equalization,—and this embraces all tangible property except railroad property and distilled spirits,—during a period of years prior to and including the year 1913, was intentionally, systematically, and notoriously assessed far below its actual value, and at certainly not exceeding 60 per cent of its fair cash value. There is little to the contrary except the general presumptions arising from the statutory duty of assessors to assess at fair cash value and from the oath customar-

ily required of individual taxpayers, and a large number of stereotyped affidavits made by former assessors to the effect that they endeavored to follow the law and assess all property at its fair cash value, and if any property was otherwise assessed it was unintentional, and not pursuant to any agreement between the assessor and the taxpayer. In our judgment this does not materially detract from the convincing effect of plaintiff's proofs. The evidence is analyzed briefly in the opinion of the district judge (230 Fed. 227-231), and nothing more need be added to his comments upon it.

This disposes of all the points raised by defendants.

(6) It is contended by plaintiff that the Board of Valuation and Assessment, in assessing plaintiff's franchise,* proceeded upon erroneous principles and adopted an improper method, not only in failing to equalize the assessment so as to make it conform to the basis generally adopted by other assessing officers in assessing other kinds of property, but also in failing to follow the course prescribed by the Kentucky statute; and that with respect to its complaint in this regard the decree of the district court gave inadequate relief.

In order to pass upon this contention, we must consider the nature of the so-called "franchise tax," the method prescribed by the statute for valuing the franchise, the method that was pursued by the Board, and the manner in which the district court dealt with it.

The statutory provisions are in §§ 4077-4081, Ky. Stat., the material portions of which are set forth in the margin.² *They

² "§ 4077. (1) Franchise—assessment of.—Every railway company or corporation, . . . also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised. The auditor, treasurer and secretary of state are hereby constituted a Board of Valuation and Assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in § 1 [4095] of subdivision 4 of this article. . . . The auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require. It shall be the duty of the attorney general, when requested by the Board of Valuation and Assessment, to attend said board at its meetings and advise with same in its proceedings.

§ 4078. (2) Corporations to report to auditor to determine value of franchise.—In order to determine the value of the franchises mentioned in the next preceding section, shall, annually, between the 30th day of June and the 1st day of October, make and deliver to the auditor of public accounts of this state a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz.: the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the 30th day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earn-

originated in the first general assembly after the new Constitution, being §§ 1 to 5 of article 3 of chap. 103 (Nov. 11, 1892; Acts 1891-1893, p. 299), which were amended by chap. 217 of the same session (June 9, 1893, p. 990), by Act of March 29, 1902 (Acts 1902, chap. 128, pp. 281, 305-309), and by Act of March 15, 1906 (Laws 1906, chap. 22, pp. 88, 126-130). One of the amendments, having to do with one of the questions we are to consider, will be mentioned below.

It will be observed that the values of franchises (except as to turnpike companies, otherwise provided for) are to be determined by the Board of Valuation and Assessment, which board, upon a consideration of information furnished to it by the cor-

ings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the 30th day of June of the year in which the statement is required; the amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment in this state, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require.

§ 4079. (3) Value of franchise—how determined—lines extend beyond state or county.—Where the line or lines of any such corporations, company or association extend beyond the limits of the state or county, the statement shall, in addition to the other facts hereinbefore required, show the length of entire lines operated, owned, leased or controlled in this state, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other state or government or organized and incorporated in this state, but operating and conducting its business in other states as well as in this state, the statement shall show the following facts in addition to the facts hereinbefore required: The gross and net income or earnings received in this state and out of this state, on business done in this state, and the entire gross receipts of the corporation, company or association in this state and elsewhere during the twelve months next before the 30th day of June of the year in which the assessment is required to be made. . . . Provided, That said Board, from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this state, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state, or in the counties where situated. The remainder thus found shall

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poration, and from such other* evidence as it may have, is to "fix the value of the capital stock of the corporation. . . . and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid." It has been held by the Kentucky court of appeals, and by this court, that the "capital stock of the corporation" includes its entire property of every kind and description, tangible and intangible, and that what is called its "corporate franchise" is the intangible property of the company in Kentucky. *Henderson Bridge Co. v. Com.* 99 Ky. 623, 639, 641, 29 L.R.A. 73, 31 S. W. 486; *Henderson*, be the value of its corporate franchise subject to taxation as aforesaid.

§ 4080. (4) Foreign corporations—franchise—how determined. If the corporation, company or association be organized under the laws of any other state or government, except as provided in the next section, the Board shall fix the capital stock in this state by capitalizing the net income derived in this state, or it shall fix the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this state and elsewhere, the proportion which the gross receipts of this state, within twelve months next before the 30th day of June of the year in which the assessments were made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock or the capitalizing of the net earnings in this state, less the assessed value of the tangible property assessed, or liable to assessment, in this state, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this state.

§ 4081. (5) Interstate carrier—franchise—how fixed.—If the corporation organized under the laws of this state, or of some other state government, be a railroad . . . company or a corporation performing any other public service, the lines of which extend beyond the limits of the state, the said Board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this state, bears to the total length of the lines owned, leased or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this state; . . . "

Bridge Co. v. Kentucky, 166 U. S. 150, 154, 41 L. ed. 953, 954, 17 Sup. Ct. Rep. 532; Adams Exp. Co. v. Kentucky, 166 U. S. 171, 180, 41 L. ed. 960, 963, 17 Sup. Ct. Rep. 527; Louisville Tobacco Warehouse Co. v. Com. 106 Ky. 165, 167, 57 L.R.A. 33, 49 S. W. 1069; Marion Nat. Bank v. Burton, 121 Ky. 876, 888, 10 L.R.A. (N.S.) 947, 90 S. W. 944.

The findings of an official body such as the Board of Valuation and Assessment, made—as was the case here—after a hearing and upon notice to the taxpayer, are quasi judicial in their character, and are not to be set aside or disregarded by the courts unless it is made to appear that the body proceeded upon an erroneous principle or adopted an improper mode of estimating the value of the franchise, or unless fraud appears. Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 435, 436, 38 L. ed. 1031, 1039, 1040, 14 Sup. Ct. Rep. 1114; Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 596, 51 L. ed. 636, 639, 27 Sup. Ct. Rep. 326. In this case there is no showing of fraud, the contention being that the Board departed from the mode prescribed by the statute. If they did this, or if they proceeded in disregard of rights secured to the taxpayer by the state or Federal Constitution, of course they proceeded upon an erroneous principle. Henderson Bridge Co. v. Com. 99 Ky. 623, 645, 29 L.R.A. 73, 31 S. W. 486; Hager v. American Surety Co. 121 Ky. 791, 800, 90 S. W. 550. It appears that the Board, having received a report from the plaintiff, and having made a tentative assessment of its franchise for taxation for the year 1913, had a hearing upon the matter in the presence of counsel for plaintiff, and as a result made up its assessment in a manner summarized by the district court (230 Fed. 193) as follows:

"The details of the assessment, showing the manner in which the Board arrived at \$45,658,630 as the value of the franchise, are these: The Board first found the fair cash value of plaintiff's capital stock, hereafter termed its unit, to be \$262,252,566. This valuation it arrived at by capitalizing at 6 per cent what it took to be plaintiff's net income from operations on its own account for the year ending June 30, 1912, as of which date the assessment speaks, less what it took to be its net income from certain property which it took to be nontaxable. Plaintiff's reports to the Kentucky Railroad Commission and to the Interstate Commerce Commission as of that date state plaintiff's net income for that year to have been \$18,052,905.12. This included the net income from the operation by plaintiff of three railroads, two in and one out of Kentucky, on account of the owners,

which amounted to \$1,439,604. The board deducted this sum from the total, leaving a balance of \$16,613,301.12 of net income from operations on its own account. It then deducted from this balance the sum of \$878,147 on account of its net income from such nontaxable property. This left a balance of \$15,735,154, which, capitalized at 6 per cent, gave the sum of \$262,252,566, at which it valued the unit. The nontaxable property, the income from which was thus deducted, consisted of stocks in other corporations which owned property in this state and which had paid the taxes thereon. The deduction was based on §§ 4085 and 4086, Kentucky Statutes, and the construction thereof by the court of appeals in the cases of Com. ex rel. McElroy v. Walsh, 133 Ky. 103, 117 S. W. 398, and Com. ex rel. Hopkins v. Fidelity Trust Co. 147 Ky. 77, 143 S. W. 1037. It then apportioned \$92,181,766 of this sum to Kentucky. The sum so apportioned was 35.15 per cent thereof. The percentage which it took was the percentage which the mileage operated by plaintiff in Kentucky on its own account was of the entire mileage so operated by it. The entire mileage so operated by it was 4,478.61, of which 1,574.41 was in Kentucky. It then added to the sum so apportioned \$2,468,612, the excess in the value which it took that the portion of the unit in Kentucky was over such mileage proportion of the value thereof. It found this excess in value to be in the intangible part of the portion of the unit in Kentucky, and that in this way: The value of the tangible part it took to be \$177,038,113, and that of the intangible \$85,214,453. The proportion of the gross income derived from Kentucky of the entire gross income it took to be 38 per cent, or 2.85 per cent in excess of such mileage proportion. It took it that this showed that the value of the portion of the intangible part of the unit in Kentucky was 2.85 per cent of the value of such part, or the sum of \$2,468,612, in excess of such mileage proportion thereof. Adding this sum to such mileage proportion of the value of the unit, to wit, \$92,181,766, made the value of the portion of the unit in Kentucky \$94,650,388. It then reduced this sum to that of \$94,500,000 as the value. This reduction is not to be accounted for, except on the ground that it wanted to place the value of such portion in round numbers. This lessened the addition to such mileage proportion of the value of the unit on account of the excess in value of the portion of the intangible part of the unit in Kentucky over such mileage proportion thereof from the sum of \$2,468,612 to \$2,318,244, which latter sum was the difference between \$94,500,000 and \$92,181,-

766. But the Board had no sooner made this reduction than it made a further reduction from this sum in round numbers to another sum, not in round numbers, to wit \$75,139,402, as the value of the portion of the unit in Kentucky, and there it stayed. On the assumption that this sum was reached by reducing from \$94,500,000, there is no accounting for how it reached it, rather than any other sum. The only account of it which it gave was that it so did 'to be conservative, and out of an abundance of caution, to the end that no injustice may be done respondent in arriving at the value of the corporate franchise of respondent in this state.' And it noted the fact that this sum was 'less than 80 per cent of that which it believes to be the fair cash value of Kentucky's proportion of the entire capital stock of respondent.' It then deducted from this last sum the assessed value of the tangible property in Kentucky, to wit, \$29,500,772, which left the sum of \$45,638,630 as the value of the franchise. Such is what the Board did on the face of things."

Plaintiff being an interstate carrier whose lines of railroad extend both within and without the limits of the state, it comes within § 4081, Ky. Stat., which requires that "the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this state, bears to the total length of the lines owned, leased or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state." The only previous provision to satisfy the reference, "will fix the value of the capital stock as hereinbefore provided," is the provision of § 4079, that the Board shall fix it "from said statement and from such other evidence as it may have."

* 540 Under this system it is obvious that there are three principal steps in the process of ascertaining the value of the intangible property, taxable in Kentucky, of companies operating lines of railroad extending within and beyond the limits of the state. These are: (1) The fixing of the value of "the capital stock of the corporation;" which, as construed in previous cases, means the total value of all its net assets, tangible and intangible, within and without the state; (2) the apportionment to Kentucky; and (3) the elimination of the value of the tangible assets. Whether the second step shall precede the third, or vice versa, is one of the matters in dispute.

No specific method being prescribed by the statute for fixing the value of the "capital

stock" of the entire system, except a requirement to the effect that the Board shall have before it, with other evidence, a statement by the corporation setting forth the kind of business engaged in, the amount of capital stock, the number of shares, the par and real value thereof, with the highest price at which it has sold recently, the amount of surplus and undivided profits, the value of all assets, the total amount of indebtedness, the gross and net earnings or income, the amount and kind of tangible property within the state, and its location and fair cash value, it follows that the particular method to be pursued in ascertaining from this and other evidence the aggregate capital value is left to the sound judgment and discretion of the Board. In such cases there are (at least) two recognized methods, known as the stock-and-bond plan and the capitalization-of-income plan. In the present case the latter was followed.

(7) The application of this method by the Board is attacked in two respects: first, in the manner of deducting nontaxable assets, and, second, in the rate of percentage used in capitalizing the income. As to the first point, the insistence is that as the tax under consideration is merely an intangible-property tax, it results that if among the assets of the corporation going to make up its total capital value there were some that were nontaxable, it was necessary to deduct these before arriving at the taxable capital. It is pointed out that under § 4085, Ky. Stat., the property of all corporations is to be assessed in the name of the corporation, and "so long as said corporation pays the tax on all its property of every kind the individual stockholders shall not be required to list their shares in said corporation;" the argument being that, to the extent that plaintiff held the stock of other corporations having property in Kentucky and paying taxes thereon in that state, this stock in plaintiff's hands was nontaxable, and its value should have been deducted from the total value of its capital stock previously ascertained; citing *Com. ex rel. Hopkins v. Fidelity Trust Co.* 147 Ky. 77, 84, 143 S. W. 1037. As the record shows, the Board of Valuation and Assessment recognized plaintiff's right to deduction upon this account, and for this reason, in applying the capitalization-of-income method, deducted from \$16,613,301.12, net income from operated roads, the sum of \$378,147, the net income from nontaxable securities as reported by plaintiff to the auditor and the Railroad Commission, taking the balance only, or \$15,735,154, as the income to be capitalized in order to arrive at the value of the entire system. The criticism is that adopting this method had the effect of deducting only

such stock in other corporations as paid dividends, whereas plaintiff insists that much of its stock thus held, although paying no dividends, or dividends at a low rate, had large intrinsic value by reason of the control it gave over other lines of railroad and the increment it brought to the aggregate income of the company. There was evidence that these nontaxable securities amounted to upwards of \$30,000,000 in value, whereas the capitalization at 6 per cent of their income of \$878,147 produced a value of only \$14,469,113. In our opinion, it is a sufficient answer to this contention to say that the Board merely carried out the capitalization-of-income plan of valuation, perhaps to its logical extreme, but certainly not in a manner that enables this court to say that they pursued a fundamentally wrong method.

(8) The second point, the adoption of a 6 per cent interest rate as the basis of capitalization, instead of the higher rate, called in the testimony the "composite percentage," reached by taking plaintiff's mileage in each of the thirteen states in which it operates, multiplying this by the legal rate of interest in that state, and dividing the total of the products by the total mileage, is, like the first, a criticism merely of the conclusion of the Board upon a question of fact which is not properly subject to review by the courts.

Therefore we concur in the opinion of the district judge that, upon this record, the value of the capital stock must be taken to be at least as great as \$262,252,566, the amount found by the Board.

(9) The Board's next step was to apportion to Kentucky a certain part of this total value, which, of course, included both tangible and intangible assets; after which it proceeded to deduct the assessed value of the tangible assets in Kentucky. Plaintiff insists that these steps should have been reversed; that the Board, having valued the total capital stock of the company, including assets tangible and intangible, should first have deducted the entire tangible assets wherever situate, and next have assigned a proper portion of the intangible to Kentucky.

What the statute requires in this respect is a question of state law, upon which we must follow the Kentucky court of appeals if that court has passed upon it. It is true that the only authority of the Board was to assess intangible property; and, whether it followed the local statute or not, it could not, consistently with the due process provision of the 14th Amendment, include, at least as against any foreign corporation, any part of its* tangible property lying without the state; and it is

not to be supposed that the statute intended to prescribe a different rule with respect to Kentucky corporations, since domestic and foreign corporations are dealt with in the same section (§ 4081). That section, according to its terms, first provides that the Board shall "fix the value of the capital stock as hereinbefore provided," there being, as already shown, no provision respecting the method except that the ascertainment shall be based upon the statement of the corporation and such other evidence as the Board may have. The section proceeds to declare that "that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this state, bears to the total length of the lines owned, leased or controlled in this state and elsewhere, shall be *considered* in fixing the value of the corporate franchise of such corporation liable for taxation in this state." Referring now to the mode of procedure, these words evidently contemplate an apportionment, as an aid in reaching the ultimate result (valuation of franchise taxable in Kentucky); but it is an apportionment of "the value of the capital stock," which includes both tangibles and intangibles, within and without the state. This is not to say that any property without the state may be taxed. It requires state mileage valuation to be considered and compared with system mileage valuation, but it does not make this comparison conclusive. As the section was enacted originally, the words "considered in fixing" were not contained in it, so that, upon the face of things, the mileage pro-rata was conclusive in ascertaining the state's proportion of the value of the corporate franchise,—just as county and district mileage was and still is conclusive as to apportionment between those taxing districts. But by the Act of June 9, 1893, the words "considered in fixing" were inserted, the necessary effect of which was to make the relation of state* mileage to system mileage a factor that must be considered, but not necessarily given conclusive weight. Section 4081 says nothing about deducting the value of tangible property, and the preceding sections speak of deducting only such tangible property as is located within the state. Indeed, there is no provision requiring the corporation to report its tangibles outside of the state. And, if all tangibles were deducted before apportionment, then the deduction of "all tangible property assessed in this state," specifically required by the proviso to § 4079, obviously would result in a double deduction. The sections are inartificially drawn in this as in some other respects. The district court, upon elaborate consideration in the case of the 1912 assessment (209

Fed. 418-429), reached the conclusion that by the proper construction the entire value of capital stock should be first apportioned, having regard to the mileage, and that from Kentucky's portion of the whole the assessed value of the tangibles within the state should then be deducted; and that the Kentucky court of appeals had so decided in *Com. v. Covington & C. Bridge Co.* 114 Ky. 343, 70 S. W. 849.

Plaintiff relies upon two cases, the first being *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 180, 41 L. ed. 960, 963, 17 Sup. Ct. Rep. 527, where this court, by Mr. Chief Justice Fuller, after referring to the statutory provisions now under consideration, and the use in the several sections of the words "franchise" and "corporate franchise," said: "But taking the whole act together, and in view of the provisions of §§ 4078-4081, we agree with the circuit court that it is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, . . . should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions; and as to railroad . . . companies, whose lines extend beyond the limits of the state, that their intangible property should be assessed on the basis of the mileage of their lines within and without the state. But from the valuation on the mileage basis the value of all tangible property is deducted before the taxation is applied." The matter of apportionment was not there involved, nor what method or order was prescribed by the statute; the question at the moment being whether the tax was a true franchise tax, or merely a property tax upon intangible property. The significant thing was that the value of tangibles was to be deducted; whether before or after apportionment was a matter of no present significance. And the last sentence quoted, in the expression "valuation on the mileage basis," indicates an apportionment of the entire capital stock, mile for mile, prior to the deduction of tangibles.

The second case referred to is *Coulter v. Weir*, 62 C. C. A. 429, 127 Fed. 897, 907, 908, where the circuit court of appeals for the sixth circuit, in dealing with the question whether the law was repugnant to the commerce clause or the 14th Amendment, used this language: "Neither is the injunction in reference to a deduction of the value of tangible taxable property from the gross value of the whole corporate property limited to such as is situated within the state of Kentucky. If tangible prop-

erty having a situs outside the state be included in the valuation of the company's intangible property, the purpose of the law, being to tax only intangible property, is defeated. We therefore read the act, as the supreme court seems to have read it in *Adams Exp. Co. v. Kentucky*, as requiring the deduction of tangible property from the gross value of all corporate assets, whether such tangible property be within or without the state." The question of apportionment, or of the particular method to be pursued in making the assessment, was not involved in this case, any more than in *Adams Exp. Co. v. Kentucky*, supra. *It is true, as the court said, that if tangible property having a situs outside the state were included in the valuation, the purpose of the law to tax only intangible property would be defeated. The same result would follow if tangible property within the state were included in the valuation. But it does not follow that tangibles, within or without the state, are to be included in the valuation because included in the apportionment. Any excess of tangibles, without or within the state, properly may be given its due weight as a factor modifying the tentative result reached by mere mileage apportionment. In the absence of special circumstances, this is not of itself necessarily an unjust method of apportioning such a tax. *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 552, 553, 31 L. ed. 790, 794, 795, 8 Sup. Ct. Rep. 961; *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 18, 20, 22, 26, 41 L. ed. 49, 55-58, 16 Sup. Ct. Rep. 1054.

However, the decision of the Kentucky court of appeals in the *Covington & C. Bridge Co. Case*, supra, is directly in point, and, being so, is conclusive upon the question of the proper statutory method. There the company's "capital stock," valued by the stock-and-bond method, amounted to \$1,330,000. It owned an interstate bridge, 59 per cent of the length thereof being in Kentucky, the remainder in Ohio; and it had tangible property in Kentucky assessed at \$452,000. The state of Ohio assessed the portion of the bridge lying in that state at \$237,984, and the company paid the taxes thereon. The Kentucky Board of Valuation and Assessment fixed the value of its entire property or capital stock at \$730,349, and, deducting from this the assessment of tangibles in Kentucky (\$42,000), took the difference, or \$278,349, as the franchise valuation. The company, insisting that the correct valuation was \$180,489, paid to Kentucky the tax on this amount, reserving the question of its liability for a claimed balance of \$464.84, and of the method or basis upon which its franchise should be

valued for taxation by the Board, to be determined by the courts. The matter was submitted to the circuit court as an agreed case presenting two questions: (1) whether the company owed to the commonwealth the sum of \$464,84, or any part thereof, on account of the tax of its franchise, and (2) what method or basis should be adopted by the State Board of Valuation and Assessment for fixing the value of defendant's franchise for taxation in the commonwealth of Kentucky. That court held that the Board had adopted an improper method, and that the company, by the payment it had made, had fulfilled its obligation to the state; reaching this conclusion by taking the aggregate market value of its capital stock and bonded indebtedness (\$1,330,000), deducting the assessed value of the Ohio tangibles (\$237,984), and apportioning the balance of \$1,092,016 on the basis of 59 per cent to Kentucky and 41 per cent to Ohio. From 59 per cent of \$1,092,016, namely \$664,289, it deducted the tangible property assessed in Kentucky, \$452,000, which left a balance of \$192,289 as the value of the Kentucky franchise. The state appealed to the court of appeals, where it insisted that, by the method adopted by the circuit court, the company was not taxed upon its entire property. The report of the case states (pp. 348, 349): "It is insisted for the state that the proper way to arrive at the valuation of the franchise is to take the total value, \$1,330,000, and get 59 per cent of it, which is \$782,700, and that this presents the total of the tangible property and of the franchise in Kentucky. Therefore, if we deduct from this total \$782,700, the assessment of the tangible property in Kentucky, \$452,000, the balance, \$330,700, is the value of the franchise. The Board fixed the value of the franchise at \$278,349, or considerably less than the result thus obtained." It was insisted for the Bridge Company that the circuit court had followed *Henderson Bridge Co. v. Com.* 99 Ky. 623, 29 L.R.A. 73, 31 S. W. 486, but the court of appeals pointed out that in that case the Board had followed the method claimed by the company; that, as the action was brought by the state to recover taxes upon the assessment made by the Board, the state was not in a position to question the propriety of the assessment, and that there was nothing in that case, or in any subsequent case approving it, to prevent the Board from adopting a different basis. To a criticism that the Board had adopted an erroneous basis in the instant case, the court conceded the point, *arguendo*, but sustained the assessment upon the ground that it was no more onerous than it would have been had a correct method been adopted;

and, in conclusion, declared (pp. 350, 351): "We therefore conclude that the basis urged by appellant [the state] is the proper one for the assessment of the property under the agreed facts, and the Board having fixed a lower assessment than this would make, the court erred in not enforcing the collection of the tax on the assessment made by the Board." This was a precise answer to the equally precise contention urged in behalf of the state, affecting each of the two questions that were submitted for decision, and it seems to us that it is binding upon the Federal courts as a construction of the statute.

This, we repeat, does not necessarily result in including in the Kentucky franchise valuation tangible or intangible property not located within that state. It does permit the Kentucky officials to take into consideration extra-state tangibles, as well as intangibles, constituting portions of the unit of which they are valuing a part. This is permissible, even in applying the statute to nonresident corporations. It is settled that total stock or total assets, situate partly within and partly without the state, but organically related, may be taken into consideration as a means of reaching the true cash value of property within the state, and that the mileage relation may be given its proper weight. *State R. Tax Cases*, 92 U. S. 575*608, 23 L. ed. 663, 671; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 26, 35 L. ed. 613, 617, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 430, 431, 38 L. ed. 1031, 1037, 1038, 14 Sup. Ct. Rep. 1114; *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 26, 27, 41 L. ed. 49, 58, 59, 16 Sup. Ct. Rep. 1054; *Fargo v. Hart*, 193 U. S. 490, 499, 48 L. ed. 761, 765, 24 Sup. Ct. Rep. 498.

(10) Plaintiff's next point is that the Board took into consideration a mileage proportion of 35.15 per cent, which was the ratio borne by the roads operated by plaintiff within the state of Kentucky to its total operated mileage; whereas it should have included the controlled mileage within and without the state, which would have yielded to Kentucky a proportion of only 24.69 per cent. In this the district court yielded to plaintiff's contention, and, we think, rightly so. By § 4079, Ky. Stat., where the company's lines extend beyond the limits of the state, the report to the auditor shall, in addition to other facts, show "the length of entire lines operated, owned, leased or controlled in this state, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere." And, by § 4081, "that proportion of the

value of the capital stock which the length of the lines operated, owned, leased, or controlled in this state bears to the total length of the lines owned, leased or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state." In *Com. v. Louisville & N. R. Co.* 149 Ky. 829, 838, 150 S. W. 37, the very point was considered by the court of appeals, which declared: "If the railroad company owns a majority of the stock of another company, so that it may elect its directors and dictate its policy, there can be no doubt that it controls it within the meaning of the statute, and that such other railroad should be included in the report required to be made to the auditor. If required to be reported, the Board of Valuation and Assessment may take them into consideration in fixing the value of the franchise of the controlling company in the state of Kentucky."

(11) The district court (230 Fed. 199 et seq.) acceded to the contention of the plaintiff that the action of the Board in adding at first \$2,468,612, and, finally, \$2,318,244, to the Kentucky proportion of the value of the unit, on account of the excess value of the portion of the Kentucky intangibles over the mileage proportion thereof, was not warranted; basing this decision upon the ground that the Board did not follow the only possible method that would have determined this excess with any certainty, and did not have before it the data that would have enabled it to do so. The point, perhaps, is covered by one of defendants' assignments of error; but no argument has been addressed to it, and we express no opinion upon it.

(12) The district court, having found that the value of plaintiff's entire capital stock must be taken to be at least as much as \$262,252,566, the amount found by the Board, and that the apportionment must be upon the basis not of the operated mileage only, but of all mileage operated, owned, leased, and controlled within and without the state, was led to the further conclusion, as a corollary (230 Fed. 202-204), that the valuation of the total capital stock should include an item that the Board had overlooked, viz., the value of so much of the controlled mileage as was not represented by plaintiff's holdings. (Of course, in adopting the capitalization-of-income method of valuation, no account was taken of the interests of others than plaintiff in the controlled roads.) Plaintiff contends that the statute does not justify this procedure; that it is beyond the power of the state because it results in taxing property not belonging to the plaintiff; and that a more logical and

consistent method would be to arrive at the operated, owned, leased, or controlled mileage by treating as controlled mileage not the*total, but only a proportion correspond-^{ing} to the amount of stock held by plaintiff in the controlled roads. The matter is not free from doubt; but we concur in the view of the district judge that it was the legislative intent that, in fixing the percentage apportionable to Kentucky and to be taken into consideration in valuing the taxable franchise, the whole of the controlled mileage within and without the state was to be treated as a part of the aggregate "capital stock," not only in fixing the mileage, but also in fixing the valuation, upon which the apportionment is to be based. It is not to be supposed that the legislature intended to require that, in making the mileage apportionment, which, as already shown, is not conclusive but evidential upon the valuation of the taxable franchise, fractional interests in the controlled roads should be taken into the account, but rather that a controlled road should be treated the same as a road owned.

In order to avoid a double assessment of the franchise of so much of the controlled mileage as was within the state, the court found it necessary to deduct from the Kentucky apportionment of the "capital stock" the value of the Kentucky portion of the controlled mileage (in addition to the assessed value of the tangible property there situate), since these local franchises would be assessed against each of the separate organizations. In this view we concur.

But the court was unable to apply the proper correction to the Board's valuation (p. 232), because of there being nothing in the record to show either the value of the portion of plaintiff's total capital stock not considered by the Board (that is, the value of the outstanding interests in the controlled roads), or the value of that portion of the controlled mileage which was in Kentucky.

After the court delivered its opinion to this effect, and before the entering of the final decree, plaintiff tendered what is called a supplemental bill, which the court allowed, to be filed, purporting to show all the facts^{respecting} the*controlled roads, and to dem-^{onstrate} that the result of adopting the process indicated by the court's opinion would be to reduce the assessment below the amount upon which the company already had paid taxes, and this whether the valuation were made on the stock-and-bond plan or on the capitalization-of-income plan. It appears that defendants never filed any answer to this, and it is urged that because of their failure to do so its allegations must be taken as confessed. But there is nothing to show that defendants were ordered to

answer; and inasmuch as this supplemental bill was filed after the hearing and decision of the cause, and the record contains nothing to show why its averments were ignored, we are not able to say either that defendants were in the position of admitting those averments, or that the court erred in failing to give effect to them. But at least it can be said that plaintiff was not in default for omitting to introduce evidence at the hearing respecting these matters, they not having been considered by the Board, nor set up in the original pleadings, nor, so far as appears, deemed by any of the parties to be material until the court rendered its decision. Yet, as will appear presently, the court in effect decided the case against plaintiff because there was nothing in the record to show the facts concerning the controlled mileage.

(13) In attempting to carry into effect its conclusions upon the facts and the law, the district court pursued the following process of reasoning (p. 231): Assuming \$262,252,566 to be the true cash value of plaintiff's entire capital stock, as the Board found it to be, and 24.6901 (in the opinion this is misprinted as "24.9601") to be the true percentage of the fair cash value apportionable to Kentucky, and that Kentucky's portion was not of greater value than the mileage proportion, the fair cash value of the portion of plaintiff's capital stock attributable to Kentucky would be \$64,750,-418.79. Sixty per cent of* this—the factor of equalization—was taken to be \$38,850,-251.12. Deducting \$29,500,772, the assessed value of the tangible property, would leave \$11,349,479.27 as the value of the franchise, —this being less than half of the amount upon which payment had been made. (There appear to be some additional misprints, or trifling errors of calculation, but not sufficient to affect the result.) But since the Board had omitted to include in the value of the capital stock that interest in the controlled mileage not represented by the stock and bonds owned by plaintiff, and since there was nothing in the record to show the value of this interest, or the value of that portion of the controlled mileage located in Kentucky, the court assumed that the result of considering these two matters might be to make the value of the Kentucky portion of plaintiff's capital stock as much as \$92,181,766, the sum at which the Board fixed it, instead of \$64,750,418.79, the amount computed by the court. The court proceeded to say (p. 232):

"The board has found the fair cash value of the portion of plaintiff's unit in this state to be \$92,181,766, without any excess value. They have not gone at it in the right way. But they have in fact found such to be its

value. It is possible that, if they had gone at it in the right way, they would have found such to be the value thereof. . . . I will therefore dispose of the case on the basis that it was that much. This is not such an exactness as I always like to attain, but the case is one where exactness is not, and only approximation is, attainable. Taking 60 per cent of \$92,181,766 would give \$55,309,059.60 as the value of the portion of plaintiff's unit in Kentucky. Deducting \$29,500,566, the assessed value of the tangible property, leaves \$25,808,493.60 as the value of the franchise. And deducting from this balance \$22,899,300, the amount on which payment has been made, leaves \$2,909,192.60 on which payment¹² should yet be made."

* This rough-and-ready reasoning had the effect of depriving plaintiff of the benefit of having controlled mileage taken into consideration in making the apportionment, instead of operated mileage only; and this because of the assumption that the same valuation reached by the Board through an erroneous method possibly might have been reached had they pursued a correct method. We think the court here fell into error. It being shown that the valuation made by the Board was the result of following a method substantially erroneous because not in accordance with the statute, there is no presumption that a like valuation would have been reached by following a correct method. As the difference is so great—more than \$27,000,000—there is a strong presumption to the contrary. If any of the facts necessary to enable the court to determine what result would have been reached by the application of a correct method were absent from the record, the court might have opened the proofs, in its discretion; otherwise it should have proceeded to base its judgment upon such proofs as already were in the record. The result of the method adopted in making up the decree was to deprive plaintiff of the relief it was entitled to, upon the basis of the facts as found, because of a surmise that, upon other facts not shown by the record, a conclusion sustaining the Board's action might have been reached.

The decree under review, so far as defendants' assignments of error are concerned, should be affirmed. Upon plaintiff's assignments of error, it should be reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

No. 778, reversed.

No. 779, affirmed.

Mr. Justice Holmes, Mr. Justice Brandeis, and Mr. Justice Clarke dissent.

(244 U. S. 555)

ILLINOIS CENTRAL RAILROAD COMPANY, Appt.,
v.

ROBERT L. GREENE, Auditor, Sherman Goodpaster, Treasurer, James P. Lewis, Secretary of State, Constituting the Board of Valuation and Assessment for the State of Kentucky, et al. (No. 642.)

ROBERT L. GREENE, Auditor, et al., Constituting the Board of Valuation and Assessment for the State of Kentucky, et al., Appts.,
v.

ILLINOIS CENTRAL RAILROAD COMPANY. (No. 643.)

ILLINOIS CENTRAL RAILROAD COMPANY, Appt.,
v.

ROBERT L. GREENE, Auditor, Sherman Goodpaster, Treasurer, James P. Lewis, Secretary of State, Constituting the Board of Valuation and Assessment for the State of Kentucky, et al. (No. 644.)

ROBERT L. GREENE, Auditor, et al., Constituting the Board of Valuation and Assessment for the State of Kentucky, et al., Appts.,
v.

ILLIONIS CENTRAL RAILROAD COMPANY. (No. 645.)

STATES $\hookrightarrow$ 191(2)—IMMUNITY FROM SUIT—SUIT AGAINST STATE OFFICERS—ENJOINING ILLEGAL TAXES.

1. State officers charged with the duty of enforcing the tax laws of the state may be enjoined by a Federal court of equity from taking steps looking to the enforcement of state and local taxes upon the intangible property of a public service corporation assessed under state authority, which are asserted to violate the Federal Constitution because of a discrimination in the valuation of the property upon which the taxes are based, arising out of systematic undervaluation of other taxable property, although the state laws under the sanction of which the officers assumed to act in making the assessment do not contemplate any unlawful discrimination.

[Ed. Note.—For other cases, see States, Cent. Dig. § 131.]

TAXATION $\hookrightarrow$ 608(5) — RESTRAINING ILLEGAL TAXATION—REMEDY AT LAW.

2. A public service corporation may sue in equity to restrain state officers from taking steps looking to the enforcement of certain state and local so-called franchise taxes on the ground of discrimination in valuation of the intangible property upon which such taxes are based, notwithstanding the remedy afforded by Ky. Stat. § 162, directing the state auditor to refund taxes unlawfully collected, such remedy being inadequate to prevent equitable relief for two reasons; (a) by the decisions of the Kentucky courts this section is confined to cases where the taxes paid were wholly without warrant in law, or based upon a

mistake as to the rate of taxation upon the amount assessed; (b) the bills deal with both state and local taxes, while this section applies to state taxes alone.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1234.]

TAXATION $\hookrightarrow$ 608(5) — RESTRAINING ILLEGAL TAXATION—UNEQUAL ASSESSMENT.

3. The requirement of Ky. Const. § 172, that all property "shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale," will not prevent injunctive relief against steps looking to the enforcement of certain state and local so-called franchise taxes based upon an assessment of the intangible property of a public service corporation by the State Board of Valuation and Assessment at not more than its fair cash value, where the local assessing officers charged with valuing other classes of property systematically undervalue such property, since to apply to one class of property the standard of fair cash value, systematically departed from with respect to other classes of property, would frustrate the principal object of that section, which, in view of the provisions of §§ 171 and 174, requiring uniformity of taxation in proportion to value, and an identical rate as between corporate and individual property, must be deemed to be equal taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1234.]

TAXATION $\hookrightarrow$ 608(5)—RESTRAINING STATE TAXATION—INEQUALITY OF VALUATION.

4. State as well as local so-called franchise taxes based upon an assessment of the intangible property of a public service corporation made by the State Board of Valuation and Assessment may be enjoined by a Federal court for discrimination arising out of systematic undervaluation of other taxable property, where the proper state officers charged with the enforcement of the tax laws of the state are made parties.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1234.]

COURTS $\hookrightarrow$ 366(6)—FEDERAL COURTS—FOLLOWING DECISIONS OF STATE COURTS—METHOD OF VALUATION FOR TAX PURPOSES — INTANGIBLE PROPERTY OF INTERSTATE RAILWAY COMPANY.

5. Federal courts will follow the decision of the highest state court of Kentucky that Ky. Stat. §§ 4077-4081, governing the valuation of the intangible property of an interstate railway company for tax purposes, properly construed, require first an apportionment to Kentucky of the proper share of the entire value of the capital stock, having regard to the relation of state mileage to system mileage, followed by a deduction from the state's proportion of the capital stock value of the assessed value of the company's tangible property within the state, rather than a deduction of the total tangible property in and out of the state from the total capital stock value before apportionment to the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 961.]

TAXATION ~~60~~493(4) — REVIEW OF JUDGMENT OF OFFICIAL BODY — VALUATION OF CAPITAL STOCK FOR TAX PURPOSES.

6. No fundamentally wrong principle was involved in the decision by a state board, when fixing the value of the capital stock of a railway company for tax purposes, conformably to Ky. Stat. §§ 4077-4081, as to whether it should be valued on the capitalization-of-income or on the stock-and-bond plan, or, if the former, as to what rate of interest should be used in capitalizing, or how many years' earnings should be considered, or as to what was in fact the amount of the net income for a given year, or, if the stock-and-bond plan were adopted, as to what was the value of the stock and bonds, but upon this and similar matters the action of the Board, in the absence of fraud, is binding upon the courts.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 879.]

TAXATION ~~60~~166—PROPERTY OF FOREIGN CORPORATION — PROPORTION OF LOCAL VALUE TO WHOLE OF SYSTEM.

7. A state cannot tax the property of a foreign interstate railway company outside of its jurisdiction, and although the fact that the property within the state is part of a system and has its actual uses only in connection with other parts of the system may be considered by the state in taxing that portion of the system within its borders, the notion of organic unity must not be made the means of unlawfully taxing property without the state.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 288, 294.]

TAXATION ~~60~~611(2) — RESTRAINING ENFORCEMENT — SCOPE OF HEARING—CONSENTION MADE TOO LATE.

8. The refusal of the trial court to consider a contention that if certain treasury securities held by a foreign interstate railway corporation be taken as a part of its capital stock when valuing its intangible property for domestic taxation, then, since such securities represent a controlling interest in large lines of railway outside the state, the apportionment of value to the state should take the mileage of these controlled lines into account, is not an abuse of discretion where the point was first made on a petition for rehearing and was inconsistent with the averments of the original bills respecting corporate mileage, and with the averments in an amended bill that the treasury securities in question had no connection with the business of transportation carried on by the complaining railway company, and that none of such securities covered or represented the physical railroads or other properties operated by it.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1245, 1246.]

[Nos. 642, 643, 644, and 645.]

Argued January 16, 17, and 18, 1917. Decided June 11, 1917.

APPEALS and **CROSS APPEALS** from the District Court of United States for the Eastern District of Kentucky to review decrees enjoining, upon certain conditions, the enforcement of certain franchise tax assessments made against a foreign interstate railway company. Affirmed.¹

See same case below, 209 Fed. 465.

The facts are stated in the opinion.

Mr. Marvel Mills Logan, Attorney General of Kentucky, and Messrs. John L. Rich, Charles Carroll, and Charles H. Morris for Robert L. Greene et al.

Messrs. Blewett Lee, Edmund F. Trabue, Robert V. Fletcher, John C. Doolan, and Atilla Cox, Jr., for the Illinois Central Railroad Company.

* Mr. Justice Pitney delivered the opinion of the court:

These are appeals and cross appeals from two final decrees of the district court enjoining (upon certain conditions) the enforcement of franchise tax assessments for the respective years 1912 and 1913, made against the Illinois Central Railroad Company (plaintiff below in each case) by Henry M. Bosworth and others, constituting the Board of Valuation and Assessment of the State of Kentucky, who were among the original defendants, and to whose offices the cross appellants Robert L. Greene and others succeeded pending the suits, and were thereupon brought in as parties defendant. Plaintiff being an Illinois corporation, the Federal jurisdiction was invoked upon the ground of diversity of citizenship, and also of alleged infringement of plaintiff's rights under the due process and equal protection provisions of the 14th Amendment; the assessments being attacked as having been made by the Board in a manner not in accordance with the state law, as including in the valuation property not within the state, contrary to the due process clause, and as being based upon a discriminatory rule of valuation as compared with other property in the state, and thus amounting to a denial of the equal protection of the laws. The equity jurisdiction was invoked upon the usual grounds. The pleadings are involved, and no attempt will be made to summarize them. In the case relating to the 1912 assessment, they differ somewhat from those in the case relating to the assessment for the following year; but the two cases were consolidated for the purposes of final hearing. They resulted in

¹ Leave granted to present petition for rehearing within sixty days, on motion of Mr. Edmund F. Trabue for the Illinois Central Railroad Company.
June 11, 1917.

decrees granting relief to the plaintiff to the extent of equalization with the basis of assessment customarily adopted by assessing officers with respect to other property in the state, and denying relief upon the other grounds of complaint. Plaintiff appealed to this court in both cases upon the ground that it was entitled to more ample relief; defendants took cross appeals upon the ground that no relief ought to have been granted.

The cases were heard here together with several cognate cases, this day decided, viz.: Nos. 617 and 618, *Greene v. Louisville & Interurban R. Co.* 244 U. S. 499, 61 L. ed. —, 37 Sup. Ct. Rep. 673, and Nos. 778 and 779, *Louisville & N. R. Co. v. Greene*, 244 U. S. 522, 61 L. ed. —, 37 Sup. Ct. Rep. 683.

The salient facts of the present cases are as follows: During the two years pertinent to the controversy, plaintiff operated a system of railroads extending throughout the state of Kentucky and ten other states, having, according to the averments contained in the bills of complaint and the proofs upon which the cases were heard, a total mileage owned, operated, leased, or controlled amounting to 4,550.54, of which 563.79 miles, or 12.3 per cent, were in Kentucky. For the year 1912, the Board of Valuation and Assessment fixed plaintiff's capital stock valuation for the state of Kentucky at \$27,124,240, and deducted from this the tangible property assessment made by the Railroad Commission, \$12,377,383, leaving the franchise assessment \$14,746,857. The district court granted a restraining order, followed by a preliminary injunction, conditioned that plaintiff should pay taxes, state and local, on a valuation of \$6,618,585 (209 Fed. 465), and eventually made a final decree enjoining the enforcement of the assessment, conditioned upon plaintiff's paying taxes upon an additional valuation of \$1,347,212, or \$7,965,797 in all.

For the year 1913, the capital stock value fixed for Kentucky was \$23,679,180, the assessed value of tangible property \$12,478,903, which, being deducted, left \$11,200,277 as the franchise valuation. The court granted a restraining order upon payment of taxes on an assessment of \$6,000,000, followed this with a temporary injunction upon the same terms, and made a final decree granting a permanent injunction upon condition of the payment of taxes upon \$2,161,067 in addition to the \$6,000,000 upon which taxes had been paid under the order for preliminary injunction.

With respect to three of the questions raised by defendants herein: (a) that the suits are not maintainable because in effect suits against the state; (b) that plaintiff has an adequate remedy at law under

§ 162, Kentucky Statutes; and (c) that plaintiff is not entitled to relief by way of equalization because of the undervaluation of property in general by the local assessors; these cases, like the *Louisville & Nashville R. Co. Cases*, are controlled by the decision in *Greene v. Louisville & Interurban R. Co.* supra. Upon the question of the sufficiency of the proofs to warrant the conclusion of the district court as to the general, systematic, and notorious undervaluation of property in Kentucky by the assessing officers for purposes of taxation, and as to the ratio of such undervaluation, the present cases are indistinguishable from the *Louisville & Nashville R. Co. Cases*, supra, and are controlled by our decision therein. Upon the point that the jurisdiction of the court extends to enjoining the collection of illegal taxes, whether assessed for state or for local purposes, the present cases are controlled by the decision in the *Louisville & Nashville R. Co. cases*.

This disposes of all assignments of error filed by the cross appellants (defendants below).

In these cases, as in those last mentioned, it is earnestly insisted by plaintiff that the district court erred in holding that the Kentucky statutes, properly construed, require first an apportionment of a proper share of the total "capital stock" value to Kentucky, followed by a deduction from Kentucky's proportion thereof of the value of its tangible property in the state, instead of holding that the total tangible property in and out of Kentucky should first be deducted from the total capital stock value before apportionment to the state. We need only repeat what was said in the *Louisville & Nashville Cases*, that this is a question of state law that has been definitely passed upon by the Kentucky court of appeals in *Com. v. Covington & C. Bridge Co.* 114 Ky. 343, whose decision the district court properly followed.

We come to questions peculiar to the present cases.

For the year 1912 the Board of Valuation and Assessment made a preliminary assessment of the franchise at \$21,500,000, of which notice was given to plaintiff, and, after a hearing, finally assessed the franchise at \$14,746,857,—a result reached, as already stated, by taking Kentucky "capital stock" at \$27,124,240, and deducting the tangible property assessment of \$12,377,383. In granting the preliminary injunction (209 Fed. 465), the court, deeming that the Board had found the fair cash value of the portion of plaintiff's capital stock in the state to be \$27,124,340, equalized this with the undervaluation of other property in the state on a basis of 70 per cent in order to arrive at a proper valuation of the franchise for the

* 1511
 purposes of a temporary injunction. Upon the final hearing, the court reached the conclusion that the valuation of \$27,124,240 was itself the result of an equalization by the Board at 80 per cent of what they had found to be the fair cash value of the capital stock in Kentucky; that is to say, that they had found the fair cash value to be \$33,905,300. Having concluded that equalization should be made upon the basis of 60 per cent, the court applied this percentage to the \$33,905,300, making the equalized capital stock value \$20,343,180, deducting from which the assessed value of the tangibles, \$12,377,383, left \$7,965,797 as the value of the franchise. Plaintiff contends that there was no sufficient evidence to support the conclusion that the Board's valuation of \$27,124,240 was the result of an 80 per cent equalization; but the contention is clearly unfounded.

There is a similar contention, equally unfounded, with respect to the mode in which the district court applied the 60 per cent equalization factor to the 1913 valuation.

* 1562
 As to the mode in which the Board arrived at a capital stock valuation for the entire system, and the mode in which the Kentucky apportionment was arrived at, several contentions are made by plaintiff besides the one of which we already have disposed. They are: (a) that when the Board capitalized earnings as an index to value they took 6 per cent as a basis instead of $7\frac{1}{2}$ or 8 per cent, either of which is said to be a more proper rate upon the ground that, because of annual unproductive items of expense, amounting to nearly or quite 2 per cent of plaintiff's capitalization, the higher rate is necessary in order to yield a net 6 per cent return upon the investment; (b) that when the stock-and-bond method was employed as an index to value the highest instead of the average market prices were employed; (c) that in capitalizing earnings gross income was used, although it included income from investments in the company's treasury, instead of net operating income, which, it is insisted, is the proper factor; (d) that plaintiff in each year had in its treasury, at its principal office without the state, large amounts of investment securities that improperly were included in the sum found as the value of its aggregate capital stock and apportioned in part to Kentucky; and (e) that plaintiff owned large and costly terminals at Chicago, New Orleans, Memphis, and elsewhere outside of Kentucky, causing a great excess value, mile for mile, of plaintiff's lines outside the state as compared with those inside, and that this excess value was not eliminated either before or after the apportionment to Kentucky.

The first three points relate to valuation, the last two to apportionment. The district court properly held that the action of the Board must be sustained unless it was made to appear that they had adopted a fundamentally wrong principle, or had been guilty of fraud. It held further, that no fundamentally wrong principle was involved in determining whether such a railroad system should be valued on the capitalization-of-income or on the stock-and-bond plan; or, if the former, what rate of interest should be used in capitalizing, or how many years' earnings should be considered, or what was in fact the amount of net income for a given year; or, if the stock-and-bond plan was adopted, what was the value of the stock and bonds; and that on these and similar matters the action of the Board, in the absence of fraud, was binding upon the court. In this we concur.

The claim for an allowance by reason of the treasury securities and the terminals situate in other states is based upon the principle laid down in *Fargo v. Hart*, 193 U. S. 490, 499, 48 L. ed. 761, 765, 24 Sup. Ct. Rep. 498, and similar cases, to which we adhere, that a state cannot tax property outside of its jurisdiction, belonging to persons domiciled elsewhere, and that although the fact that property is part of a system and has its actual uses only in connection with other parts of the system may be considered by the state in taxing that portion of the system which is within its borders, yet the notion of organic unity must not be made the means of unlawfully taxing property without the state. * 1563

As to the terminals, the district court held that since it did not appear but that the Board made due allowance on account of them, it must be presumed that they did make such an allowance. As to the treasury securities, the court held that plaintiff had not made an adequate showing to the Board of Valuation and Assessment; that it did not appear but that the Board had given proper consideration to them; and that plaintiff had not put the court in possession of the evidence upon which to determine whether the securities were a part of its "unit," or why the securities were held by plaintiff instead of being distributed to the stockholders, and that the case of *Coulter v. Weir*, 62 C. C. A. 429, 127 Fed. 897, 909-911, did not apply because there the property in question had been placed in the hands of trustees for the benefit of stockholders. Upon petitions for rehearing, plaintiff insisted that if the treasury securities were to be taken as a part of the unit, then, since these securities represented a controlling interest in certain large lines of railroad lying outside of Kentucky (the

Central of Georgia, the Yazoo & Mississippi Valley, and the Indianapolis Southern systems), the apportionment should take the mileage of these controlled lines into account, which would have yielded a total mileage of all lines amounting to 7,862.95, and Kentucky mileage 560.49, or only 7.13 per cent for the year upon which the 1912 assessment was based, and a somewhat smaller percentage for the following year. To this the court responded that the contention came too late, and it cannot be said that this was an unreasonable view, or showed an abuse of discretion. In addition to the averments respecting comparative mileage contained in the original bills, it was distinctly stated in an amended bill in the case pertaining to the 1912 assessment that the treasury securities in question had not "any connection*whatever with the business of transportation carried on by complainant, and that none of said stocks, bonds, or other properties covered or represented the physical railroads or other properties operated by complainant."

In criticism of the conclusions of the court upon these and some other points, a most elaborate argument is submitted; but we see no sufficient ground for disturbing the decision.

Decrees affirmed.

Mr. Justice Holmes, Mr. Justice Brandeis, and Mr. Justice Clarke dissent in Nos. 643 and 645. In Nos. 642 and 644 they concur in the result.

(244 U. S. 564)

R. J. DARNELL, Appt.,
v.

GEORGE R. EDWARDS, F. M. Sheppard, and W. B. Wilson, Constituting the Mississippi Railroad Commission.

CARRIERS $\Rightarrow$ 12(5)—GOVERNMENT REGULATION OF RATES—CONFISCATION—CHARGE AGAINST OPERATING REVENUE.

1. One twentieth of the amount expended by the owner of a railway in the construction of the road cannot be charged against annual operating revenue in determining whether rates fixed under state authority are confiscatory, as not yielding a proper return, merely because of a contract whereby the ownership of the road was to be transferred at the end of twenty years to a connecting railroad without payment of any purchase price.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 11, 15-20.]

CARRIERS $\Rightarrow$ 18(6)—ENJOINING RAILWAY RATES—DOUBT.

2. The enforcement of railway rates fixed under state authority will not be enjoined as being confiscatory, where the evidence tending to show that they were not

remunerative, while based upon actual experience in the operation of the road, relates only to a brief period when conditions were abnormal, and there has been no serious effort to develop traffic along the line of the road from property other than that owned by the owner of the railway.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24.]

CARRIERS $\Rightarrow$ 18(6)—ENJOINING RAILWAY RATES—DISMISSAL WITHOUT PREJUDICE.

3. The dismissal of a bill which seeks to enjoin the enforcement of railway rates fixed under state authority as being confiscatory, in advance of sufficient actual experience under normal conditions, should be without prejudice to another suit if, after a full and fair test, the rates shall be found to be confiscatory.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24.]

[No. 216.]

Argued and submitted April 25, 1917. Decided June 11, 1917.

APPEAL from the District Court of the United States for the Southern District of Mississippi to review a decree dismissing the bill in a suit to enjoin the enforcement of railway rates fixed under state authority, as being confiscatory. Modified by providing that the dismissal of the bill shall be without prejudice, and, as so modified, affirmed.

See same case below, on motion for temporary injunction, 209 Fed. 99.

The facts are stated in the opinion.

Messrs. Roger Montgomery and William P. Metcalf for appellant.

Messrs. James N. Flowers, J. B. Harris, James Stone, George H. Ethridge, Asst. Atty. Gen., W. R. Woods, and J. M. Kuykendall, for appellees.

*Mr. Justice Pitney delivered the opinion of the court:

Appellant filed his bill in the district court against the members of the Mississippi Railroad Commission, an administrative body having the usual powers, in which he sought relief by injunction against an order prescribing maximum rates on logs in carload lots transported in intrastate commerce, upon a railroad operated by him; the ground of his complaint being that the rates were so low as to be confiscatory and, therefore violative of the due process of law provision of the 14th*Amendment. The court refused a preliminary injunction (209 Fed. 99), and, upon final hearing, dismissed the bill. The case is brought here by direct appeal because of the constitutional question, under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1916, § 1215].

The railroad in question is known as the

Batesville Southwestern, and extends from a junction with the Illinois Central at Batesville for a distance of about 17 miles through a timber country, its entire line being within the state of Mississippi. It was built jointly by appellant and the Illinois Central Railroad Company, under a contract pursuant to which he disbursed approximately \$146,000 and the company approximately \$98,000. The contract was made in 1910, and by its terms Darnell was to maintain and operate the road for twenty years, the company to pay him for maintaining it \$143 per mile per annum, and the road was to become the property of the company at the end of twenty years without further payment; the agreement, however, being subject to termination by the company prior to the expiration of the twenty years upon specified terms. The building of the road was commenced about June, 1911. Darnell began operating it as a common carrier in March, 1912, but its construction was not finally completed until about the middle of June, 1914.

The road is of standard gauge and construction, ballasted, and built in a first-class manner. Its traffic consists almost wholly of shipments of logs in carload lots from points along the line to the terminus at Batesville.

Pending the construction of the road, the Batesville Southwestern Railroad Company was organized as a corporation to take over the property, but the road remained in the hands of Darnell as lessee. In April, 1912, he established and promulgated a tariff providing a uniform rate for freight on logs in carload lots, with a minimum of 4,500 feet, regardless of the kind or character of the timber; which was, for 10 miles and under, \$2.80 per thousand*feet; 10 to 15 miles, \$3.35 per thousand; 15 to 20 miles, \$3.90 per thousand. Complaint having been made to the Mississippi Railroad Commission, by citizens interested in the logging business, that these rates were extortionate, unjust, and confiscatory, a hearing was had, and, as a result, the Commission, in July, 1913, made an order reducing the rates nearly 50 per cent on oak, ash and hickory, and more than 50 per cent on other kinds of logs.

It appears that at the time of the construction of the railroad Darnell individually was the owner of a large amount (at the time of the hearing he owned 19,000 acres) of timber land in the country through which the road was projected, and that this furnished the reason for his interest in its construction and operation. At the same time he owned the principal part of the stock of R. J. Darnell, Incorporated, a lumber-milling corporation; but between that

time and the time of the hearing the bulk of the stock had passed into the hands of his sons, he still remaining president of the company, and having sold to it the timber on the lands owned by him, the company agreeing to cut it, have it hauled, and loaded on the cars, and to pay him a fixed amount per stump.

The bill of complaint showed gross receipts from the operation of the railroad for the year ending June 30, 1913, amounting to \$15,553.01, and operating expenses \$4,296.20, leaving net earnings of \$11,256.81. Against this, however, complainant charged as an annual rental \$8,133.39, this being $\frac{1}{20}$ of \$162,667.69, then stated to be the amount invested by him in the construction of the road. Deducting this so-called rental charge left only \$3,123.42, or less than 2 per cent on the sum alleged to have been expended by complainant. These figures were the result of the rates established by him; and it was alleged that at the much lower rates established by the Commission the road would yield no return above operating expenses.

* The bill was filed in September, 1913, the Commission's rates not having as yet been put into effect. At the preliminary hearing the district court held (209 Fed. 99) that upon the showing then made it would not interfere with the Commission's rates, at least until final hearing; thus affording a period for experiment as to whether new business would be developed in volume sufficient to make those rates remunerative.

Upon the final hearing, evidence having been submitted by both sides, the court's decree was to the effect that the rates established by the Commission were reasonable and should be enforced.

In this court appellant insists, first, that the district court erred in holding that he was not entitled to charge against the annual operating revenue $\frac{1}{20}$ of the amount expended by him in the construction of the road. We are clear that this contention is untenable. In determining whether rates are confiscatory because not yielding a proper return, the basis of calculation is the fair value of the property used in the service of the public. *Smyth v. Ames*, 169 U. S. 466, 546, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418; *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 434, 57 L. ed. 1511, 1555, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. The hypothetical annual payments of $\frac{1}{20}$ of the cost of the road to Darnell were not a proper rent charge, and bore no relation to the actual value of the property. They arose out of the contractual arrangement between Darnell and the Illinois Central, and were in the nature of an amortization charge to

take account of his diminishing interest in the road. But, upon that theory, the interest of the Illinois Central increased in value by as much as that of Darnell decreased. In any aspect, the transference of his interest to the Illinois Central, and any charge on that account, made by him for purposes of his own bookkeeping, had no proper relation to the question of the value of the property, and hence were of no concern to the public.

It is insisted that upon the proofs, and especially by actual experiment, the rates established by the Commission were shown to be confiscatory.

It is well established that in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing. Besides this, there was affirmative evidence before the district court to the effect that the rates were reasonable. The evidence for complainant, tending to show they were nonremunerative, while based upon actual experience in the operation of the road, yet relates to only a brief period when conditions were abnormal. The road was a new one, not completed until June, 1914; that is, after the filing of the bill and shortly before the final hearing. The Commission's rates, although promulgated in June, 1913, were not put into effect until September 10, and the period of experimentation to which the evidence related extended only from the date last mentioned to March 31, 1914. Practically the entire business of the road, at first, was hauling logs from complainant's land to a mill operated by R. J. Darnell, Incorporated, at Memphis. That mill was destroyed by fire in June, 1913, and thereafter the corporation constructed a mill at Batesville, but this was not placed in operation until March 17, 1914. In consequence there was a heavy falling off in traffic on the road, there being no Darnell shipments except such logs as were on hand when the Memphis mill was burned.

The evidence throws doubt upon the question whether the road, if built merely for the purpose of serving the timber country that is tributary to its present line, was not an extravagant venture. But, as yet, there has been no serious effort to develop traffic even from that country, aside from complainant's own properties. If the road was built rather as a branch of the Illinois Central, and with a view to extending it into a more lucrative territory, any extra cost of construction attributable to this is hardly to be accounted as a part of the fair value devoted to the use of the timber traffic. The circumstances that a road may have been unwisely built, in a locality where

there is not sufficient business to sustain it, may be taken into account. *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 412, 38 L. ed. 1014, 1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047. And the nature and value of the service rendered by the company to the public are matters to be considered. *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 597, 41 L. ed. 560, 566, 17 Sup. Ct. Rep. 198; *Smyth v. Ames*, 169 U. S. 466, 544, 42 L. ed. 819, 848, 18 Sup. Ct. Rep. 418.

In the case before us, if the earning capacity of the railroad, present and prospective, really is as small as appellant claims, it may be doubted whether the road is worth what it cost. But it is sufficient for the present to say that the experimental period was too brief; there is too little showing of an effort to develop traffic along the line of the road from property other than that of complainant; and conditions during the entire period covered by the testimony have been too abnormal to enable us to say that the Commission's rates are confiscatory.

The decree under review should be so modified that the dismissal of the bill shall be without prejudice to another suit to restrain the enforcement of the Commission's rates if, after a full and fair test, they shall be found to be confiscatory (*Knoxville v. Knoxville Water Co.* 212 U. S. 1, 19, 53 L. ed. 371, 382, 29 Sup. Ct. Rep. 148; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 55, 53 L. ed. 382, 400, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034), and, as so modified, it should be affirmed.

Modified and affirmed.

(244 U. S. 571)

SOUTHERN RAILWAY COMPANY, Plff.
in Err.,
v.

H. E. PUCKETT.

REMOVAL OF CAUSES 3—DIVERSE CITIZENSHIP—SUIT ARISING UNDER FEDERAL EMPLOYERS' LIABILITY ACT.

1. An action brought under the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the Act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1916, § 8662), cannot be removed from a state to a Federal court upon the ground of diverse citizenship.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5.]

COMMERCE 27(8)—EMPLOYERS' LIABILITY—WHEN EMPLOYEE IS ENGAGED IN "INTERSTATE COMMERCE."

2. An employee of an interstate railway carrier assisting in clearing up a wreck which was blocking the movement of cars in interstate commerce, who, while carrying

blocks on his shoulder which were to be used in jacking up a wrecked car and replacing it upon the track, stumbled over some large clinkers which were on the roadway near the track, and in stumbling struck his foot on some old cross ties, overgrown with grass, as a result of which he was seriously injured, was employed in interstate commerce within the meaning of the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the Act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1916, § 8662), giving a right of recovery against the carrier for injury to an employee while so employed, although his primary object may have been the rescue of a fellow employee, pinned beneath the car.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

COURTS —399(2)—ERROR TO STATE COURT—FOLLOWING DECISION BELOW—NEGLIGENCE.

3. The Federal Supreme Court will not lightly disturb the concurrent conclusion of two state courts in an action brought under the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the Act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1916, § 8662), that there was sufficient ground for attributing negligence to the railway carrier because of the presence of large clinkers in the path along which an employee was called upon to pass in the course of his duty, and over which he stumbled while carrying some blocks to be used in jacking up a wrecked car.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1090; Appeal and Error, Cent. Dig. § 3396.]

[No. 219.]

Argued April 25, 1917. Decided June 11, 1917.

IN ERROR to the Court of Appeals of the State of Georgia to review a judgment which affirmed a judgment of the City Court of Atlanta, in that state, in favor of plaintiff in a personal-injury action brought under the Federal Employers' Liability Act. Affirmed.

See same case below, 16 Ga. App. 551, 85 S. E. 809.

The facts are stated in the opinion.

Messrs. Sanders McDaniel, E. R. Black, and L. E. Jeffries for plaintiff in error.

Messrs. Edgar Watkins, Spencer R. Atkinson, and E. W. Born for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

Puckett recovered a verdict and judgment in the city court of Atlanta against the Southern Railway Company* for damages arising from personal injuries sustained by him in August, 1911, while at work for the company in its yard at Atlanta, Georgia.

As submitted to the jury, the action was founded upon the Federal Employers' Liability Act of April 22, 1908, as amended by Act of April 5, 1910 (35 Stat. at L. 65, chap. 149, 36 Stat. at L. 291, chap. 143, Comp. Stat. 1916, § 8662). The judgment was affirmed by the Georgia court of appeals (16 Ga. App. 551, 85 S. E. 809), and a writ of error brings it under our review.

The record shows that a petition and bond for the removal of the cause to the appropriate Federal court upon the ground of diversity of citizenship was filed in due time by the defendant and overruled by the trial court. An assignment of error based upon this ruling has been abandoned, and properly so, in view of our decision in *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 602, 59 L. ed. 1478, 1482, 35 Sup. Ct. Rep. 844.

Whether, at the time he was injured, plaintiff was employed in interstate commerce, is the only substantial question; there being no dispute that defendant at that time was a common carrier by railroad, engaged in commerce of that character.

As detailed in the opinion of the court of appeals, the circumstances of the occurrence were as follows: Plaintiff had been engaged in inspecting cars which had been put into an interstate train—No 75—that ran between Atlanta, Georgia, and Birmingham, Alabama; he had inspected about 25 cars, and there remained to be inspected about 12 cars, which were to be placed in the same train; while plaintiff was waiting for these, a collision between other cars of defendant occurred in the yard nearby, and several tracks were blocked by the wreckage; one of defendant's employees, named O'Berry, was caught in the collision and pinned beneath a car; in obedience to the printed rules of the company, plaintiff went immediately to the scene of the wreck to render what assistance he could, and was there instructed by a superior employee to go and get a "jack" to assist in raising the wrecked car *so as to extricate O'Berry and clear the tracks of the wreckage; some of the remaining cars not yet placed in train No. 75 were to have been hauled over the tracks that were obstructed by the wreck, and on account of the obstruction it became necessary to detour them, whereby train No. 75 was delayed for about an hour; while plaintiff, assisting in clearing up the wreck, was carrying some blocks on his shoulder to be used in jacking up the wrecked car and replacing it upon the track, he stumbled over certain large clinkers which were on the roadway near the track, and, in stumbling, struck his foot against some old cross ties

overgrown with grass, and in consequence fell and was seriously injured.

The court held that although plaintiff's primary object may have been to rescue his fellow employee, his act nevertheless was the first step in clearing the obstruction from the tracks, to the end that the remaining cars for train No. 75 might be hauled over them; that his work facilitated interstate transportation on the railroad, and that consequently he was engaged in interstate commerce when injured.

We concur in this view. From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce. The case is controlled by *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 152, 57 L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; *New York C. & H. R. R. Co. v. Carr*, 238 U. S. 260, 263, 59 L. ed. 1298, 1299, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; *Pennsylvania Co. v. Donat*, 239 U. S. 50, 60 L. ed. 139, 36 Sup. Ct. Rep. 4; *Louisville & N. R. Co. v. Parker*, 242 U. S. 13, 61 L. ed. 119, 37 Sup. Ct. Rep. 4. *Pedersen v. Delaware, L. & W. R. Co.* supra, holds that a workman employed in maintaining interstate tracks in proper condition while they are in use is employed in interstate commerce; the other cases are to the effect that preparatory movements in aid of interstate transportation are a part of such commerce within the meaning of the act.

*Of course, we attribute no significance to the fact that plaintiff had been engaged in inspecting interstate cars before he was called aside by the occurrence of the collision. *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, 478, 58 L. ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, 10 N. C. C. A. 153; *Erie R. Co. v. Welsh*, 242 U. S. 303, 306, 61 L. ed. 319, 37 Sup. Ct. Rep. 116.

It is contended that there was no sufficient ground for attributing negligence to defendant because of the presence of large clinkers in the path along which plaintiff, in the course of his duty, was called upon to pass. This is no more than a question of fact, without exceptional features, and we content ourselves with announcing the conclusion that we see no reason for disturbing the result reached by two state courts. *Great Northern R. Co. v. Knapp*, 240 U. S. 464, 466, 60 L. ed. 745, 751, 36 Sup. Ct. Rep. 399.

Judgment affirmed.

The CHIEF JUSTICE dissents.

PUGET SOUND TRACTION, LIGHT, & POWER COMPANY, Appt.,
v.

CHARLES A. REYNOLDS, Frank R. Spinning, and Arthur A. Lewis, Constituting the Public Service Commission of the State of Washington, and W. V. Tanner, Attorney General.

CONSTITUTIONAL LAW § 135—IMPAIRING CONTRACT OBLIGATIONS—REQUIRING STREET RAILWAY PASSENGERS TO BE CARRIED BEYOND FRANCHISE LIMITS.

1. An order of the Public Service Commission created by Wash. Laws 1911, chap. 117, requiring street railway passengers to be carried beyond the limits of a particular franchise, does not impair the obligation of any contract contained in municipal ordinances granting street railway franchises which give the street railway companies the right to make rules for the management and operation of the lines, "provided that such rules and regulations shall not conflict with the laws of the state" and the charter and ordinances of the city, since this, by fair construction, means the laws as they shall from time to time exist, and the act creating the Commission and the orders made by the Commission are within this description.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 380-387.]

CONSTITUTIONAL LAW § 135—IMPAIRING CONTRACT OBLIGATIONS—MUNICIPAL CONTRACTS—POLICE POWER OF STATE—STREET RAILWAY FARES AND TRANSFERS.

2. The exercise by the state, acting through a Public Service Commission, of its police power over street railway fares and transfers, could not be precluded by ordinances of the cities of Seattle and Ballard, in the state of Washington, contractual in form, granting street railway franchises, where, under Wash. Const. art. 12, § 18, adopted before the franchises were granted, the legislature was required to pass laws establishing reasonable maximum rates for transportation of passengers and freight, and to correct abuses and prevent discrimination in such rates, and was empowered to establish a railroad and transportation commission and define its powers and duties, and by art. 11, § 10, any city containing a population of 20,000 inhabitants or more is permitted to frame a charter for its own government "consistent with and subject to the Constitution and laws of this state."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 380-387.]

CONSTITUTIONAL LAW § 297—DUE PROCESS OF LAW—RATE REGULATION.

3. Whether an order of a Public Service Commission requiring street railway passengers to be carried beyond the limits of the particular franchises covering those lines, and at a reduced rate, is confiscatory or otherwise arbitrary within the inhibition of U. S. Const. 14th Amend., is not to be

determined with reference to earnings and operating expenses of the lines in question, separately considered, where such lines are and have long been operated as parts of a system.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832-834.]

CARRIERS  **12(10)—GOVERNMENTAL CONTROL — STREET RAILWAYS — THROUGH SERVICE—SINGLE FARE.**

4. A street railway company operating a number of lines as parts of a single system may be required to establish through service upon the payment of a single fare.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 15-20.]

[No. 220.]

Submitted April 25, 1917. Decided June 11, 1917.

A PPEAL from the District Court of the United States for the Western District of Washington to review a decree denying an application for a temporary injunction to restrain the enforcement of an order of the Public Service Commission of that state, requiring street railway passengers to be carried beyond the limits of the particular franchise and at a reduced rate. Affirmed.

See same case below, 223 Fed. 371.

The facts are stated in the opinion.

Messrs. **James B. Howe** and **Hugh A. Tait** for appellant.

Mr. W. V. Tanner, Attorney General of Washington, and Messrs. **Scott Z. Henderson**, **L. L. Thompson**, and **C. E. Arney** for appellees.

*575 * **Mr. Justice Pitney** delivered the opinion of the court:

576 Appellant (plaintiff below) owns and operates a street railway system in the city of Seattle, Washington, aggregating about 200 miles, as assignee of numerous franchises granted to its predecessors in interest by the cities of Seattle, West Seattle, and Ballard, and by King county. It filed its bill in the district court to obtain relief from the operation and effect of an order made by the Public Service Commission of the state on March 24, 1915, bringing in as defendants the members of the Commission and the attorney general of the state. Plaintiff being a corporation of the state of Massachusetts, and defendants citizens of the state of Washington, the jurisdiction was invoked both upon the ground of diversity of citizenship and upon the ground that the order complained of was alleged to impair the obligation of contracts and deprive plaintiff of its property without due process of law, in violation of the Constitution of the United States. The order was made as the result of an investigation of

which plaintiff had notice, and it contains the following provisions:

"(1) That the defendant company [plaintiff] continue the operation of through service on the Ballard beach line.

"(2) That the Alki point and Fauntleroy park lines be operated through the city of Seattle on First or Second avenue as far north at least as Virginia street.

"(3) That the defendant company furnish sufficient cars to provide seats for substantially all persons using the Alki point and Fauntleroy park lines."

The third paragraph was subject to a qualification; but since the district court granted an injunction against this part of the order, and defendants have not appealed, the qualifying clause need not be set forth and we may confine our attention to the requirements of §§ 1 and 2. As to these, the district court, three judges sitting, denied an application for a temporary injunction (223 Fed. 371), and plaintiff brings the case here by direct appeal under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1916, § 1215].

* In order to understand the effect of the* first two paragraphs and the grounds upon which they are attacked, it should be stated that the Ballard beach line was constructed and is operated under a franchise ordinance of the city of Ballard, which city afterwards became and now is a part of the city of Seattle. The line extends from Ballard beach to the intersection of West 59th street and 24th avenue, at which point it connects with lines of plaintiff that were constructed under other franchises. For some time prior to and at the date of the making of the order in question, plaintiff had been and was operating through cars over the Ballard beach line and the connecting lines to and into the business section of Seattle, instead of physically transferring passengers from car to car at West 59th street and 24th avenue. Because, as is said, of the expense attached to the operation of through cars, plaintiff had given notice that it would discontinue such operation and require the transfer of passengers at the point mentioned. The effect of the order was to require plaintiff to continue the through service.

The Alki point and Fauntleroy park lines, each of them 8 or 9 miles in length, were constructed under separate franchises granted to predecessors in interest of plaintiff by the city of Seattle. They have their northern termini at or about Yessler way, but for two or three years prior to the date of the order cars on these lines, instead of stopping on their north-bound trips at that point, continued about a mile farther north along First or Second avenue to Virginia

street, in the business district of the city. Shortly before the promulgation of the order, this through service was discontinued, and north and South-bound passengers required to transfer at Yessler way. The effect of the order was to compel the reinstatement of the through service.

The ordinances under which these three lines were constructed provide in substance * that the company "shall have the right at any and all times to make reasonable rules and regulations for the management and operation of the railway lines herein provided for; provided that such rules and regulations shall not conflict with the laws of the state of Washington and the charter and ordinances of the city." Each franchise provides also that the company shall have the right to charge a passenger fare for one continuous passage, not exceeding 5 cents, even though a transfer be necessary, but shall sell commutation tickets entitling the purchaser to 25 rides for \$1, such tickets, however, not to be transferable, and not to entitle the owner to the transfer privilege.

(1) One ground of complaint respecting the order of the Commission is that, in requiring passengers to be carried beyond the limits of a particular franchise, it in effect confers the transfer privilege upon holders of commutation or "4-cent" tickets. The order says nothing about rates of fare; but we will assume, as the district court assumed, that it has the effect attributed to it in this respect.

It is urged that the order impairs the obligation of the contracts contained in the franchise ordinances, both in regard to transfers and in regard to plaintiff's right to make rules for the management and operation of its lines. As to the latter point, the proviso that the rules "shall not conflict with the laws of the state," etc., by fair construction, means the laws as they shall from time to time exist. The act establishing the Public Service Commission (Laws 1911, chap. 117) and orders made by that Commission are within the description; hence, the contract, if it be a contract, was subject to and is not impaired by the order in question.

Assuming (what is not clear) that the provision in the franchise ordinances respecting the rates of fare and the transfer privilege are contractual in form, still it is well settled that a municipality cannot, by a contract of this nature, foreclose the exercise of the police power of the state unless clearly authorized to do so by the supreme legislative power. The Constitution of Washington, art. 12, § 18, requires the legislature to pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight,

and to correct abuses and prevent discrimination in rates by railroads and other common carriers, and provides that "a railroad and transportation commission may be established, and its powers and duties fully defined by law." By art. 11, § 10, any city containing a population of twenty thousand inhabitants or more is permitted to frame a charter for its own government "consistent with and subject to the Constitution and laws of this state." This Constitution was adopted in 1889, long previous to the date of the earliest of plaintiff's franchise ordinances. The supreme court of Washington has held that the provisions of municipal charters are subject to the legislative authority of the state; that the Public Utilities Act superseded any conflicting ordinance or charter provision of any city; and that contractual provisions in franchises conferred by municipal corporations without express legislative authority are subject to be set aside by the exercise of the sovereign power of the state. *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259; *State ex rel. Webster v. Superior Ct.* 67 Wash. 37, 43-50, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78.

The present case is very clearly distinguishable from *Detroit United R. Co. v. Michigan*, 242 U. S. 238, 248, 61 L. ed. 268, 37 Sup. Ct. Rep. 87, where the state legislature had expressly provided that the municipal corporation might make a binding agreement with a street railway respecting the rates of fare.

(2) It is insisted that neither the Alki nor the Fauntleroy park line is earning sufficient to pay its operating cost, or ever can do so under a fare limited to 5 cents, and that for this reason an order requiring these lines to carry passengers beyond the termini fixed in their franchises upon 4-cent tickets, and to give them the more costly through service by means of a single car, is necessarily a taking of plaintiff's property without compensation, and hence without due process of law, within the meaning of the 14th Amendment. A similar point was made in the bill with respect to the Ballard beach line, but is not seriously pressed here. As to the other two lines, there seems to be no question that since they run for a considerable distance over the tide flats, receiving and discharging but few passengers en route, so that a majority of the passengers are carried distances of 5 or 6 miles, these lines, separately considered, never have paid operating expenses, and probably never will.

But we cannot accede to the suggestion that the question whether the Commission's order is confiscatory or otherwise arbitrary within the inhibition of the 14th Amend-

ment is to be determined with reference alone to the Alki, the Fauntleroy, or the Ballard beach lines. These are and long have been operated by plaintiff as parts of a system comprising 200 miles of tracks. The Commission found that the net earnings of the system for the year ending February 28, 1915, not including depreciation and taxes, were upwards of \$1,600,000; that the company had refused to produce the valuations of its property made by experts, and had failed to show that there was not sufficient return from its property to pay operating expenses, taxes, and depreciation, and leave a balance. And from the evidence introduced the Commission found the fact to be that, allowing for the services required by its order, the company would have net returns over and above operating expenses, taxes, and depreciation. It was not and is not contended that the system earnings are unremunerative.

Plaintiff relies upon *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 604, 59 L. ed. 735, 745, L.R.A.—, —, P.U.R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1, where this court held that a statute which segregated a single commodity, and imposed upon it a rate that would compel the carrier to transport it for less than the proper cost of transportation, was in excess of the power of the state. In our opinion, that decision is inapplicable, the present case being controlled rather by *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 665, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484, where the state of Arkansas had prescribed a maximum rate of 3 cents per mile for each passenger, under a penalty payable to the passenger from whom an overcharge was exacted, and in an action to recover such a penalty the company defended on the ground that the portion of its road over which plaintiff was carried was highly expensive to construct and maintain, and that the cost of maintaining it and transporting passengers over it exceeded the maximum rate fixed by law. But this court held "that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; . . . and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the

act within the limits of the state of Arkansas."

(3) Plaintiff's brief contains some general attacks upon the effect of the Commission's order in requiring plaintiff to carry passengers over portions of "separate and distinct franchise routes" upon payment of a single fare. This criticism is not well founded. Even were the several portions of its lines separately owned, they being operated practically as a single system, it would be within the bounds of reasonable regulation to establish through service and a joint rate. *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 296, 301, 45 L. ed. 194, 199, 201, 21 Sup. Ct. Rep. 115; *Michigan C. R. Co. v. Michigan R. Commission*, 236 U. S. 615, 629, 59 L. ed. 750, 755, P.U.R. 1915C, 263, 35 Sup. Ct. Rep. 422.

The decree of the District Court, so far as appealed from, is affirmed.

The CHIEF JUSTICE and Mr. Justice McKenna dissent because they are of the opinion that this case, as a matter of authority, is controlled by *Detroit United R. Co. v. Michigan*, 242 U. S. 238, 61 L. ed. 268, 37 Sup. Ct. Rep. 87, and that as a matter of original consideration the assailed legislation has impaired the obligation of a contract, in violation of the Constitution of the United States, and was repugnant to the Constitution because wanting in due process.

Mr. Justice McReynolds also dissents.

(244 U. S. 582)

PERRY G. LANHAM, as Administrator of the Estate of Mary J. Lanham, Deceased.
et al., Pliffs. in Err.,
v.

J. F. MCKEEL.

TIME 5 — COMPUTATION — EFFECTIVE DATE OF REMOVAL OF RESTRICTION ON ALIENATION.

The removal of restrictions on alienation of a surplus Indian allotment became effective on the 30th day after the date of the Secretary of the Interior's approval, conformably to the Act of Congress of April 21, 1904 (33 Stat. at L. 189, chap. 1402), of an appropriate finding and recommendation by the Indian agent, where the order of the Secretary of the Interior read, "Approved: this approval to be effective thirty days from date."

[Ed. Note.—For other cases, see *Time, Cent. Dig.* §§ 5-8.]

[No. 245.]

Submitted April 30, 1917. Decided June 11, 1917.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Marshall County, in that state, in favor of defendant in an action of ejectment. Affirmed.

See same case below, — Okla. —, 148 Pac. 844.

The facts are stated in the opinion.

Messrs. **Orion L. Rider**, **George E. Rider**, and **E. S. Hurt** for plaintiffs in error.

Mr. J. F. McKeel, in propria persona, and Messrs. **C. H. Ennis** and **James E. Webb** for defendant in error.

* **Mr. Justice Pitney** delivered the opinion of the court:

This writ of error presents but a single Federal question, and that is within narrow compass. The suit involves the title to a part of the surplus allotment of **Mary Jane Lanham**, who was a **Choctaw Indian** of three-fourths blood. Defendant in error claims title under a deed made by her on April 25, 1908. It is conceded that because of legislation by Congress prior to the Act of April 21, 1904 (chap. 1402, 33 Stat. at L. 189, 204), the land was inalienable, unless the restriction upon its alienation had been removed by an order of the Secretary of the Interior, made pursuant to that act. In conformity to its provisions, the United States Indian agent, after investigation, made the appropriate finding and recommended the removal of restrictions upon the alienation by **Mary Jane Lanham** of her surplus allotment, and this was approved by the Secretary of the Interior in writing under date of March 26, 1908, in these terms: "Approved: this approval to be effective thirty days from date." If either the day of the approval or the day of the conveyance be included, thirty days had expired on the day the deed was executed. The supreme court of Oklahoma, following **Taylor v. Brown**, 147 U. S. 640, 37 L. ed. 313, 13 Sup. Ct. Rep. 549, and **Baker v. Hammett**, 23 Okla. 480, 100 Pac. 1114, held that the date of approval should be included in computing the thirty-day period, and that therefore the deed was valid (— Okla. —, 148 Pac. 844).

In our opinion the decision was correct, although we sustain it upon grounds differing somewhat from those upon which the cited cases rest. In **Taylor v. Brown**, the question arose under the proviso to § 15 of an Act of March 3, 1875 (18 Stat. at L. 402, 420, chap. 131, Comp. Stat. 1916, § 4611), that the title to lands acquired by certain Indians under that section should "remain inalienable for a period of five years from the date of the patent." In

Baker v. Hammett, the language in question was that contained in § 16 of the Supplemental Creek Agreement (Act of June 30, 1902, chap. 1323, 32 Stat. at L. 500, 503), to the effect that lands allotted to citizens should not be alienated "before the expiration of five years from the date of the approval of this supplemental agreement." In each case the statute contemplated a vesting of title accompanied with a prohibition of alienation during a specified period, and it was held that the initial date should be included in the computation because, but for the restriction, the land might have been alienated on that date. Here the restriction upon alienation arose out of antecedent legislation, and continued until the effective approval by the Secretary of the Interior of an appropriate finding by the Indian agent. The approval was required to be, and in this case was, in writing, and we have to do merely with its interpretation. What, then, is the meaning of "effective thirty days from date?" Certainly this cannot be construed the same as if it read, "effective after thirty days from date." Plaintiffs in error, in argument, suppose it to have read: "effective one day from date," and ask whether in that event it would have become effective immediately upon being signed by the Secretary of the Interior. We answer "No," but that it would have become effective on the following day; that is, on the first day after its date. By like reasoning, the order as written became effective on the 30th day after its date; that is to say, on April 25th, and enabled the allottee to make a valid conveyance on that day.

Judgment affirmed.

(244 U. S. 585)

WILLIAM McCOACH, Collector of Internal Revenue, Petitioner,

v.

INSURANCE COMPANY OF NORTH AMERICA.

INTERNAL REVENUE — 25 — CORPORATION EXCISE TAX — DEDUCTIONS FROM GROSS INCOME — RESERVES OF INSURANCE COMPANY HELD AGAINST UNPAID LOSSES — "RESERVE FUNDS."

The amounts of accrued unpaid losses which fire and marine insurance companies are required by the state insurance commissioner, under the authority of Pa. Act June 1, 1911, P. L. 607, to schedule each year as items of liabilities, are not "reserve funds required by law," within the meaning of the provision of the Federal corporation excise tax law of August 5, 1909 (36 Stat. at L. 112, chap. 6), § 38, which permits a deduction from annual gross income of insurance companies subject to the tax of "the net addition, if any, required by law

to be made within the year to reserve funds."

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 72, 73.

For other definitions, see Words and Phrases, First and Second Series, Reserve Fund.]

[No. 475.]

Argued March 14, 1917. Decided June 11, 1917.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which reversed a judgment of the District Court for the Eastern District of Pennsylvania in favor of plaintiff in a suit to recover back taxes, with instructions to allow a disputed item in full. Reversed. Judgment of District Court affirmed.

See same case below, 140 C. C. A. 167, 224 Fed. 657.

The facts are stated in the opinion.

Assistant Attorney General Wallace for petitioner.

Messrs. B. F. Pepper, G. W. Pepper, and Bayard Henry for respondent.

Mr. Justice Pitney delivered the opinion of the court:

This was an action brought by respondent, a fire and marine insurance company of the state of Pennsylvania, to recover a part of the excise taxes exacted of it for the years 1910 and 1911 under the Act of August 5, 1909, chap. 6, § 38, 36 Stat. at L. 11, 112. As the case comes here, only two items are in dispute, one for each of the years mentioned, representing the tax upon amounts added in each of those years to that part of what are called its "reserve funds" that is held against accrued but unpaid losses.

The act imposed upon every insurance company*organized under the laws of the United States or of any state an annual excise tax with respect to the carrying on or doing business, equivalent to 1 per centum upon its entire net income over and above \$5,000, with exceptions not here pertinent. The second paragraph of § 38 provided: "Such net income shall be ascertained by deducting from the gross amount of the income of such . . . insurance company . . . (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other

than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds."

The italics indicate the particular words upon which the controversy turns; the question being whether, within the meaning of the act of Congress, "reserve funds," with annual or occasional additions, are "required by law" in Pennsylvania to be maintained by fire and marine insurance companies, other than the "unearned premium" or "re-insurance reserve," known to the general law of insurance.

The district court rendered a judgment in plaintiff's favor, excluding, however, the disputed items (218 Fed. 905); on plaintiff's writ of error the circuit court of appeals reversed this judgment, with instructions to allow the claim in full (140 C. C. A. 167, 224 Fed. 657); and the case was brought here by writ of certiorari.

Plaintiff was chartered by a special act, but is subject to the state insurance law. Its business is confined to fire and marine insurance.

The law of Pennsylvania (Act of June 1, 1911, P. L. 607, 608) creates a state insurance commissioner with supervisory control over the companies; provides in § 4 that he shall see that all the laws of the commonwealth*respecting insurance companies are faithfully executed, authorizing him to make examinations, to have access to all the books and papers of any company, to examine witnesses relative to its affairs, transactions, and condition, to publish the result of his examination when he deems it for the interest of the policy-holders to do so, and to suspend the entire business of any company during its noncompliance with any provision of law obligatory upon it, or whenever he shall find that its assets are insufficient to justify its continuance in business; and whenever he finds any company to be insolvent or fraudulently conducted, or its assets insufficient for the carrying on of its business, he is to communicate the facts to the attorney general. By § 15 every insurance company is required to file annual statements with the commissioner, upon blank forms to be furnished by him, such as shall seem to him best adapted to elicit a true exhibit of their financial condition. Sections 7, 8, and 9, set forth in the margin,* make specific pro-

*Section 7. In determining the liabilities upon its contracts of insurance of any insurance company other than life insurance, and the amount such company should hold as a reserve for reinsurance, he shall, for casualty insurance companies, charge one half of the premium on all annual policies written within one year, and on poli-

cies written for more than one year he shall charge one half of the current year's premiums, plus the whole of the premiums for subsequent years. For fire insurance companies he shall charge 50 per centum of the premiums written in their policies upon all unexpired risks that have one year, or less than one year, to run, and

visions for ascertaining the reserve for different classes of companies other than life insurance companies. Another act of the same date (P. L. 1911, p. 599) provides for judicial proceedings at the instance of the insurance commissioner looking to the dissolution of insolvent and delinquent companies. Its provisions need not be quoted.

A previous act (April 4, 1873, P. L. 20, 22) required a specified reinsurance reserve against unexpired risks on fire, marine, and inland policies. The Act of 1911, just quoted, requires the maintenance of a substantially similar reserve; and, with respect to casualty companies, and these only, that a reserve be maintained against unpaid losses, based upon the amount of claims presented. The reference in § 9 to "reinsurance and loss reserves, as above defined," is limited by what precedes it; and the section deals not alone with "reserves," but requires "all other debts and claims" to be accounted as liabilities.

It appears that under this legislation, and under previous statutes in force since 1873, the insurance commissioner has required plaintiff and similar companies to return each year, as an item among their liabilities, the net amount of unpaid losses and claims, whether actually adjusted, in process of adjustment, or resisted. And, although this practice has not been sanctioned by any decision of the supreme court of the state, it is relied upon as an administrative interpretation of the law.

* Conceding full effect to this, it still does not answer the question whether the amounts required to be held against unpaid losses, in the case of fire and marine insurance companies, are held as "reserves," within the meaning of the Pennsylvania law or of the act of Congress, however they may be designated upon the official forms. As already appears, the Pennsylvania act specifically requires debts and claims of all kinds to be included in the statement of liabilities, and treats them as something distinct from reserves. The object is to

a pro rata of all premiums on risks having more than one year to run; on perpetual policies he shall charge the deposit received, less a surrender charge of not exceeding 10 per centum thereof. For marine and inland risks he shall charge 50 per centum of the premium written in the policy upon yearly risks, and the full amount of the premium written in the policy upon all other marine and inland risks not terminated.

Section 8. He shall, in calculating the reserve against unpaid losses of casualty companies, other than losses under liability policies, set down by careful estimate in each case the loss likely to be incurred against every claim presented, or that may

exercise abundant caution to maintain the companies in a secure financial position.

The act of Congress, on the other hand, deals with reserves not particularly in their bearing upon the solvency of the company, but as they aid in determining what part of the gross income ought to be treated as net income for purposes of taxation. There is a specific provision for deducting "all losses actually sustained within the year and not compensated by insurance or otherwise." And this is a sufficient indication that losses in immediate contemplation, but not as yet actually sustained, were not intended to be treated as part of the reserve funds; that term rather having reference to the funds ordinarily held as against the contingent liability on outstanding policies.

In our opinion the reserve against unpaid losses is not "required by law," in Pennsylvania, within the meaning of the act of Congress.

It results that the judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Reversed.

The CHIEF JUSTICE and Mr. Justice McKenna dissent.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

(244 U. S. 486)

OLIVIA H. HOPKINS et al., Apts.,

v.

FRANK WALKER et al.

COURTS  209—JURISDICTION OF UNITED STATES COURTS — FEDERAL QUESTION—PLEADING.

Allegations of the bill in a suit by the owners of a placer mining claim to cancel the record of certain lode location certificates as a cloud on title, which concern the nature and validity of plaintiffs' title, and the existence, invalidity, and recording of the defendants' certificates of location, must, when determining whether the bill states a cause of action under the mining laws of the United States justiciable in the

be presented in pursuance of notice from the insured of the occurrence of an event that may result in a loss; and the sum of the items so estimated shall be the total amount of the reserve. . . .

Section 9. Having charged as a liability the reinsurance and loss reserves, as above defined for insurance companies of this commonwealth other than life, and adding thereto all other debts and claims against the company, the commissioner shall, in case he finds the capital of the company impaired 20 per centum, give notice to the company to make good the capital within sixty days. . . .

Federal courts, be regarded as essential parts of the cause of action, either under the general rule of equity respecting suits to remove a cloud on title, or under the local law (Mont. Codes 1907, §§ 6115 and 6870), under which, as construed by the state courts, the complaint in suits to remove clouds from title must disclose the facts necessary to show that, but for the interposition of the court, the plaintiff may suffer injury.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841.]

[No. 234.]

Submitted October 18, 1915. Decided June 11, 1917.

APPEAL from the District Court of the United States for the District of Montana to review a decree dismissing, for want of jurisdiction, the bill in a suit to remove a cloud on the title of a placer mining claim. Reversed.

The facts are stated in the opinion.

Messrs. **John A. Shelton** and **H. C. Hopkins** for **Olivia H. Hopkins**.

Messrs. **John A. Shelton** and **J. L. Templeman** for the **Washington-Butte Mining Company**.

Messrs. **L. O. Evans**, **W. B. Rodgers**, **D. M. Kelly**, and **D. Gay Stivers** for the **Anaconda Copper Mining Company**.

Mr. Thomas J. Walsh for appellees.

* **Mr. Justice Van Devanter** delivered the opinion of the court:

This is a direct appeal under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1916, § 1215], from a decree dismissing a suit in equity for want of jurisdiction, the question for decision now being whether the case presented by the bill is one arising under the laws of the United States.

With considerable detail the bill alleges that the plaintiffs are the owners of a placer mining claim in Montana for which a United States patent was issued to their predecessors in interest in 1895; that they and their predecessors have been the owners and in actual possession for more than twenty years; that at the time of the application for the patent no mineral-bearing vein or lode was known to exist within the boundaries of this placer claim; that prior to its location two lode locations were made or attempted to be made, covering part of it, and while the application for the patent was pending the lode claimants conformed to the mining laws of the United States by filing adverse claims in the local land office and bringing suits to establish them in a court of competent jurisdiction; that the placer claimants prevailed in those suits

and certified copies of the judgments were duly filed in the local land office; that further proceedings were then had in the Land Department, resulting in the issue of a patent to the placer claimants according to those judgments; and that under the mining laws this passed to the plaintiffs' predecessors a full title to all land and all minerals within the boundaries of the placer claim.

The bill further alleges that, notwithstanding the absence of any known vein or lode within the boundaries of the placer claim at the time of the application for the patent, notwithstanding the judgments in favor of the placer claimants in the two adverse suits, and notwithstanding the issue of the patent, several persons claim to have made lode locations at different times from 1900 to 1913 upon part of the placer claim,—the part covered by the two earlier lode locations which were unsuccessfully asserted in the adverse suits,—and have caused certificates of the location of these later lode claims to be recorded in the office of the clerk of the county wherein the land lies; that these certificates contain declarations and recitals tending to support the lode claims to which they refer,—there are nine,—and give the length of each claim as 1,500 feet and its width as 600 feet; that these lode claims and the certificates were made upon the mistaken theory that, under the mining laws, the placer patent is wholly invalid as to the ground covered by the two earlier lode claims, and, if this be not so, that the ground in controversy was known at the time of the application for the patent to contain valuable mineral-bearing veins or lodes, and therefore, under the mining laws, was excepted from the patent and remained subject to location as lode claims; that, even if there were known mineral-bearing veins or lodes within the placer claim at the time of the application for the patent, no subsequent location of any such vein or lode could be made, under the mining laws, to embrace more than 25 feet of the surface on each side of it; that the defendants are claiming the ground in controversy under the later lode claims and the certificates before described; that for the reasons indicated these locations and certificates are invalid and the certificates, as recorded, constitute clouds upon the plaintiffs' title and reduce its market value; and that the determination of the plaintiffs' rights requires a construction of the mining laws under which the proceedings resulting in the patent were had,* and a decision of what, according to those laws, passed by the patent, and what, if anything, was excepted and remained open to location.

There is also an allegation that the suit is one arising under the laws of the United

States, and the matter in dispute exceeds, exclusive of interests and costs, the sum or value of \$3,000, but there is no allegation of diverse citizenship. The prayer is that the cloud caused by the recording of the certificates of location be removed and the title of the plaintiffs quieted.

It is conceded that the plaintiffs, being in possession, have no remedy at law, and that their remedy, if any, is in equity. Our concern is not with this, but with the question whether the case is one arising under the laws of the United States. A case does so arise where an appropriate statement of the plaintiff's cause of action, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of a law of Congress. *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434; *Shulthis v. McDougal*, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704; *Denver v. New York Trust Co.* 229 U. S. 123, 133, 57 L. ed. 1101, 1120, 33 Sup. Ct. Rep. 657; *Taylor v. Anderson*, 234 U. S. 74, 58 L. ed. 1218, 34 Sup. Ct. Rep. 724. Assuming that the allegations of the bill concerning the nature and validity of the plaintiffs' title and the existence, invalidity, and recording of the defendants' certificates of location constitute a part of the plaintiffs' cause of action, it is plain that a controversy respecting the construction and effect of the mining laws is involved and is sufficiently real and substantial to bring the case within the jurisdiction of the district court. This is practically conceded in the brief for the defendants which says: "The controversy arises by reason of the peculiar provisions of the law (Rev. Stat. § 2333, Comp. Stat. 1916, § 4632) under which one is permitted to enter upon lands patented as a placer claim and to locate within such claim a lode or lodes known to exist at the time of filing the application for the placer patent." But it is insisted that the allegations concerning the existence, invalidity, and recording of the defendants' certificates of location form no part of the plaintiffs' cause of action, and so, for present purposes, must be disregarded. To this we cannot assent.

In both form and substance the bill is one to remove a particular cloud from the plaintiffs' title,—as much so as if the purpose were to have a tax deed, a lease, or a mortgage adjudged invalid and canceled. It hardly requires statement that in such cases the facts showing the plaintiff's title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts

of the plaintiff's cause of action. Full recognition of this is found in the decisions of this and other courts. *Wilson Cypress Co. v. Del Pozo y Marcos*, 236 U. S. 635, 643, 644, 59 L. ed. 758, 761, 766, 35 Sup. Ct. Rep. 446; *Lancaster v. Kathleen Oil Co.* 241 U. S. 551, 554, 555, 60 L. ed. 1161, 1165, 1166, 36 Sup. Ct. Rep. 711; *Walton v. Perkins*, 28 Minn. 413, 10 N. W. 424; *Wals v. Grosvenor*, 31 Wis. 681; *Teal v. Collins*, 9 Or. 89; *Sheets v. Prosser*, 16 N. D. 180, 183, 112 N. W. 72.

If we turn to the statutes and decisions in Montana relating to the right to maintain such suits, we find that the same rule is recognized there. Two statutes may be noticed. Both were copied from the laws of California and are found in the Montana Codes of 1907. One, § 6115, provides for the cancelation of an instrument, apparently valid, but actually invalid, where there is reason to apprehend that, if not canceled, it may prove injurious to the plaintiff. The other, § 6870, permits a suit to quiet title against an adverse claimant in the absence of conditions which formerly were deemed essential. In California suits under the former are referred to as suits to remove clouds from title, while those under the latter are called suits to quiet title. The two sections are there regarded as different in both substance and purpose,—the former as putting in statutory form and preserving "an old and well-settled rule of equity," and the latter as greatly liberalizing and enlarging another old rule.⁴⁹¹ Of the former, it is said that it "is aimed at a particular instrument, or piece of evidence, which is dangerous to the plaintiff's rights," and that "there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated." *Castro v. Barry*, 79 Cal. 443, 21 Pac. 946; *Hibernia Sav. & L. Soc. v. Ordway*, 38 Cal. 679. The supreme court of Montana follows the California decisions, quotes approvingly from them, and holds in respect of suits to remove clouds from title that "the complaint must disclose the facts necessary to show that, but for the interposition of the court, the plaintiff may suffer injury." *Hicks v. Rupp*, 49 Mont. 40, 44, 45, 140 Pac. 97; *Merk v. Bowery Min. Co.* 31 Mont. 298, 309, 78 Pac. 519.

Thus, whether we apply the general rule or the Montana rule, it is manifest that the allegations of the bill which it is insisted must be disregarded are material parts of the plaintiffs' cause of action; that is to say, they are important elements of the asserted right to have the recording of the

certificates canceled as a cloud upon the title.

Recorded certificates of location constitute the first muniment of the locator's paper title (Lindley on Mines, 3d ed. § 379); and when verified, as in the case here, are, in Montana, made prima facie evidence of all facts properly recited in them. Codes 1907, §§ 2284, 2285. So, when they are apparently valid, but, under the mining laws, are actually invalid, as is asserted here, they may becloud the title injuriously.

We are accordingly of opinion that the bill states a case arising under the mining laws of the United States, and of which the District Court is given jurisdiction.

Decree reversed.

(244 U. S. 492)

SANTA FE PACIFIC RAILROAD COMPANY, Appt.,

v.

FRANKLIN K. LANE, Secretary of the Interior.

CONSTITUTIONAL LAW — 278(1) — VESTED RIGHTS—DUE PROCESS OF LAW — RAILWAY LAND GRANT — IMPOSING COST OF SURVEY ON GRANTEE.

1. Vested rights of the grantee under the Railway Land Grant Act of July 27, 1866 (14 Stat. at L. 292, chap. 278), which expressly stated that such act was subject to addition, alteration, amendment, or repeal by Congress, regard being had for the rights of the grantee, were not infringed, contrary to the due process of law clause of U. S. Const. 5th Amend., by the enactment by Congress, while the grantee was in default, of the provisions of the Act of July 31, 1876 (19 Stat. at L. 121, chap. 246, Comp. Stat. 1916, § 4882), requiring the grantee railway company and similar grantees to pay for the survey of the granted lands, and directing that this be done in advance of the issue of the patents.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 763.]

PUBLIC LANDS — 82 — RAILWAY LAND GRANT—COST OF SURVEY.

2. The departmental construction of the provisions of the Act of July 31, 1876 (19 Stat. at L. 121, chap. 246, Comp. Stat. 1916, § 4882), requiring the grantee in a railway land grant to pay for the survey of the granted lands in advance of the issue of the patents, as charging the grantees with the cost of surveying the granted lands only, and not with the entire cost of the survey of a township in which the grantee is entitled to a part of the lands only, was, in effect, incorporated into the Act of June 25, 1910 (36 Stat. at L. 834, chap. 406, Comp. Stat. 1916, § 4914), in which Congress, with undoubted knowledge of that construction, chose to leave the terms of the former provision undisturbed save as the time of payment was advanced by re-

quiring a deposit of the cost in advance of the survey.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 236, 253-256.]

INJUNCTION — 75 — AGAINST UNAUTHORIZED DEMAND BY OFFICIAL — ADEQUATE REMEDY AT LAW.

3. The insistence upon or the giving effect to the unauthorized demand by the Secretary of the Interior, made under the Act of June 25, 1910 (36 Stat. at L. 834, chap. 406, Comp. Stat. 1916, § 4914), that the grantee in a railway land grant, within ninety days of the demand, make an advance deposit of the entire cost of surveying a township within the primary limits of the grant, in which the grantee was entitled to the odd-numbered sections only, may be enjoined in equity, where there are millions of acres of unsurveyed lands within the primary limits of such grant, and the railway company is entitled to many of the odd-numbered sections within the unsurveyed areas, and where the statute contemplates that when a demand thereunder is not complied with the rights of the grantee in the granted lands specified in the demand "shall cease and forfeit" to the United States, and the Secretary of the Interior shall notify the Attorney General in order that the latter may begin "proceedings to declare the forfeiture" and to restore the lands to the public domain. The plaintiff was not required, in order to test the validity of the demand, to permit the ninety days to pass and to rely entirely upon defending such suit as might be brought by the Attorney General.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 143, 144, 150.]

PUBLIC LANDS — 82 — COST OF SURVEY—TENDER BY GRANTEE IN RAILWAY LAND GRANT—ADEQUACY.

4. Tender by the grantee in a railway land grant of one half the amount demanded by the Secretary of the Interior as an advance deposit under the Act of June 25, 1910 (36 Stat. at L. 834, chap. 406, Comp. Stat. 1916, § 4914), to cover the entire estimated cost of surveying a township in which the grantee was entitled to the odd-numbered sections only, was adequate, the statute charging the grantee with the cost of the survey of the granted lands only, which could not, at most, be more than half the acreage in the township.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 236, 253-256.]

[No. 170.]

Argued April 18, 1917. Decided June 11, 1917.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, dismissing the bill in a suit to enjoin the Secretary of the Interior from insisting upon or giving effect to a demand that the grantee in a railway land grant make an advance de-

posit to cover the entire estimated cost of surveying a township in which the grantee was entitled only to the odd-numbered sections. Reversed.

See same case below, 43 App. D. C. 497. The facts are stated in the opinion.

Messrs. **Alexander Britton**, **Evans Browne**, and **Francis W. Clements** for appellant.

Assistant Attorney General **Kearful** for appellee.

* Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a suit to enjoin the Secretary of the Interior from insisting upon or giving effect to a demand heretofore made by him on the plaintiff to the effect that the latter make an advance deposit, under the Act of June 25, 1910, chap. 406, 36 Stat. at L. 834, Comp. Stat. 1916, § 4914, of \$5,500 to cover the cost of surveying certain lands within the primary limits of the land grant made by the Act of July 27, 1866, chap. 278, 14 Stat. at L. 292, to the Atlantic & Pacific Railroad Company, to whose rights the plaintiff has succeeded. The court of first instance refused the injunction and dismissed the bill, and its action was affirmed. 43 App. D. C. 497.

The land grant was made in aid of the construction of a proposed railroad from Missouri through Arizona to the Pacific ocean, and included, subject to exceptions not here material, every alternate odd-numbered section of public land within defined limits on either side of the road.* The lands along the proposed road had not been surveyed at the date of the grant, but the President was to cause them to be surveyed as the construction proceeded; and as each 25 miles of road was completed patents were to be issued for the granted lands lying opposite that section. The grant was made upon condition that construction be commenced within two years and that not less than 50 miles of road be completed during each year thereafter; and the granting act was declared to be subject to addition, alteration, amendment, or repeal by Congress, due regard being had for the rights of the grantee. Although expressly contemplating that the granted lands should be surveyed along with the other lands on each side of the road, the granting act said nothing about who should bear the cost of the survey. At first the grantee did not proceed with the construction at the rate prescribed (Atlantic & P. R. Co. v. Mingus, 165 U. S. 413, 442, 41 L. ed. 770, 781, 17 Sup. Ct. Rep. 348; House Report No. 193, 49 Cong. 1st Sess.), and during the continuance of this default Congress incorporated in the Appropriation Act of July 31, 1876, chap.

246, 19 Stat. at L. 121, Comp. Stat. 1916, § 4882, a provision requiring the grantee, as also other similar grantees, to pay for the survey of the granted lands, and directing that this be done in advance of the issue of the patents. This provision, it is contended, infringed upon the vested rights of the grantee, and therefore was repugnant to the due process of law clause of the 5th Amendment to the Constitution. But, in view of the grantee's default and the reserved power to add to, alter, amend, or repeal the granting act, the contention must be held untenable. This necessarily follows from the decisions in Northern P. R. Co. v. Traill County (Northern P. R. Co. v. Rockne) 115 U. S. 600, 29 L. ed. 477, 6 Sup. Ct. Rep. 201, and New Orleans P. R. Co. v. United States, 124 U. S. 124, 31 L. ed. 383, 8 Sup. Ct. Rep. 417.

Under the rectangular system of surveying the public lands, which long has been in force, they are divided into townships, and sections bounded by north and south and east and west lines. A township consists of thirty-six sections,—each approximately 1 mile square,—arranged in six rows and progressively numbered by starting with the northeasterly one and proceeding west through the upper row, then east through the second row, and then alternately west and east through the others. Rev. Stat. § 2395, Comp. Stat. 1916, § 4803. A township has the same number of odd-numbered sections that it has of even-numbered ones, and the two are so arranged that they alternate just as do the different colored squares on a checker board. The only lines run in the course of the survey are the township lines and the exterior section lines and the only monuments erected or placed are those which mark these lines. Every section line is a boundary between two sections, one having an odd and the other an even number. A township cannot be divided until its exterior lines are established, and the lines of the alternate odd-numbered sections cannot be established without at the same time and by the same acts establishing the lines of the even-numbered sections. In short, the system is such that a township is surveyed as a unit.

With this surveying system in mind, the officers of the Land Department construed the provision of 1876 as intended to charge the grantee with the cost of surveying the granted lands, and not with the cost of surveying the township. A plan for dividing the cost on an acreage basis between the granted and the ungranted lands was accordingly adopted. By it, if the granted lands constituted half the total area, as they would where all the odd-numbered sections passed under the grant, the grantee

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was charged with half the total cost. This plan was followed uniformly as to all the land grants coming within the purview of that provision up to the passage of the Act of June 25, 1910, *supra*. Of the terms of this act it suffices to say in this connection that it requires the cost of surveying the "lands granted" to be deposited within ninety*days after a demand by the Secretary of the Interior specifying the amount required and the lands to be surveyed. It makes no other change in the duty or obligation of the grantee. In other words, what is to be paid remains the same as before, but the time for payment is advanced. Following this act the officers of the Land Department adhered to the view that the cost to be paid was that of surveying the granted lands, and continued to divide the cost of surveying the township according to the plan previously adopted, save as a different course was pursued in this and possibly a few other instances.

The demand by the Secretary, out of which this suit arose, relates to the survey of four townships in Arizona, the odd-numbered sections of which are claimed by the plaintiff under the grant of 1866. The amount specified in the demand is the estimated cost of surveying these townships, and not a proportional part of the total cost corresponding to the acreage of the granted lands. The townships lie opposite the constructed portion of the road, and, speaking generally, the plaintiff's right to the odd-numbered sections is not questioned; indeed, it is the basis of the Secretary's demand. The townships also lie within the limits of a forest reserve, but this does not affect the plaintiff's rights under the grant, for the reserve was established long after the road was constructed.

The construction which the officers of the Land Department placed upon provision of 1876, if not the only permissible one, was obviously both reasonable and equitable. Their uniform adherence to it for over thirty years prior to the Act of 1910 gave it additional force, and when Congress, with undoubted knowledge of what had been done, chose, as it did in passing that act, to leave the terms of the former provision undisturbed, save as the time for payment was advanced, the departmental construction received a further sanction which, in effect, incorporated it into the statute. Convincing evidence*that Congress took the same view of the matter as did the officers of the Land Department is afforded by the committee reports on the Act of 1910, wherein the grantees in the land grants were spoken of as under an existing duty "to pay one half the cost of surveying the lands within their granted limits," and the

Secretary of the Interior was encouraged to call upon Congress "for a sufficient appropriation, from time to time, to cover the government's share of the cost of the work of surveying as it progressed." See Senate Report No. 609, 61st Cong. 2d Sess., which includes the House Report. One of the reports, in evident explanation of provisions in the act intended to hasten such surveys, said:

"It is deemed wise and important that these lands be surveyed as promptly as possible for various reasons: first, that they may become taxable by the states and communities; second, that the government may dispose of its lands which join the railroad lands, and in order that where the railroad lands occur within forest reserves—about 3,000,000 acres of the unsurveyed lands being in reserves—the government officials may be able to determine the boundaries of the public lands for the purpose of regulating and controlling the same, selling the timber, etc."

We conclude that the provision of 1876, as supplemented by the Act of 1910, gives no warrant for demanding of the grantee in a land grant a deposit covering the entire cost of surveying a township, wherein the grantee is entitled to only a part of the lands, and that in making such a demand of the plaintiff the defendant plainly exceeded his authority. Thus, the demand was an unauthorized act, done under color of office, and the defendant properly may be enjoined from insisting upon or giving effect to it, unless it be that there is an absence of other elements essential to granting such relief.

We think the other elements are not wanting. There*are millions of acres of unsurveyed lands within the primary limits of the unforfeited portion of the grant of 1866. See Senate Report, *supra*. The plaintiff is entitled to many of the odd-numbered sections within the unsurveyed areas. A claim such as is evidenced by the demand made by the defendant, unless and until it is adjudged unauthorized, will cast a serious cloud upon the plaintiff's rights in the granted lands remaining unsurveyed and be a source of serious embarrassment. Besides, the Act of 1910 contemplates that when a demand thereunder is not complied with the rights of the grantee in the granted lands specified in the demand "shall cease and forfeit" to the United States, and the Secretary shall notify the Attorney General in order that the latter may begin "proceedings to declare the forfeiture" and to restore the lands to the public domain. The plaintiff was not required, in order to test the validity of the demand, to permit the ninety days to pass and to rely entirely

upon defending such suit as might be brought by the Attorney General. On the contrary, if the demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity to have the defendant enjoined from insisting upon or giving any effect to it. The hazard and embarrassment incident to any other course were such as to entitle it to act promptly and affirmatively, and of course there was no remedy at law that would be as plain, adequate, and complete as a suit such as this against the defendant.

The plaintiff promptly tendered a deposit of half the amount demanded, but the tender was rejected. As the granted lands could not, at most, be more than half the acreage in the townships, and the amount demanded was what was required to survey the entire acreage, the tender was adequate. Decree reversed.

(244 U. S. 456)

IN THE MATTER OF THE INDIANA TRANSPORTATION COMPANY, Petitioner.

ADMIRALTY §50—PROCESS—NECESSITY OF SERVICE—AMENDED LIBEL—INTRODUCING NEW CLAIMS OF NEW CLAIMANTS.

1. New claims of new claimants may not, without service of process, be introduced by an amended libel into an existing suit begun by a libel in personam, setting up a cause of action for a death caused by the capsizing of a vessel, although the respondent has appeared in the suit; the new claimants are strangers and must begin their action by service of process just as if no one had sued the respondent.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 414-429.]

ADMIRALTY §44 — APPEARANCE — AS WAIVER OF LACK OF SERVICE OF PROCESS.

2. The right of the respondent, who had appeared in a suit begun by a libel in personam for a death caused by the capsizing of a vessel, to object that new claims of new claimants could not be introduced into the suit without service of process, was not lost when respondent excepted that it could not in law in this case be called upon to answer the amended libel as to additional libellants, or when, not waiving its previous exception, which had been overruled, it again excepted that the court had not jurisdiction over it in respect of the additional libellants, and that the amended libel did not state a cause of action against it.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 376-384.]

[No. 25, Original.]

Argued May 21, 1917. Decided June 11, 1917.

ORIGINAL PETITION for a Writ of Prohibition directed to the Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, to prevent that court from exceeding its jurisdiction by permitting new claims of new claimants to be introduced without service of process by an amended libel into an existing suit begun by a libel in personam, setting up a cause of action for a death caused by the capsizing of a vessel. Rule made absolute.

The facts are stated in the opinion.

Messrs. Charles E. Kremer and Russell Mott in support of the petition.

No appearance for respondent.

Mr. Harry W. Standidge (by special leave) in support of the return of respondent.

* Mr. Justice Holmes delivered the opinion of the court:

The suit in which this writ of prohibition is sought was originally a libel in personam against the petitioner, an Indiana corporation, and others, for causing the death of one Dawson through the capsizing of the steamer Eastland in the Chicago river. The libel was filed on August 21, 1915. A citation was served upon an agent of the petitioner within the district, and the petitioner filed exceptions to the libel. On July 24, 1916, leave was granted "to certain parties" to intervene as libellants, and a citation to respondents not served was ordered, returnable the first Monday in September. At this time the petitioner was not subject to service in the district and was not served with process. The "certain parties" mentioned in the order seem to have been 373 other libellants, each alleging a distinct cause of action for death due to the same accident. The petitioner excepted that the amended libel was contrary to law because it joined 373 other libellants who had separate causes of action, and also because the petitioner could not in law be called on to answer the amended libel as to 373 additional libellants. The exceptions were overruled and the petitioner directed to answer in twenty days from the date of the order, September 18, 1916. Thereupon the petitioner, not waiving its previous exceptions, on October 7 again excepted that the court had not jurisdiction over it in respect of the additional libellants, and that the libel did not state a cause of action against it. On October 25 this petition was filed.

The foundation of jurisdiction is physical power. If a defendant's body were in custody by arrest, or a vessel were held by proceedings in rem, it well might be that new claims would be entertained against

the person or against the ship, in addition to those upon which the arrest was made. The Oregon, 158 U. S. 186, 210, 39 L. ed. 943, 953, 15 Sup. Ct. Rep. 804. But appearance in answer to a citation does not bring a defendant under *the general physical power of the court. He is not supposed, even by fiction, to be in prison. Conventional effect is given to a decree after an appearance because when power once has been manifested, it is to the advantage of all not to insist upon its being maintained to the end. Michigan Trust Co. v. Ferry, 228 U. S. 346, 353, 57 L. ed. 867, 874, 33 Sup. Ct. Rep. 550. That, however, is the limit of the court's authority. Not having any power in fact over the defendant unless it can seize him again, it cannot introduce new claims of new claimants into an existing suit simply because the defendant has appeared in that suit. The new claimants are strangers and must begin their action by service just as if no one had sued the defendant before. The Oregon, 158 U. S. 186, 205, 210, 39 L. ed. 943, 952, 953, 15 Sup. Ct. Rep. 804. We may repeat with more force concerning defendants what was said *alio intuitu* in a New Jersey case cited in Reynolds v. Stockton, 140 U. S. 254, 268, 35 L. ed. 464, 468, 11 Sup. Ct. Rep. 773. "Persons by becoming suitors do not place themselves for all purposes under the control of the court."

The only question is whether the petitioner lost its rights by its mode of asserting them; the argument for the respondent being that the exceptions above mentioned amounted to an appearance and plea to the merits, and that thus the absence of service was cured. But it is to be remembered that the motion for leave to intervene was a motion in the cause in which petitioner already had appeared. We should not be astute to treat recognition that it was in court as the case stood before the motion, to let in upon it an avalanche of new claims, as waiving what it was the prime and only purpose of the exceptions to prevent. The language of the first exceptions was not as explicit as it might have been, but the absence of service seems to us sufficiently covered by the words: "Because the above-named respondent cannot in law, in this case, be called upon to answer the said amended libel as to 373 additional libellants."

The second exception, still insisting on the petitioner's denial that the court had jurisdiction of it in respect of the new claims set up, pleaded further, upon the rule to answer, that the amended libel did not state a cause of action. But if the principles of waiver and appearance by pleading to the merits are not modified in a

case where the defendant already is in court, it is true at least that when objections to the jurisdiction have been overruled the defendant does not lose its rights by pleading to the merits. Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237. The District Court attempted to exceed its jurisdiction and the writ of prohibition should be granted.

Rule absolute.

(244 U. S. 459)

PAINÉ LUMBER COMPANY, Limited,
Gould Manufacturing Company, the R.
McMillen Company, et al., Appts.,
v.

ELBRIDGE H. NEAL, Individually and as
Secretary and Treasurer of the Joint Dis-
trict Council of New York and Vicinity
of the United Brotherhood of Carpenters
and Joiners of America, and Amalgamated
Society of Carpenters and Joiners
of America, et al.

MONOPOLIES ⇨ 24(1) — **RESTRAINING VIOLATION OF SHERMAN ANTI-TRUST ACT—WHO MAY MAINTAIN SUIT — PRIVATE PARTY.**

1. Concerted action to prevent the use of nonunion-made materials manufactured in other states, even if a violation of the Sherman Anti-trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1916, § 8820), may not be enjoined under § 4 of that act at the instance of a private party, although he may have suffered special damage therefrom. The remedy by injunction is available only to the government.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17.]

MONOPOLIES ⇨ 24(1) — **CONSPIRACY IN RESTRAINT OF TRADE—CONCERTED ACTION TO PREVENT USE OF NONUNION-MADE MATERIALS.**

2. The Federal Supreme Court will not hold that the usual devices of labor unions to prevent, by concerted action, the use of nonunion-made materials, may be made the ground of an injunction under the New York anti-trust laws, in the absence of a decision of the highest state court to that effect.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17.]

[No. 24.]

Argued May 3 and 4, 1915. Restored to docket for reargument June 12, 1916. Reargued October 24 and 25, 1916. Decided June 11, 1917.

A PPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York, dismissing the bill in a suit by private parties to enjoin concerted action to prevent the use of non-

union-made materials manufactured in other states. Affirmed.

See same case below, 130 C. C. A. 522, 214 Fed. 82.

The facts are stated in the opinion.

Messrs. Walter Gordon Merritt and Daniel Davenport for appellants.

Mr. Charles Maitland Beattie for Labor Unions, appellees.

Mr. Frederick Hulse for Manufacturing Woodworkers' Association and Master Carpenters' Association, appellees.

Messrs. Anthony Gref, Charles J. Hardy, and Frederick P. Whitaker for appellee James Elgar, Inc.

* Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity brought by corporations, of states other than New York, engaged in the manufacture of doors, sash, etc., in open shops, against officers and agents of the United Brotherhood of Carpenters and Joiners of America and of the New York branch of the same, certain union manufacturers of doors, sash, etc., members of the Manufacturing Woodworkers' Association, and many master carpenters, members of the Master Carpenters' Association, whose business is to install such products in buildings. The bill was dismissed by the district court (212 Fed. 259), and the decree was affirmed by the circuit court of appeals (130 C. C. A. 522, 214 Fed. 82).

The bill alleges a conspiracy of the members of the Brotherhood and the New York branch to prevent the exercise of the trade of carpenters by anyone not a member of the Brotherhood, and to prevent the plaintiffs and all other employers of carpenters not such members from engaging in interstate commerce and selling their goods outside of the state where the goods are manufactured, and it sets out the usual devices of labor unions as exercised to that end. In 1909 the Master Carpenters, coerced by the practical necessities of the case, made an agreement with the New York branch, accepting a previously established joint arbitration plan to avoid strikes and lock-outs. This agreement provides that "there shall be no restriction against the use of any manufactured material except nonunion or prison-made;" the arbitration plan is confined to shops that use union labor, and the employers agree to employ union labor only. The unions will not erect material made by nonunion mechanics. * Another agreement between the Manufacturing Woodworkers' Association, the Brotherhood, and the New York branch, also adopts the plan of arbitration; the labor unions agree that "none of their members will erect or install nonunion or prison-made material,"

and the Woodworkers undertake that members of the Brotherhood shall "be employed exclusively in the mills of the Manufacturing Woodworkers' Association." It is found that most of the journeymen carpenters in Manhattan and part of Brooklyn belong to the Brotherhood, and that, owing to their refusal to work with non-union men, and to employers finding it wise to employ union men, it is very generally impracticable to erect carpenter work in those places except by union labor. It also is found that, owing to the above provisions as to nonunion material, the sale of the plaintiffs' goods in those places has been made less. The workmen have adopted the policy complained of without malice toward the plaintiffs, as part of a plan to bring about "a nation-wide unionization in their trade."

An injunction is asked against the defendants (other than the Master Carpenters) conspiring to refuse to work upon material made by the plaintiff, because not made by union labor; or enforcing by-laws intended to prevent working with or upon what is called unfair material; or inducing persons to refuse to work for persons purchasing such material, or taking other enumerated steps to the same general end; or conspiring to restrain the plaintiffs' interstate business in order to compel them to refuse to employ carpenters not members of the Brotherhood. It is prayed further that the provision quoted above from the Master Carpenters' agreement and another ancillary one be declared void and the parties enjoined from carrying them out. No other or alternative relief is prayed. The ground on which the injunction was refused by the district court was that, although it appeared that the agreements above mentioned were parts of a comprehensive plan to restrain commerce among the states, the conspiracy was not directed specially against the plaintiffs and had caused them no special damage, different from that inflicted on the public at large. The circuit court of appeals, reserving its opinion as to whether any agreement or combination contrary to law was made out, agreed with the judge below on the ground that no acts directed against the plaintiffs personally were shown.

In the opinion of a majority of the court, if the facts show any violation of the Act of July 2, 1890, chap. 647, 26 Stat. at L. 209, Comp. Stat. 1910, § 8820, a private person cannot maintain a suit for an injunction under § 4 of the same (Minnesota v. Northern Securities Co. 194 U. S. 48, 70, 71, 48 L. ed. 870, 880, 881, 24 Sup. Ct. Rep. 598); and especially such an injunction as is sought; even if we should go

behind what seems to have been the view of both courts below, that no special damage was shown, and reverse their conclusion of fact. No one would maintain that the injunction should be granted to parties not showing special injury to themselves. Personally, I lay those questions on one side because, while the Act of October 15, 1914, chap. 323, § 16, 38 Stat. at L. 730, 737, Comp. Stat. 1916, §§ 8835a, 8835o, establishes the right of private parties to an injunction in proper cases, in my opinion it also establishes a policy inconsistent with the granting of one here. I do not go into the reasoning that satisfies me, because upon this point I am in a minority.

As this court is not the final authority concerning the laws of New York, we say but a word about them. We shall not believe that the ordinary action of a labor union can be made the ground of an injunction under those laws until we are so instructed by the New York court of appeals. *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369. Certainly the conduct complained of has no tendency to produce a monopoly of manufacture or building, since the more successful it is the more competitors are introduced into the trade. Cases like *Kellogg v. Sowerby*, 190 N. Y. 370,*83 N. E. 47, concerning conspiracies between railroads and elevator companies to prevent competition, seem to us very clearly not to have been intended to overrule the authority that we cite, and not to have any bearing on the present point.

Decree affirmed.

Mr. Justice Pitney, with whom concurred Mr. Justice McKenna and Mr. Justice Van Devanter, dissenting:

Appellants, who were complainants below, filed their bill in the United States circuit court (afterwards district court) in the month of February, 1911, to obtain an injunction against the prosecution of a conspiracy to restrain interstate trade and commerce in the products of complainants' woodworking mills, and destroy their interstate business by means of a boycott. The Federal jurisdiction was invoked both on the ground of diverse citizenship and on the ground that the action arose under the Sherman Anti-trust Act of July 2, 1890, chap. 647, 26 Stat. at L. 209, Comp. Stat. 1916, § 8820. Upon the merits, the laws of the state of New York were relied upon, as well as the Federal act. General Business Law of New York, § 340; Penal Law of New York, § 580, subd. 6.

It was found by the district court (212 Fed. 259, 263, 266) that the defendants were engaged in a combination directly restrain-

ing competition between manufacturers and operating to restrain interstate commerce, in violation of both Federal and state acts. The circuit court of appeals assumed this to be so (130 C. C. A. 522, 214 Fed. 82), and there is no serious dispute about it here. The district court dismissed the bill, upon the ground that injunctive relief under either statute could be had only at the instance of the United States or the state of New York, as the case might be, and therefore complainants could not have relief in this suit; citing *National Fireproofing Co. v. Mason Builders' Asso.* 26 L.R.A.* (N.S.) 148, 94 C. C. A. 535, 169 Fed. 259, 263. The circuit court of appeals affirmed the decree upon the ground that defendants' acts were not malicious and not directed against the individual complainants personally, and hence relief by injunction could not be granted, irrespective of whether the particular combination in question was obnoxious either to the common law or to the statutes. This decision was rendered on April 7, 1914.

In this court, the prevailing opinion is that, although the facts show a violation of the Sherman Act, a private person cannot maintain a suit for an injunction under its 4th section. I dissent from the view that complainants cannot maintain a suit for an injunction, and I do so not because of any express provision in the act authorizing such a suit, but because, in the absence of some provision to the contrary, the right to relief by injunction, where irreparable injury is threatened through a violation of property rights, and there is no adequate remedy at law, rests upon settled principles of equity that were recognized in the constitutional grant of jurisdiction to the courts of the United States. I think complainants were entitled to an injunction also upon grounds of state law; but will confine what I have to say to the Federal question.

The proofs render it clear that defendants are engaged in a boycotting combination in restraint of interstate commerce prohibited by and actionable under the Sherman Law, on the authority of *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 44-48, 48 L. ed. 608, 611-613, 24 Sup. Ct. Rep. 307; *Loewe v. Lawlor*, 208 U. S. 274, 292, et seq., 52 L. ed. 488, 496, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; *Eastern States Retail Lumber Dealers Asso. v. United States*, 234 U. S. 600, 614, 58 L. ed. 1490, 1500, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951; *Lawlor v. Loewe*, 235 U. S. 522, 534, 59 L. ed. 341, 348, 35 Sup. Ct. Rep. 170. The proof is clear also that the conspiracy is aimed at the property rights of complainants in particular; certainly that it is designed to injure directly

and drive out of business a limited class of traders—the so-called “nonunion” wood-working mills—to which complainants belong; that complainants are sustaining*direct and serious injury through the closing of the channels of interstate trade to their products,—an injury quite different from that suffered by the public in general; and that it is a continuing injury not adequately remediable by the ordinary action at law or the action for treble damages under the Sherman Act, and hence is an irreparable injury in the sight of equity. That there is no particular animosity towards complainants as individuals—assuming it to be true—is, in my view, a matter of no consequence. If evidence of malice be necessary (and I do not think it is), this is only in the sense that malice consists in the intentional doing of an unlawful act, to the direct damage of another, without just cause or excuse. *Brennan v. United Hatters*, 73 N. J. L. 729, 744, 9 L.R.A. (N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698.

Free access to the markets through unobstructed channels of commerce is the very breath of the life of such manufacturing establishments; and to say that complainants are not specially injured by the conduct of defendants seems to me to require that the eyes be closed to the evidence in the case and to the familiar facts of commerce. I do not understand either of the courts below to have held as matter of fact that complainants were not specially injured; but that the district court (212 Fed. 267), while finding in fact that complainants were directly injured, reasoned (erroneously, as I think) that it was not such special injury as was contemplated by certain New York decisions cited.

Section 1 of the Sherman Act declares that every combination or conspiracy in restraint of trade or commerce among the several states or with foreign nations is illegal, and imposes a punishment of fine or imprisonment upon the guilty parties. It clearly recognizes, what is well known, that injury to other traders and competitors is the primary effect of such a combination. A right of action for damages by a party specially aggrieved would have followed by implication (*Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 39, 60 L. ed. 874, 877, 36 Sup. Ct. Rep. 482); and it was doubtless because treble damages were to be allowed that an express authorization of suit at law was included in the act. § 7.

The 4th section provides: “The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys

of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations,” etc. The act was designed to be highly remedial, so far as *preventing* restraints of trade and commerce is concerned, and the semicolon in the sentence just quoted indicates, as I think, that the grant of jurisdiction was intended to be general, and that the following clause was intended to impose a special duty upon the district attorneys to resort to that jurisdiction whenever, in the discretion of the Attorney General, a public prosecution should seem to be called for.

Nor is the omission of an express declaration that persons threatened with special injury through violations of the act may have relief by injunction, of particular significance. Declarations of that character are rarely met within the legislation of Congress.¹ The reason is not far to seek. By § 2 of article 3 of the Constitution, the judicial power is made to extend to “all cases, in law and equity, arising under this Constitution, the laws of the United States,” etc. This had the effect of adopting equitable remedies in all cases arising under the Constitution and laws of the United States* where such remedies are appropriate. The Federal courts, in exercising their jurisdiction, are not limited to the remedies existing in the courts of the respective states, but are to grant relief in equity according to the principles and practice of the equity jurisdiction as established in England. *Robinson v. Campbell*, 3 Wheat. 212, 221, 223, 4 L. ed. 372, 375, 376; *United States v. Howland*, 4 Wheat. 108, 115, 4 L. ed. 526, 528; *Irvine v. Marshall*, 20 How. 558, 565, 15 L. ed. 994, 998. In *United States v. Detroit Timber & Lumber Co.* 200 U. S. 321, 339, 50 L. ed. 499, 506, 26 Sup. Ct. Rep. 282, the court, by Mr. Justice Brewer, declared: “It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases.”

¹ Sec. 16 of the so-called Clayton Act of October 15, 1914, chap. 323, 38 Stat. at L. 730, 737, Comp. Stat. 1916, §§ 8835a, 8835o, contains such a provision; but this was inserted only because some of the Federal courts had held—erroneously, as I think—that private parties could have no relief by injunction against threatened violations of the Sherman Act. These decisions will be discussed below.

To speak accurately, it is not the statute that gives a right to relief in equity, but the fact that in the particular case the threatening effects of a continuing violation of the statute are such as only equitable process can prevent. The right to equitable relief does not depend upon the nature or source of the substantive right whose violation is threatened, but upon the consequences that will flow from its violation. As the court, by Mr. Justice Field, declared in *Holland v. Challen*, 110 U. S. 15, 25, 28 L. ed. 52, 56, 3 Sup. Ct. Rep. 495: "If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

To take a familiar example: The Constitution of the United States does not declare in terms that infringements of the rights thereby secured may be prevented by injunction. Ordinarily they may not be. It is only where a threatened infringement will produce injury and damage for which the law can afford no remedy—such, for instance, as irreparable and continuing damage, or a multiplicity of suits—that resort may be had to equity; and when this does appear, the right to an injunction arises because that is the only appropriate relief. *Osborn v. Bank of United States*, 9 Wheat. 738, 838-845, 6 L. ed. 204, 228, 229; *Pennoyer v. McConaughy*, 140 U. S. 1, 12, 18, 35 L. ed. 363, 366, 368, 11 Sup. Ct. Rep. 699; *Fargo v. Hart*, 193 U. S. 490, 503, 48 L. ed. 761, 767, 24 Sup. Ct. Rep. 498.

So, tax laws rarely, if ever, contain express authorization of an injunction to restrain illegal taxes. And a suit in equity will not lie on the mere ground that a tax is illegal. But if, in addition, enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or if the property taxed is real estate and the tax throws a cloud upon the title, equity will interfere by injunction. *Dows v. Chicago*, 11 Wall. 108, 112, 20 L. ed. 65, 67; *Hannewinkle v. Georgetown*, 15 Wall. 547, 21 L. ed. 231; *Union P. R. Co. v. Cheyenne* (*Union P. R. Co. v. Ryan*) 113 U. S. 516, 525, 28 L. ed. 1098, 1101, 5 Sup. Ct. Rep. 601; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 348, 35 L. ed. 1035, 1038, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Ogden City v. Armstrong*, 168 U. S. 224, 237, 42 L. ed. 444, 451, 18 Sup. Ct. Rep. 98; *Ohio Tax Cases*, 232 U. S. 576, 587, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372.

The fact that the threatened invasion of plaintiff's rights will amount at the same time to an offense against the criminal laws is no bar to relief by injunction at the in-

stance of a private party. *Re Debs*, 158 U. S. 564, 593, 39 L. ed. 1092, 1105, 15 Sup. Ct. Rep. 900.

I find nothing in the letter or policy of the Sherman Act to exclude the application of the ordinary principles of equity, recognized in the constitutional grant of jurisdiction. Applying them to the facts of the present case, appellants are entitled to an injunction to restrain the threatened, continuing, and irreparable injury and damage that otherwise will result from defendants' violation of the act.

The special duty imposed upon the Attorney General and the district attorneys is not inconsistent with this view. The field to be covered by such public prosecutions, and the objects sought thereby, are quite different from the scope and effect of an injunction granted to a private party threatened with special and irreparable injury to his property rights through a violation of the act. The proceeding by the district attorney is a kind of equitable quo warranto, calculated to bring the entire combination to an end, whether it be in the form of a corporation or otherwise. But there may be and are cases of direct and irreparable injury to private parties resulting from violations of the act, not capable of being redressed through actions at law under § 7; and justice to the parties aggrieved requires that the act be construed, if the language admits of such a construction (and I think it does), so as to allow an injunction to prevent irreparable injury to a private party, otherwise remediless, without going to the extent of dissolving the combination altogether, which in some cases might not be a matter of public interests or importance. Unless so construed, the act must operate in many instances to deprive parties of a right of injunction that they would have had without it. So far, at least, as boycotting combinations are concerned,—and this case is of that character,—the act creates no new offense and gives no new right of action. *Temperton v. Russell* [1893] 1 Q. B. 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676; *Quinn v. Leatham* [1901] A. C. 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 112-121, 30 Atl. 881; *George Jonas Glass Co. v. Glass Bottle Blowers' Asso.* 77 N. J. Eq. 219, 225, 41 L.R.A.(N.S.) 445, 79 Atl. 262.

I find no controlling decision in this court. *Minnesota v. Northern Securities Co.* 194 U. S. 48, 71, 48 L. ed. 870, 881, 24 Sup. Ct. Rep. 598, is not an authority against the right of complainants to an injunction

to prevent special and irreparable damage to their property rights through a violation of the Sherman Act; the effect of that decision being merely to deny relief by injunction to individuals not directly and specially injured. There the state of Minnesota sued in one of its own courts under certain statutes of its own, as well as under the Sherman Act, and the case was removed to the United States circuit court as being one arising under the Constitution and laws of the United States. The purpose of the suit was to annul an agreement and suppress a combination alleged to exist between the defendant railroad corporations; and the only threatened injury because of which an injunction was prayed was that the state, being the owner of large tracts of land whose value depended upon free and open competition over the lines of railway involved in the combination, and being the owner of certain public institutions whose supplies must, of necessity, be shipped over the same railways, it was alleged that the successful maintenance of these institutions as well as the performance by the state of its governmental functions depended largely upon the value of real and personal property situate within the state and the general prosperity and business success of its citizens, and that these in turn depended upon maintaining free and unrestricted competition between the railway lines involved. The court, by Mr. Justice Harlan, said (p. 70) that the threatened injury was at most only remote and indirect, and such as would come alike, although in different degrees, to every individual owner of property in a state by reason of the suppression of free competition between interstate carriers, and was "not such a direct, actual injury as that provided for in the 7th section of the statute;" and that upon the view contended for, "every individual owner of property in a state may, upon like general grounds, by an original suit, *irrespective of any direct or special injury to him* [Italics mine], invoke the original jurisdiction of a circuit court of the United States, to restrain and prevent violations of the Anti-trust Act of Congress." It was said further (p. 71): "Taking all the sections of that act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the Anti-trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several states and with foreign nations, to those instituted in the name of the United States. . . . Possibly the thought of Congress was that, by such a limitation upon suits in equity of a general nature, to restrain violations of

the act, *irrespective of any direct injury sustained by particular persons or corporations*, interstate and international trade and commerce and those carrying on such trade and commerce, as well as the general business of the country, would not be needlessly disturbed by suits brought, on all sides and in every direction, to accomplish improper or speculative purposes." [Italics mine.] The reasoning manifestly proceeds upon the assumption that individuals sustaining direct and irreparable injury through a continuing violation of the act would be entitled to an injunction.

D. R. Wilder Mfg. Co. v. Corn Products Ref. Co. 236 U. S. 165, 174, 175, 59 L. ed. 520, 525, 526, 35 Sup. Ct. Rep. 398, Ann. Cas. 1916A, 118, is not in point. There plaintiff in error, which had purchased, received, and consumed goods from defendant in error, defended a suit for the price upon the ground that defendant in error was an illegal combination in violation of the Sherman Act, and therefore could not sue to recover for goods sold with direct reference to and in execution of agreements that had for their object and effect the accomplishment of the illegal purposes of the combination. The court held that an individual could not defend a suit brought against him on his otherwise legal contract by asserting that the corporation or combination suing had no legal existence because of its violations of the act, the statute having cast upon the Attorney General of the United States the responsibility of enforcing its provisions in that regard.

The question whether private parties threatened with injury through violations of the Sherman Act might (prior to the Clayton Act of October 15, 1914, chap. 323, § 16, 38 Stat. at L. 730, 737, Comp. Stat. 1916, §§ 8835a, 8835o) have relief by injunction is one upon which the lower Federal courts are not in accord. In the present case, the district court, in dismissing the bill upon the ground that relief by injunction might be had only at the instance of the United States (212 Fed. 259, 266), merely cited and relied upon National Fireproofing Co. v. Mason Builders' Assn. 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259, 263. That case was decided upon the authority of Greer, M. & Co. v. Stoller, 77 Fed. 1, 3, and Southern Indiana Exp. Co. v. United States Exp. Co. 88 Fed. 659, 663. Reference was made also to E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 87, 88, 46 L. ed. 1058, 1067, 1068, 22 Sup. Ct. Rep. 747, where the point was assumed arguendo; Post v. Southern R. Co. 103 Tenn. 184, 228, 55 L.R.A. 481, 52 S. W. 301, where it was ruled on the authority of 86 Fed. 407 and 88 Fed. 659, 663; and

the following cases in the Federal courts: *Blindell v. Hagan* (C. C.) 54 Fed. 40, 41; *Hagan v. Blindell* (C. C. A.) 6 C. C. A. 86, 13 U. S. App. 354, 56 Fed. 696; *Pidcock v. Harrington* (C. C.) 64 Fed. 821; *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.* (C. C. A.) 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407, 420; *Block v. Standard Distilling & Distributing Co.* (C. C.) 95 Fed. 978; and *Metcalf v. American School-Furniture Co.* (C. C.) 108 Fed. 909. An examination of these cases (including *Greer v. Stoller* and *Southern Indiana Exp. Co. v. United States Exp. Co.* *supra*) discloses that *Blindell v. Hagan*, 54 Fed. 40, 41, is the source from which all the others derive the only authority they have for the doctrine that, under the Sherman Act, the remedy by injunction was available to the government only. But one or two of the cases contain any reasoning upon the question, and that is meager and unsatisfactory.

Moreover, so far as these cases have held that private parties could have no injunction for a violation of the Sherman Act (some of them have not so held), the real ground of decision in *Blindell v. Hagan* was misunderstood. In that case the jurisdiction of the Federal court was invoked upon the ground of the alienage of complainants, defendants being citizens of the state of Louisiana, and also upon the ground that defendants were engaged in a combination in restraint of trade between New Orleans* and Liverpool, contrary to the prohibition of the Sherman Act. The circuit court, in declining to allow an injunction under the act, said: "This act makes all combinations in restraint of trade or commerce unlawful, and punishes them by fine or imprisonment, and authorizes suits at law for triple damages for its violation, but it gives no new right to bring a suit in equity, and a careful study of the act has brought me to the conclusion that suits in equity or injunction suits by any other than the government of the United States are not authorized by it." Evidently this was intended to be confined to the question of an express authorization of an injunction for a mere violation of the act, for the court proceeded to grant preventive relief on the ground that there was jurisdiction because of the citizenship of the parties, and that under the ordinary equity jurisdiction an injunction should issue because of the threatened irreparable injury and the inadequacy of pecuniary compensation, and in order to prevent a multiplicity of suits. Upon appeal the decree was affirmed, upon the grounds expressed by the court below (6 C. C. A. 86, 13 U. S. App. 354, 56 Fed. 696). Since there was no infringement of complainants' rights except through

a combination in restraint of foreign trade, as to which manifestly the Sherman Act furnished the exclusive rule of law, the effect of the decision is to allow an injunction to one injured through a violation of that act if he show in addition the ordinary grounds for resorting to equity, such as the probability of irreparable mischief, the inadequacy of a pecuniary compensation, or the necessity of preventing a multitude of suits.

So, in *Bigelow v. Calumet & H. Min. Co.* (C. C.) 155 Fed. 869, 876, the court, after reviewing the previous decisions, declared (p. 877): "They do not commend themselves to my judgment so far as they deny the right of a private party, who has sustained special injury by the violation of the Anti-trust Act, to relief by*injunction under the general equity jurisdiction of the court. As already seen, the cases referred to do not generally announce such rule."

Aside from their rights under the Act of 1890 [26 Stat. at L. 209, chap. 647, Comp. Stat. 1916, § 8820], I think appellants are now entitled to an injunction under § 16 of the Clayton Act,—the case clearly being within the terms of the section,—notwithstanding the act took effect after the final decree in the district court. In an equity suit for injunction the reviewing court should decide the case according to the law as it exists at the time of its decision. This is not giving a retrospective effect to the new statute, for the relief granted operates only in futuro.

The suggestion, in behalf of defendants, that § 6 of the Clayton Act² establishes a policy inconsistent with relief by injunction in such a case as the present, by making legitimate any acts or practices of labor organizations or their members that were unlawful before, is wholly inadmissible. The section prohibits restraining members of such organizations from "lawfully carrying out the legitimate objects thereof." What these are is indicated by the qualifying words: "Instituted for the purpose of mutual help, and not having capital stock

² "Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

or conducted for profit." But these are protected only when "lawfully carried out." The section safeguards these organizations while pursuing their *legitimate* objects by *lawful* means, and prevents them from being considered, merely because organized, to be illegal combinations or conspiracies in restraint of trade. The section, fairly construed, has*no other or further intent or meaning. A reference to the legislative history of the measure confirms this view. House Rep. No. 627, 63d Cong. 2d Sess. pp. 2, 14-16; Senate Rep. No. 698, 63d Cong. 2d Sess. pp. 1, 10, 46. Neither in the language of the section, nor in the committee reports, is there any indication of a purpose to render lawful or legitimate anything that before the act was unlawful, whether in the objects of such an organization or its members or in the measures adopted for accomplishing them.

It is altogether fallacious, I think, to say that what is being done by the present defendants is done only for the purpose of strengthening the union. Conceding this purpose to be lawful, it does not justify or excuse the resort to unlawful measures for its accomplishment. A member of a labor union may refuse to work with nonunion men, but this does not entitle him to threaten manufacturers for whom he is not working, and with whom he has no concern, with loss of trade and a closing of the channels of interstate commerce against their products if they do not conduct their business in a manner satisfactory to him.

And the suggestion that, before the Clayton Act, unlawful practices of this kind were usually and notoriously resorted to by labor unions, and that for this reason Congress must have intended to describe them as "legitimate objects," and thus render lawful what before was unlawful, is a libel upon the labor organizations and a serious impeachment of Congress.

Nor can I find in § 20 of the Clayton Act anything interfering with the right of complainants to an injunction. It refers only to cases "between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment." * These words evidently relate to suits arising from strikes and similar controversies, and the committee reports upon the bill bear out this view of the scope of the section. But this is not such a suit. There is no relation of employer and employee, either present or prospective, between the parties in this case. Defendants who are employees are in one branch of industry in New York city; com-

plainants are employers of labor in another branch of industry in distant states. Nor is there any dispute between them concerning terms or conditions of employment. Section 20 prohibits an injunction restraining any person "from ceasing to patronize or to employ any party to *such dispute*, or from recommending, advising, or persuading others by *peaceful and lawful* means so to do; . . . or from peaceably assembling *in a lawful manner*, and for *lawful purposes*; or from doing any act or thing *which might lawfully be done in the absence of such dispute* by any party thereto."

Clearly, this provision is limited to the participants in a dispute of the character just indicated. And, quite as clearly, only "lawful" measures are sanctioned,—that is, of course, measures that were lawful before the act. There is no grant, in terms or by necessary inference, of immunity in favor of a boycott of traders in interstate commerce, violative of the provisions of the Sherman Act, to which the Clayton Act is supplemental.

Mr. Justice McKenna and Mr. Justice Van Devanter concur in this dissent.

Mr. Justice McReynolds also dissents.

(244 U. S. 432)

EMILIO VALDEZ, Plff. in Err.,

v.

UNITED STATES.

CRIMINAL LAW §508(9) — EVIDENCE — WEIGHT—TESTIMONY OF SELF-CONFESSED ACCOMPLICE — CONTRADICTORY STATEMENTS.

1. The testimony of a self-confessed, active, hired accomplice as a witness for the prosecution on a trial for homicide is not to be disregarded because, while first testifying to the guilt of defendant, he, by a subsequent statement, retracted the accusation, and later retracted the retraction, but his testimony is to be judged by confirming or opposing circumstances as well as by his character and the influences that invest him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1111.]

CRIMINAL LAW §511(1) — EVIDENCE — WEIGHT — CORROBORATION OF ACCOMPLICE.

2. There was sufficient corroboration of the testimony of a self-confessed, active, hired accomplice as a witness for the prosecution on a trial for homicide to sustain a verdict finding defendant guilty, notwithstanding the well-nigh incredible character of his testimony, and his various repudiations and retractions, where the evidence shows such mental and social inferiority as to render him easily purchasable by defend-

ant, and defendant is shown to have entertained a fixed enmity to the deceased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1128.]

CRIMINAL LAW — 662(2) — CONFRONTING WITH WITNESSES — VIEW OF SCENE OF CRIME.

3. An inspection of the scene of a homicide, made by the trial judge in the presence of counsel for the accused, but in the absence of the accused himself, did not infringe the right to "meet the witnesses face to face," secured to an accused by the Act of July 1, 1902 (32 Stat. at L. 692, chap. 1369), § 5, enacting a Bill of Rights for the Philippine Islands, where the judge, in his inspection of the scene, was not improperly addressed by anyone, and did no more than visualize the testimony of the witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3, 1538.]

[No. 361.]

Argued and submitted April 23 and 24, 1917. Decided June 11, 1917.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a conviction of homicide rendered by the Court of First Instance of the Province of Nueva Ecija. Affirmed.

The facts are stated in the opinion.

Messrs. **Timothy T. Ansberry** and **Challen B. Ellis** for plaintiff in error.

Solicitor General Davis and **Assistant Attorney General Warren** for defendant in error.

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***Mr. Justice McKenna** delivered the opinion of the court:

Valdez was proceeded against by complaint under the procedure, of the Philippine Islands for the crime of murder. It was circumstantially described as having been committed by Valdez and one Francisco Amante and one Juan Gatmaitan, the latter having been induced by Valdez "by reason of a promise of reward" (900 pesos) to shoot one Eusebio Yuson with a shotgun furnished by Amante, inflicting nine mortal wounds, instantly killing Yuson.

There was a demurrer filed to the complaint which need not be noticed. Upon the trial of Valdez and Amante, after pleas of not guilty, the court in an opinion circumstantially reviewed the evidence and found Amante not guilty, "for insufficiency of evidence." Valdez was found guilty "beyond a reasonable doubt." He was sentenced to the penalty of death and to indemnification of the family of the deceased.

At a separate trial Gatmaitan was also found guilty and sentenced to imprisonment for life.

There was a motion for rehearing, which was denied.

Valdez and Gatmaitan took separate appeals to the supreme court of the Islands, but, according to the statement of the court, at the request of counsel, the appeals were "heard and considered together, in order to give counsel for the defense an opportunity to develop any inconsistencies or contradictions which might appear as a result of a critical analysis and comparison of the evidence of record in both cases."

The judgment against Valdez was affirmed; that against Gatmaitan was modified by the substitution of death for life imprisonment. Two of the judges dissented, one thinking that the "accused," not designating him (presumably Valdez), was entitled "to an acquittal on the facts presented;" the other being of opinion that the prosecution had "not proved the guilt of appellants of the crime of which they were convicted."

The case is here upon a writ of error sued out by Valdez, and the questions presented are, to quote counsel: (1) Whether the absence of the accused during a part of the proceedings in the trial constitutes an error requiring reversal, and (2) whether there was any evidence adequate to warrant the conviction.

The second question may be disposed of first. A negative answer is urged upon a consideration of the credibility of the witnesses, the relative probative strength of their testimonies, their mental and moral defects, the various statements of Gatmaitan, being a witness for the prosecution, first testifying to the guilt of Valdez and by subsequent statement retracting the accusation, and later retracting the retraction, and an asserted absence of motive for the crime.

The elements of these contentions were passed upon by the lower courts and the guilt of Valdez and Gatmaitan determined. It ordinarily would be enough to say that there was justification for the determination; but lest it may be supposed that the guilt of Valdez depended alone upon the testimony of Gatmaitan, he having been an active accomplice in the homicide, some comment becomes necessary and at least a characterization of the evidence.

Gatmaitan's testimony was, of course, an important factor, but it had substantial corroboration. He was shown, it is true, to be a low type of man. One who becomes for hire, as he did, the criminal executor of another's malice, is usually such. No other would accept the shameful service. But it is not reserved for this case to make a novel contribution to the criminal experience of the country, or to demonstrate that there are such hirers and hirelings; and when the hireling turns state's evidence, as

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he sometimes does, or his weakness, awed by the penalties of his crime, breaks down and confesses, as it sometimes does, or he changes or qualifies or retracts, as he sometimes does, as hope or interest or fear sways him, his testimony or confession is not to be summarily discarded, but to be judged of by confirming or opposing circumstances as well as by his character and the influences that may invest him. And it was such judgment the two lower courts exercised; it is such judgment in our turn that we are required to exercise. This record, indeed, shows that the character and characteristics of Gatmaitan, his mental and social inferiority to Valdez, made him facile to Valdez's solicitation and a purchasable agent for Valdez's purpose. And Valdez was shown, independently of Gatmaitan's testimony, to have had a purpose,—a fixed enmity to Yuson, engendered in a controversy over certain water rights. In gratification of it he carefully planned the crime, set its time and place, procured its weapon, gave the weapon to Gatmaitan, and hired a scout to observe the moments of Yuson and report his approach. The service was exactly performed, and upon his approach occurred the tragedy.

Yuson was shot in the back and instantly killed as he was entering his home; and the crowning horror of it was that it was done in the hearing and almost in the presence of his wife, even as she was speaking to him and moving to meet him.

Such is the outline of the crime. And crime it was. There is no dispute about that or the manner of execution. Valdez, as a witness in his own behalf, denied participation in it or precedent knowledge, and attempted to prove an alibi. His denial was not believed, his alibi decided not to have been established. It cannot be held, therefore,*that his conviction was not sustained by the evidence, and the sentence imposed upon him not justified, even though its doom be death.

Upon the other question the record shows this: Gatmaitan was a witness for the prosecution. He related that he was employed by Valdez to kill Yuson for 900 pesos, given him, Gatmaitan, for that purpose, and that he shot Yuson as Yuson was approaching his (Yuson's) house—Valdez assisting him, Gatmaitan. Indeed, Gatmaitan testified that Valdez ordered him to shoot, but that the gun would not go off, and Valdez showed him how to shoot—"and right at that moment the gun went off." Gatmaitan further testified that he and Valdez located themselves "in a fence near the staircase" of Yuson's house, and from that location fired the shot.

There was other testimony, as we have in-

dicated, and distances of objects from one another were testified to.

At the close of the testimony the prosecuting attorney asked the court to visit "the place of the occurrence in order to make there an inspection so that the court may judge the distances." One of the counsel for the defense assented, saying: "Yes: we do not object, so that the court may see." Another counsel for the defense called for the "motive" of the prosecution in asking "for the ocular inspection." It was replied that its object was to enable the court to obtain a correct idea of all the distances in connection with the assassination of the deceased, as well as, of the places where the witnesses for the prosecution found themselves and where they talked together. And further, "We want that done in order that everything may be clear." To which counsel for the defense replied that he had on occasions been present at ocular inspections and that testimony was taken which produced confusion, and, further: "What I wish, with the consent of the prosecuting attorney, is that an inspection be made there, but that no testimony be taken*because it produces great confusion* when one tries to examine witnesses at the place of the occurrence."

The prosecuting attorney, however, thought it advisable not to dispense with such testimony or take from the court its discretion, "so that when the court arrives there it may ask all unknown persons where the deceased fell, where the wad was found, where Gatmaitan was, and where Mateo Arcilla was." All of which opposing counsel thought had been already proved.

The court expressed its willingness to make the inspection, as the result would be evidence for both parties after the defense had produced its rebuttal testimony, and upon the defense announcing that it had no rebuttal testimony, the case was closed.

The court made the inspection; Valdez was not present, but his counsel were. There is an opposition of affidavits submitted upon a motion for new trial. Those submitted by defendant (three of which were in almost exactly the same words) averred that the persons making them were present at the inspection by the court and saw the judge examine the various points at the scene of the crime and the point where Gatmaitan stood when he fired the murderous shot. That they also saw the widow of the deceased show the manner in which her husband fell,—she illustrating,—and that she also told the judge "certain facts which happened at the time of the murder." That they also saw Captain Crockett, of the constabulary, point out to the judge the places in the stairway and in the house where the

shot had penetrated, and saw him walk with the judge and point out to him certain streets and houses connected with the case, and also saw the judge and such officer and the attorneys in the case and other persons examine other places.

*444 One of the counsel for the defense also filed an affidavit. It averred that the judge went to the scene of the killing, accompanied by the attorneys for both sides, but that neither Valdez nor his attorneys were consulted by the judge as to whether or not Valdez desired to accompany the court. That the widow of the deceased "explained to the judge many occurrences which she claimed to have taken place on the night of the killing, what she claimed to have said to the deceased just prior to the killing and illustrated how and where the deceased had fallen, and discussed many other matters in connection with the case, during all which times she was crying and wringing her hands in grief." That Captain Crockett was charged by at least one witness as being an official "of a body which had forced and intimidated" the witness to give false testimony against Valdez. That Captain Crockett pointed out bullet marks to the judge, pointed out where the shot was fired as indicated by Gatmaitan, and made other statements to the judge that Gatmaitan had made to him "as to other circumstances of the case." That Captain Crockett walked through the streets with the judge and pointed out to him various objects which had been referred to during the trial, part of the time being alone with the judge. That Captain Crockett discussed distances between objects, giving his opinion of the same, and particularly the distance from the house of the deceased to the house of Valdez, and told the judge in that connection that he had measured such distance with a "speedometer" on his motorcycle." That during the inspection the affiant made objections as attorney for Valdez as to the conduct of the widow and Crockett, but they were allowed to continue their conversations with the judge.

These affidavits were distinctly and circumstantially contradicted by affidavits, accompanied by photographs of the positions of the judge and the persons involved. One of the affidavits was by Captain Crockett and two of them were by the attorneys who prosecuted the case, both of whom were present at the inspection and in such relation to it as to know what occurred.

*445 *The supreme court, in passing upon the motion, said: "A careful examination of these affidavits and the counteraffidavits filed by the appellee satisfies us that nothing more than inspection of the scene of the murder was made by the trial judge, and

that no evidence whatever was taken on that occasion; and we are of opinion that, under all the circumstances, there was no violation of the constitutional right of the prisoner to be confronted with the witnesses. *People v. Thorn*, 156 N. Y. 286, 42 L.R.A. 368, 50 N. E. 947, and the cases cited in the extended note in the annotated report."

Such being the record, we must assume that the judge, in his inspection of the scene of the homicide, was not improperly addressed by anyone, and, in the presence of counsel, did no more than visualize the testimony of the witnesses,—giving it a certain picturesqueness, it may be, but not adding to or changing it. It would be going a great way to say that the requirement of the Philippine Code, carrying the constitutional guaranty to an accused to "meet the witnesses face to face," was violated and could not be waived. And we think practically Valdez's presence was waived.

But, aside from any question of waiver, it would be pressing the right of an accused too far and *Diaz v. United States*, 223 U. S. 442, 56 L. ed. 500, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138, beyond its principle to so hold. As well might it be said that an accused is entitled to be with the judge in his meditations, and that he could entertain no conception nor form any judgment without such personal presence.

The judgment should not be reversed upon a mere abstraction. It is difficult to divine how the inspection, even if the affidavits of the defendants should be taken at their face value, added to or took from the case as presented.

It follows that the judgment of the Supreme Court must be and it is affirmed.

* Mr. Justice Clarke, dissenting: *446

I greatly regret that I cannot concur in the opinion of the court in this case, and the fact that the decision must cost two men their lives impels me to state, as briefly as I may, my reasons for dissenting from it.

We have before us the record only in the case of Emilio Valdez.

Valdez is described in the opinion of the trial judge as "a highly educated man and very prominent both on account of his social standing and his wealth;" and by the supreme court as "a recognized leader of an active political faction and a member of one of the richest, most powerful and influential families in the community."

He was convicted of lying concealed with another and of shooting, in the early evening, one Eusebio Yuson, also a man of

prominence, as he was mounting an outside stairway to the second story of his village home. Pursuant to the practice of the Philippine Islands, the case was tried by a judge without the aid of a jury.

The guilt or innocence of Valdez turns upon the testimony of one Juan Gatmaitan, who was found by the trial court to be so "densely ignorant a man, of so low an order of intelligence and so lacking in instruction, both mental and moral," that upon finding him guilty of participating in the murder, the court, on this account, reduced his sentence from death to life imprisonment. The supreme court says of him that he "is a convicted cattle thief;" that "his testimony in his own behalf is wholly unworthy of credit," and that in his own case he repudiated all of his testimony in the Valdez case and testified in a manner "so incoherent, irrational, and incredible as to cast doubt on all that he said in his own behalf."

*417 To this we must add that this witness Gatmaitan first confessed to having murdered Yuson, without mentioning Valdez. That afterwards, but two months before the trial of Valdez, he made affidavit that he and one Mateo Arcilla went to Valdez's house during the early evening of the day of the murder, that Valdez there gave them a shotgun in the village street, and that then the two, without Valdez, went and concealed themselves on the lot of Yuson, and when he came home "I (Gatmaitan) discharged both barrels of the shotgun at him at the same time and then ran to Valdez's house and delivered the shotgun to him."

Next he gave testimony, such as we shall see, on the trial of Valdez, and eight days later made oath in prison that the local constables had tortured him for three weeks, not allowing him to sleep day or night, and thereby had forced him to confess that he and Valdez had committed the murder, when the truth was he did not know who killed Yuson.

Nine days after this, again under oath, he denied all torture and prosecution and says that his testimony on the trial of Valdez was true.

And finally the supreme court says that on his own trial he repudiated his testimony in the trial of Valdez, denied all knowledge of the crime, and attempted to establish an alibi for himself.

Such is the witness who tells the following amazing story on which Valdez is sentenced to death:

I can neither read nor write. I never talked with Valdez but three times in my life. The first time I was looking for

sugar cane seed and he said to me that 'he wished to win my friendship,'—nothing else and we parted. The second time we met in Valdez's seed field and he offered me a business, which, according to his own statement, was an easy one. *I asked him what kind of a business it was and he said to me . . . 'that I should kill Eusebio Yuson and that he would pay me 900 pesos (\$450).'* I told him I could not please him because I was very busy of my work*and* no one could release me in said work. And he told me to say nothing about it to anyone and thus we parted. The third time I met Valdez he came to my hut in my sugar cane fields about five o'clock of a Sunday evening (the evening of the murder) and he invited me to return to town and I rode with him in his calesa (carriage) to his home. During this drive of about an hour he said nothing to me. When we arrived at his house he left me in the street and went into the house. When the bell struck the time of evening prayer as he did not come down from the house I thought that he was praying and when he did come down from the house he said nothing to me but handed me a shotgun.

Q. And what did you do when you received the gun?

A. He still invited me to go to Loacon.

Q. What did he do?

A. He followed me.

Q. Where did you go?

A. To the house of Lieutenant Eusebio Yuson.

He says that on the way to Yuson's house he and Valdez stopped at a store and one Figueroa came and told them that Yuson was already there, and they then approached Yuson's house and located themselves in the fence near the staircase (outside the house, leading to the second story), and when Yuson arrived Valdez ordered me to shoot.

Q. And what did you do?

A. I tried to shoot, but the gun would not go off

Q. And then—

A. He approached me and said, "Son of a whore, he was able to go up and you won't shoot," and he showed me how to shoot and right at that moment the gun went off.

On cross-examination he says he pulled the two triggers and that the gun would not go off, and that then Valdez showed him how to shoot. "I was holding the shotgun this way (indicating) and he was showing me how to shoot,*saying, 'This

way,' and without more ado the shot came out, the shot gun fell and I was frightened and ran away from the place and I know nothing more." He says he had never handled firearms before, and did not know how to shoot a gun, and that he did not tell Valdez that he did not know how to shoot. The shot thus fired was the one fatal to Yuson.

I shall not go into the testimony of the corroborating witnesses for the prosecution, Mateo Arcilla, who is described by the supreme court as "a convicted wife murderer, sentenced to life imprisonment for that crime since he appeared as a witness at the trial of Valdez," and Figueroa, who, with Gatmaitan and Arcilla, the trial judge says pleaded guilty, before a justice of the peace, to murdering Yuson, without implicating Valdez.

The only motive suggested on the part of Valdez for murdering Yuson is a difference between him or his mother (it is not clear which) and Yuson about some boundary and water rights, which had been amicably settled four years before the murder, and an indefinite business rivalry, which is only remotely alluded to by the widow of the deceased.

A careful reading of this entire record convinces me, and the opinions of the lower courts throughout proceed upon the assumption, that the conviction of Valdez could not be thought of except this story of Gatmaitan, which I have thus detailed from the record, is believed to be true. Under the authority of the decisions of this court in *Wiborg v. United States*, 163 U. S. 632, 658, 41 L. ed. 289, 298, 16 Sup. Ct. Rep. 1127, 1197; *Clyatt v. United States*, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; and in *Diaz v. United States*, 223 U. S. 454, 56 L. ed. 505, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138, I have thus examined this record for the purpose of determining whether there is any substantial evidence to be found in it to warrant the conviction of the defendant, and my conclusion is that there is no such evidence, because, after making full allowance for differences of habit, of life, and of character of the persons*involved and of the witnesses, I cannot conceive it possible that a man such as Valdez is described to be, even if he desired the death of an enemy or a rival (as to which there is no evidence), would bribe to shoot him, an entire stranger of the most ignorant type obtainable, who had never used firearms; should promise him money to commit the murder; should deliberately hand him, in the early evening, in a village street, the gun with which to shoot the victim; and then should go with the murderer to the scene and participate

in the assassination by pulling the trigger which fired the fatal shot.

Comment would be superfluous. The mere narration of the story makes it impossible for me to consent to making it the legal basis for depriving a man of his life, for the testimony of Gatmaitan is not merely mistaken testimony, due to faulty recollection or statement, but one of his series of stories is necessarily, consciously, and corruptly false, and therefore the other should not be relied upon; especially not in a capital case. It is not uncommon for ignorant and corrupt men to falsely charge others with doing what they imagine that they themselves, in their narrow minds and experience, would have done under the circumstances of a given case, and the surest check, often the only check, on such perjury, is to recognize the impossibility that men of larger instruction and resources and experience could have been guilty of such conduct. It is, of course, possible that Valdez committed or inspired this crime, but it is impossible to believe that he would have committed it in the crude, certain to be detected, manner described by Gatmaitan.

This conclusion is arrived at putting wholly aside the defense of the accused, in which he took the witness stand, and, so far as the record shows, sustained himself through a searching cross-examination, in a categorical denial of the, to me, utterly incredible stories of the prosecuting witnesses.¹⁵¹
* But even if the evidence in the case were* deemed by me credible, I still should conclude that the judgment should be reversed for the purely legal reason which I shall now state.

When the state closed its evidence in rebuttal, the prosecuting attorney requested the court (there was no jury) to view the scene of the murder. To this counsel for the accused assented, but with the request that "no testimony be taken because it produced great confusion when trying to examine witnesses at the place of the occurrence." To this request the prosecuting attorney replied: "What Mr. Southworth says would be very advisable, but I believe it would be very advisable also not to dispense with the task in which the court may exercise its discretion, so that when said court arrives there it may ask of unknown persons where the deceased fell, where the wad was found, where Gatmaitan was, and where Mateo Arcilla was."

Then this follows:

The court: The court has no objection to making that inspection after the defense has produced its rebuttal evidence, not showing in the record the result of said inspection.

Mr. Southworth: We have no rebuttal evidence.

The court: So that we may close the case?

Mr. Chicote: Yes, sir.

The court: Good; to-morrow you may present your arguments. The session of the court is closed.

The record further shows that the judge visited the scene of the murder, that Valdez was confined in prison several miles away at the time of the visit, and that he was neither required nor invited to be present at the view.

This visit to the scene by the judge without the presence of the accused is assigned as one of the reasons why a new trial should be granted, on the ground that such action violated § 5 of the Act of Congress of July 1st, 1902 [32 Stat. at L. 692, chap. 1369], known as the "Philippine bill," and also article 6 of the Amendments to the Constitution of the United States, providing that the accused "shall enjoy the right to be confronted with the witnesses against him."

What was done by the judge at this view is the subject of much dispute and conflict of statement made in affidavits on motion for a new trial. A typical statement in the interest of the accused of what occurred is made by his attorney, who is described in the record as a reputable member of the bar, who stated that the widow of the deceased explained to the judge what she claimed had taken place on the night of the murder, pointing out where the deceased had fallen, and discussing many other matters in connection with the case, she weeping and wringing her hands all of the time that such interview was in progress, and that one Crockett, a constable, was active in indicating to the court various points and circumstances connected with the murder, all of this against objections made by counsel as to the conduct of the widow and Crockett.

A typical affidavit introduced by the state was by the private prosecutor Buencamino, who stated that he was present at the view, that the judge "neither received any evidence nor admitted any testimony referring to the case then being prosecuted against Valdez, and, according to my best recollection, I did not see the widow crying, but I saw her at a place distant from the judge. I also state that Captain Crockett did not give any evidence before the judge."

An assistant attorney for the government made affidavit that at no time did he see the widow crying or talking to the judge, or illustrating how her husband had fallen.

However, a photograph of the scene at the time of the view indicates that it must

have been a very unusual local event, for a large crowd was present, and in this photograph the widow is shown in a position which must have been very close to the judge, and it is very significant that there is no statement from the judge as to just what he did and as to what occurred at the view.

It has long been familiar, textbook, law, that a viewing of the premises where the crime is alleged to have been committed is part of the trial. Thus, in Wharton's Criminal Law, 9th ed. vol. 3, § 707, it is said: "The visit (of the jury) must be made in the presence of the accused, who is entitled to have all the evidence received by the jury taken in his presence." And in Enc. of Pl. & Pr. vol. 22, p. 1059, it is said: "In criminal causes the accused is entitled to be present if the jury is sent to view the locus of the crime, as a view in the absence of the accused would violate his constitutional right to appear in person and be confronted with the witnesses against him."

But the law upon this subject has been recently summed up by this court (Diaz v. United States, 223 U. S. 442, 454, 56 L. ed. 500, 505, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138) in an admirable statement, which, in my judgment, rules the case before us, and is as follows:

"We are thus brought to the question whether the provision in § 5 of the Philippine Civil Government Act, securing to the accused in all criminal prosecutions 'the right to be heard by himself and counsel,' makes his presence indispensable at every stage of the trial, or invests him with a right which he is always free to assert, but which he also may waive by his voluntary act. Of course, if that provision makes his presence thus indispensable, it is of no moment that the Philippine laws do not go so far, for they cannot lessen its force or effect. *An identical or similar provision is found in the constitutions of the several states, and its substantial equivalent is embodied in the 6th Amendment to the Constitution of the United States.* It is the right which these constitutional provisions secure to persons accused of crime in this country that was carried to the Philippines by the congressional enactment, and therefore, according to a familiar rule, *the prevailing course of decision here may and should be accepted as determinative of the nature and measure of the right there.* Kepner v. United States, 195 U. S. 100, 124, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655.

" . . . In cases of felony our courts, with substantial accord, have regarded it as extending to every stage of the trial, inclusive of the impaneling of the jury and

the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right; the one, because his presence or absence is not within his own control, and the other because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction. . . .

"The reasoning upon which this rule of decision rests is clearly indicated in *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743, where it is said by the supreme court of Georgia:

"It is the right of the defendant in cases of felony . . . to be present at all stages of the trial,—especially at the rendition of the verdict,—and if he be in such custody and confinement . . . as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside. . . . The principle thus ruled is good sense and sound law; because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into the court by its order."

It is difficult to imagine a case which would show the value of this rule more strongly than the case we are considering. If the description of what occurred as given by counsel for the defendant is even approximately true, it is not improbable that even the most stoical judge might have been influenced by it, and the presence of the defendant might very well have had a counterbalancing influence, and, in addition to this, he was entitled to the benefit of any suggestion which he might have been able to make through his counsel.

It is very clear to my mind that *Diaz v. United States*, supra, in principle rules this case, and that the viewing of the scene of the murder by the judge without the presence of the accused requires that it be reversed and a new trial granted.

That the conclusion I have reached in this case is not idiosyncratic, or the result of an undue regard for a man's life when it is adequately proved to have been forfeited under the law, is, I think, sufficiently shown by the fact that two of the members of the supreme court of the Philippine Islands expressed their estimate of the case made against Valdez by this record in these terms:

Moreland, J., dissenting: "I dissent. I think that the least the accused is entitled

to, under the facts and the law, is a new trial. I believe, however, that he is entitled to an acquittal upon the facts as presented."

And

Grant T. Trent, J.: "I dissent on the ground that the prosecution has not proved the guilt of the appellants of the crime of which they were convicted."

For the reasons thus stated, I am of opinion that this record does not show any credible testimony supporting the judgment, that, upon the authorities cited, it rests upon error of law gravely prejudicial to the accused, and that it therefore should be reversed and a new trial granted.

I am authorized to say that the CHIEF JUSTICE concurs in this opinion.

(244 U. S. 412)

EX PARTE THE PARK SQUARE AUTOMOBILE STATION, Petitioner.

MANDAMUS $\Rightarrow$ 4(3)—TO REVIEW JUDICIAL ACTION — OTHER REMEDY—REMAND OF CAUSE IMPROPERLY REMOVED.

The refusal of a Federal district court in the state of New York to remand a cause which had been removed to that court from a state court of New Hampshire may not be reviewed by mandamus, however manifest may be the error of the district court, and however grave the inconvenience arising in the particular case from the construction which that court gave to the removal statutes, and upon which it based its jurisdiction, since such error is susceptible of review in the Federal Supreme Court by certificate and direct review on the question of jurisdiction alone, after final judgment, or by review of the whole case in the circuit court of appeals, and by certiorari from the Supreme Court.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 10-15, 18.]

[No. 31, Original.]

Submitted May 21, 1917. Decided June 11, 1917.

ORIGINAL PETITION for a Writ of Mandamus directed to the District Judge of the United States for the Northern District of New York to compel the remand of a cause to the Superior Court for Hillsborough County, in the State of New Hampshire, as having been improperly removed to the Federal District Court. Rule discharged.

The facts are stated in the opinion.

Mr. Edward C. Stone for petitioner.

Mr. Robert G. Dodge for respondent.

Mr. Chief Justice White delivered the opinion of the court:

Upon the ground that the American Locomotive Company, a corporation created un-

der the laws of New York,* was carrying on business in the state of New Hampshire and amenable to the jurisdiction of the courts of that state, the petitioner, the Park Square Automobile Station, a Maine corporation, commenced its suit for breach of contract against the American Locomotive Company in a New Hampshire state court. In such court, after service upon it, the Locomotive Company prayed a removal of the cause, not to the district court of the United States for the district of New Hampshire, but to the district court of the United States for the southern district of New York, and its prayer to this effect was denied by the state court. Some time thereafter the prayer for removal was renewed, modified, however, by asking that the removal be ordered to the district court of the United States for the northern district of New York on the ground that the corporation was an inhabitant of that district and had its principal place of business there. This request being also denied, the Locomotive Company, executing a bond for removal, filed the record in the district court of the United States for the northern district of New York. The Automobile Company thereupon moved to remand, not on the ground that the case was not a removable one, but because it was solely entitled to be removed to the proper district; that is, from the state court in New Hampshire to the United States district court of that state. This motion having been overruled (222 Fed. 979), the case was brought directly here upon the theory that the alleged error resulting from the refusal to remand was susceptible of being reviewed although no final judgment had been entered in the cause. At this term the writ of error taken for the purpose stated was dismissed because there was no final judgment (244 U. S. 633, 61 L. ed. —, 37 Sup. Ct. Rep. 481), and thereupon, on petition to that effect, a rule to show cause why a mandamus should not be granted, directing the district court to reverse its ruling refusing to remand the cause, was allowed, and on a return of the district court to that rule the subject is before us for consideration.

The contention of the petitioner is that manifest error was committed in taking jurisdiction on a removal of the cause from the state court of New Hampshire since the proper court, upon the assumption that the case was removable, was the district court of the United States for the district of New Hampshire, and that court alone.

At the threshold, however, we are met by the suggestion that, conceding, for the sake of the argument, that the lower court erred in refusing to remand and in taking jurisdiction, as such error was susceptible of

being reviewed by the regular methods provided by the statute, that is, by certificate and direct review on the question of jurisdiction alone after final judgment, or by review of the circuit court of appeals where allowed if the whole case were taken to that court, or by the exercise by this court of its power to issue a writ of certiorari in a proper case, there is hence no power to substitute the writ of mandamus as a means of reviewing for the express remedial processes created by the statute for such purpose.

It is not disputable that the proposition thus relied upon is well founded and hence absolutely debars us from reviewing by mandamus the action of the court below complained of, whatever may be our conviction as to its clear error. (*Ex parte Harding*, 219 U. S. 363, 55 L. ed. 252, 37 L.R.A.(N.S.) 392, 31 Sup. Ct. Rep. 324; *Ex parte Roe*, 234 U. S. 70, 58 L. ed. 1217, 34 Sup. Ct. Rep. 722), unless it be that by some exception the case is taken out of the reach of the control of the cases referred to. It is insisted that this case is such an exceptional one, first, because of the clearly erroneous construction of the statute upon which the court below based its assertion of jurisdiction and the strange result which arose from that construction, that is, the removal of a case pending in the state court of New Hampshire to a district court in the state of New York, and second, because of the grave wrong which would result from forcing the petitioner to try its case in the state of New York, at great inconvenience and expense, as a preliminary to securing a review of the question of jurisdiction,—an expense and inconvenience which would be saved if, by review, now, by means of a writ of mandamus, the removal statutes be given their natural meaning, and thus the wrong and confusion arising from their misconstruction would be avoided. And in support of the exceptions thus asserted, reliance is placed on expressions contained in the opinion in *Ex parte Harding*, 219 U. S. 363, 373, 55 L. ed. 252, 255, 37 L.R.A.(N.S.) 392, 31 Sup. Ct. Rep. 324, by which it is contended they are sustained.

But conceding that the error which the proposition attributes to the ruling below is manifest, the conclusion drawn from the opinion in *Ex parte Harding* is obviously a mistaken one. Indisputably in that case the court was called upon to consider in a twofold aspect some contrariety of views manifested in decided cases, first, as to the power to correct an unwarranted exercise of jurisdiction by way of proceedings in mandamus in a case where no method of review of such question was otherwise provided,

and second, the right to resort to mandamus in disregard of and as a substitute for express and positive statutory regulations pointing out the method by which such review could be had. Bearing this in mind, it is plain that the language relied upon in *Ex parte Harding* related to the first class and established the doctrine that even in a case where no means of review were provided by statute, the writ of mandamus could be used only in exceptional cases calling for an exceptional remedy. But this did not in the slightest degree qualify or limit the comprehensive rule which was established as to the second class, to the effect that where statutory methods of review of questions of jurisdiction were provided for, they could not be disregarded, and therefore that there was no power to override the statutory provisions by resorting to the writ of mandamus. And the whole subject will be made very clear by a consideration of the opinion in *Ex parte Roe*, *supra*, which gave effect to and applied the rule laid down in *Ex parte Harding*.

Indeed, when the situation dealt with in *Ex parte Harding* is taken into view, it becomes apparent that the confusion and conflict which had imperceptibly arisen from obscuring the lines dividing the statutory methods for review of questions of jurisdiction, and the effort to review them by the writ of mandamus, which was corrected by the decision in that case, would be recreated by now permitting a resort to the writ of mandamus in this case. And this also makes clear that, however grave may be the inconvenience arising in this particular case from the construction which the court gave to the statute, and upon which it based its assertion of jurisdiction, greater inconvenience in many other cases would necessarily come from now departing from the established rule and reviewing the action of the court by resort to a writ of mandamus instead of leaving the correction of the error to the orderly methods of review established by law.

Rule discharged.

(244 U. S. 416)

FIRST NATIONAL BANK OF BAY CITY,
Plff. in Err.,
v.

GRANT FELLOWS, Attorney General of
the State of Michigan, ON THE RELATION
OF UNION TRUST COMPANY
et al.

BANKS AND BANKING — 234 — NATIONAL
BANKS—POWER OF CONGRESS — IMPLIED
POWERS—CONFERRING AUTHORITY TO ACT
AS TRUSTEE, EXECUTOR, ADMINISTRATOR,
OR REGISTRAR.

1. Congress did not exceed its power under U. S. Const. art. 1, § 8, clause 18, to

make "all laws which shall be necessary and proper for carrying into execution" the powers expressly given by the Constitution, when giving authority to the Federal Reserve Board by the Act of December 23, 1913 (38 Stat. at L. 262, chap. 6, Comp. Stat. 1916, § 9794), § 11 (k), to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the board may prescribe.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 879-967, 970-1127.]

CONSTITUTIONAL LAW — 62 — DELEGATION OF POWER—FEDERAL RESERVE ACT.

2. Legislative power was not constitutionally conferred on the Federal Reserve Board by the Act of December 23, 1913 (38 Stat. at L. 262, chap. 6, Comp. Stat. 1916, § 9794), § 11 (k), giving authority to that board to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds, under such rules and regulations as the board may prescribe.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 94-102.]

COURTS — 489(11) — CONFLICTING JURISDICTION—QUO WARRANTO — NATIONAL BANK.

3. The institution by a state attorney general in a state court of the proceeding in the nature of quo warranto to test the authority of a national bank, under the Act of December 23, 1913 (38 Stat. at L. 262, chap. 6, Comp. Stat. 1916, § 9794), § 11 (k), to act as trustee, executor, administrator, or registrar of stocks and bonds, was impliedly if not expressly authorized by the provisions of that section giving such power only "when not in contravention of state or local law," and of the Act of June 3, 1864 (13 Stat. at L. 116, chap. 106) § 57, now in Rev. St. § 5198 (U. S. Comp. St. 1916, § 9759), making controversies concerning national banks cognizable in state courts.

[No. 764.]

Argued March 22 and 23, 1917. Decided
June 11, 1917.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which, in a proceeding in the nature of quo warranto, held that a national bank could not be clothed with power by the Federal Reserve Board to act as trustee, executor, administrator, or registrar of stocks and bonds. Reversed and remanded for further proceedings.

See same case below, — Mich. —, 159 N. W. 335.

The facts are stated in the opinion.

Messrs. Edward S. Clark and H. M. Gillett for plaintiff in error.

Messrs. Henry M. Campbell and John G. Johnson for defendant in error.

Solicitor General Davis and Messrs. Milton C. Elliott and Joseph P. Cotton as amici curiæ, for the United States, by leave of court.

* Mr. Chief Justice White delivered the opinion of the court:

We are of opinion that the procedure resorted to was appropriate and that the state court was competent to administer relief, but we postpone stating our reasons on the subject until the merits have been passed upon.

The court below held that an act of Congress conferring on national banks additional powers was in excess of the authority of Congress, and was hence repugnant to the Constitution. — Mich. —, 159 N. W. 335. The correctness of this conclusion is in substance the sole question for decision on the merits.

Although the powers given were new, the principles involved in the right to confer them were long since considered and defined in adjudged cases. We shall first consider the leading of such cases and then, after stating this case, determine whether they are controlling, causing the subject not to be open for original consideration.

In *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, the bank had been incorporated by Congress with powers to transact business of both a governmental and of a private character. The question which was decided was the authority of Congress to grant such charter. Without undertaking to restate the opinion of Mr. Chief Justice Marshall, it suffices for the purpose of the matter now before us to say that it was held that although Congress was not expressly given the power to confer the charter, authority to do so was to be implied as appropriate to carry out the powers expressly given. In reaching this conclusion it was further decided that to recognize the existence of the implied power was not at all in conflict with article I, § 8, clause 18 of the Constitution, providing that Congress should have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," since that provision did not confine the implied authority to things which were indispensably necessary, but, on the contrary, gave legislative power to adopt every appropriate means to give effect to the powers expressly given. In terms it was pointed out that this broad authority was not stereotyped as of any particular time, but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion, en-

abling it to take into consideration the changing wants and demands of society and to adopt provisions appropriate to meet every situation which it was deemed required to be provided for. In fact, the rulings which we have stated were all summed up in the following passage, which ever since has been one of the principal tests by which to determine the scope of the implied power of Congress over subjects committed to its legislative authority:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate,* let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." p. 421.

In *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204, where substantially the subject was presented in the same form in which it had been passed upon in *M'Culloch v. Maryland*, yielding to the request of counsel, the whole subject was re-examined and the previous doctrines restated and upheld. Considering more fully, however, the question of the possession by the corporation of private powers associated with its public authority, and meeting the contention that the two were separable, and the one, the public power, should be treated as within, and the other, the private, as without, the implied power of Congress, it was expressly held that the authority of Congress was to be ascertained by considering the bank as an entity possessing the rights and powers conferred upon it, and that the lawful power to create the bank and give it the attributes which were deemed essential could not be rendered unavailing by detaching particular powers and considering them isolatedly, and thus destroy the efficacy of the bank as a national instrument. The ruling in effect was that although a particular character of business might not be, when isolatedly considered, within the implied power of Congress, if such business was appropriate or relevant to the banking business, the implied power was to be tested by the right to create the bank and the authority to attach to it that which was relevant, in the judgment of Congress, to make the business of the

bank successful. It was said: "Congress was of opinion that these faculties were necessary, to enable the bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national legislature." p. 864.

*As the doctrines thus announced have been reiterated in a multitude of judicial decisions, and have been undeviatingly applied in legislative, and enforced in administrative, action, we come at once to state the case before us to see whether such doctrines dispose, without more, as a mere question of authority, of the subject under consideration.

Section 11(k) of the Act of Congress approved December 23, 1913, establishing the Federal Reserve Board (38 Stat. at L. 251, 262, chap. 6, Comp. Stat. 1916, §§ 9785, 9794), gives to that board authority "to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

The First National Bank of Bay City, having obtained the certificate required, began the exercise of the powers stated. Thereupon certain trust companies which, under the laws of Michigan, had the authority to do the same character of business, petitioned the attorney general of the state to test the right of the national bank to use the functions, on the ground that its doing so was contrary to the laws of the state of Michigan, and that the action of the Federal Reserve Board, purporting to give authority, was in contravention of the Constitution of the United States. The attorney general then, on the relation of the trust companies, commenced in the supreme court of the state a proceeding in the nature of quo warranto to test the right of the corporation to exercise the functions. The bank, in defense, fully stated its Federal charter, the rights given by the act of Congress, and the action of the Federal Reserve Board taken thereunder. The attorney general demurred to this defense, first, because Congress had no power to confer the authority which was called in question; second, because if it had the power, it was without right to delegate to the Reserve Board the determination of when it should be used; and third, because the exercise of the powers was in contravention of the laws and authority of the state, and the Reserve Board, therefore, under the act, had no power to grant the certificate.

The case was heard by the full court. In

an opinion of one judge, which, it would seem, was written before the opinion of the court was prepared, it was elaborately reasoned that the exercise by a national bank of the functions enumerated in the section of the act of Congress under consideration would be contrary to the laws of the state, and therefore the Reserve Board, under the terms of the act of Congress, had no power to authorize their exertion. The opinion of the court, however, fully examining the grounds thus stated and disagreeing with them, expressly decided that corporations were authorized by the state law to perform the functions in question, and that the mere fact that national banks were Federal corporations did not render them unfit to assume and perform such duties under the state law, because the mere difference existing between the general administrative rules governing national banks and state corporations afforded no ground for saying that it would be contrary to state law for national banks to exert the powers under consideration. The authority conferred by the act of Congress and the rights arising from the certificate from such point of view were therefore upheld. Looking at the subject, however, from a consideration of the legislative power of Congress in the light of the decisions in *McCulloch v. Maryland* and *Osborn v. Bank of United States*, and recognizing that it had been settled beyond dispute that Congress had power to organize banks and endow them with functions both of a public and private character, and in the assumed further light of the rule that every reasonable intendment must be indulged in in favor of the constitutionality of a legislative power exercised, it was yet decided that Congress had no authority to confer the powers embraced in the section of the act under consideration, and hence that the section was void. The court, following its reference to *McCulloch v. Maryland* and *Osborn v. Bank of United States*, and to passages in the opinions in those cases, upholding the rightful possession by the bank of both public functions and private banking attributes, stated the grounds which led it to conclude that the rulings in the decided cases were distinguishable and therefore not controlling. It said:

"But in the reasoning of the judges, in the opinions to which I have referred, I find, I think, a conclusive argument supporting the proposition that Congress has exceeded its constitutional powers in granting to banks the right to act as trustees, executors, and administrators. If for mere profit it can clothe this agency with the powers enumerated, it can give it the rights of a trading corporation, or a transporta-

tion company, or both. There is, as Judge Marshall points out, a natural connection between the business of banking and the carrying on of Federal fiscal operations. There is none, apparently, between such operations and the business of settling estates, or acting as the trustee of bondholders. This being so, there is in the legislation a direct invasion of the sovereignty of the state which controls not only the devolution of estates of deceased persons and the conducting of private business within the state, but as well the creation of corporations and the qualifications and duties of such as may engage in the business of acting as trustees, executors, and administrators. Such an invasion I think the court may declare and may prevent by its order operating upon the offending agency." [— Mich. —, 159 N. W. 339.]

But we are of opinion that the doctrine thus announced not only was wholly inadequate to distinguish the case before us from the rulings in *M'Culloch v. Maryland* and *Osborn v. Bank of United States*, but, on the contrary, directly conflicted with what was decided in those cases; that is to say,*disregarded their authority so as to cause it to be our duty to reverse for the following reasons:

1. Because the opinion of the court, instead of testing the existence of the implied power to grant the particular functions in question by considering the bank as created by Congress as an entity, with all the functions and attributes conferred upon it, rested the determination as to such power upon a separation of the particular functions from the other attributes and functions of the bank, and ascertained the existence of the implied authority to confer them by considering them as segregated; that is, by disregarding their relation to the bank as component parts of its operations,—a doctrine which, as we have seen, was in the most express terms held to be unsound in both of the cases.

2. Because while, in the premise to the reasoning, the right of Congress was fully recognized to exercise its legislative judgment as to the necessity for creating the bank, including the scope and character of the public and private powers which should be given to it, in application the discretion of Congress was disregarded or set aside by exercising judicial discretion for the purpose of determining whether it was relevant or appropriate to give the bank the particular functions in question.

3. Because even under this mistaken view the conclusion that there was no ground for implying the power in Congress was erroneous because it was based on a mistaken standard, since, for the purpose of testing

how far the functions in question which were conferred by the act of Congress on the bank were relevant to its business, or had any relation to discrimination by state legislation against banks created by Congress, it considered not the actual situation, that is, the condition of the state legislation, but an imaginary or nonexistent condition; that is, the assumption that, so far as the state power was concerned, the particular functions were in the state enjoyed*only by individuals or corporations, not coming at all, actually or potentially, in competition with national banks. And the far-reaching effect of this error becomes manifest when it is borne in mind that, plainly, the particular functions enumerated in the statute were conferred upon national banks because of the fact that they were enjoyed as the result of state legislation, by state corporations, rivals in a greater or less degree of national banks.

4. In view of the express ruling that the enjoyment of the powers in question by the national bank would not be in contravention of the state law, it follows that the reference of the court below to the state authority over the particular subjects which the statute deals with must have proceeded upon the erroneous assumption that, because a particular function was subject to be regulated by the state law, therefore Congress was without power to give a national bank the right to carry on such functions. But if this be what the statement signifies, the conflict between it and the rule settled in *M'Culloch v. Maryland* and *Osborn v. Bank of United States* is manifest. What those cases established was that although a business was of a private nature and subject to state regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank the power to exercise such private business in co-operation with or as part of its public authority. Manifestly this excluded the power of the state in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function, since to do so would be but the exertion of state authority to prohibit Congress from exerting a power which, under the Constitution, it had a right to exercise. From this it must also follow that even although a business be of such a character that it is not inherently considered susceptible of*being included by Congress in the powers conferred on national banks, that rule would cease to apply if, by state law, state banking corporations,

trust companies, or others which, by reason of their business, are rivals or quasi rivals of national banks, are permitted to carry on such business. This must be, since the state may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks, and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency. Of course, as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came, in virtue of authority conferred upon them by Congress, to exert such particular powers. And these considerations clearly were in the legislative mind when it enacted the statute in question. This result would seem to be plain when it is observed (a) that the statute authorizes the exertion of the particular functions by national banks when not in contravention of the state law; that is, where the right to perform them is expressly given by the state law; or, what is equivalent, is deducible from the state law because that law has given the functions to state banks or corporations whose business in a greater or less degree rivals that of national banks, thus engendering from the state law itself an implication of authority in Congress to do as to national banks that which the state law has done as to other corporations; and (b) that the statute subjects the right to exert the particular functions which it confers on national banks to the administrative authority of the Reserve Board, giving besides to that board power to adopt rules regulating the exercise of the functions conferred, thus affording the means of coordinating the functions when permitted to be discharged by national banks with the reasonable and nondiscriminating provisions of state law regulating their exercise as to state corporations,—the whole to the end that harmony and the concordant exercise of the national and state power might result.

Before passing to the question of procedure we think it necessary to do no more than say that a contention which was pressed in argument, and which it may be was indirectly referred to in the opinion of the court below, that the authority given by the section to the Reserve Board was void because conferring legislative power

on that board, is so plainly adversely disposed of by many previous adjudications as to cause it to be necessary only to refer to them. *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; *Intermountain Rate Cases* (*United States v. Atchison, T. & S. F. R. Co.*) 234 U. S. 476, 58 L. ed. 1408, 34 Sup. Ct. Rep. 986.

The question of the competency of the procedure and the right to administer the remedy sought then remains. It involves a challenge of the right of the state attorney general to resort in a state court to proceedings in the nature of quo warranto to test the power of the corporation to exert the particular functions given by the act of Congress because they were inherently Federal in character, enjoyed by a Federal corporation, and susceptible only of being directly tested in a Federal court. Support for the challenge in argument is rested upon *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169; *Tarble's Case*, 13 Wall. 397, 20 L. ed. 597; *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 557, 49 L. ed. 1161, 1162, 25 Sup. Ct. Rep. 775, 3 Ann. Cas. 1154; *State ex rel. Wilcox v. Curtis*, 35 Conn. 374, 95 Am. Dec. 263. But, without inquiring into the merits of the doctrine upon which the proposition rests, we think when the contention is tested by a consideration of the subject-matter of this particular controversy it cannot be sustained. In other words, we are of opinion that, as the particular functions in question, by the express terms of the act of Congress, were given only "when not in contravention of state or local law," the state court was, if not expressly, at least impliedly, authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law, and we place our conclusion on that ground. We find no ambiguity in the text, but if it be that ambiguity is latent in the provision, a consideration of its purpose would dispel doubt; especially in view of the interpretation which we have given the statute, and the contrast between the clause governing the subject by the state law and the provision conferring administrative power on the Reserve Board. The nature of the subject dealt with adds cogency to this view, since that subject involves the action of state courts of probate in a universal sense, implying from its very nature the duty of such courts to pass upon the

question, and the power of the court below, within the limits of state jurisdiction, to settle, so far as the state was concerned, the question for all such courts by one suit, thus avoiding the confusion which might arise in the entire system of state probate proceedings and the very serious injury to many classes of society which also might be occasioned. And our conclusion on this subject is fortified by the terms of § 57, chap. 106, 13 Stat. at L. 116, making controversies concerning national banks cognizable in state courts because of their intimate relation to many state laws and regulations, although, without the grant of the act of Congress, such controversies would have been Federal in character.

As it follows from what we have said that the court below erred in declaring the section of the act of Congress to be unconstitutional, the judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

C. W. * 1

*Mr. Justice Van Devanter, dissenting:

I dissent from the conclusion that this proceeding could be brought and maintained in the state court. It is an information in the nature of a quo warranto against a Federal corporation,—a national bank. It calls in question the bank's right to exercise a privilege claimed under an act of Congress, the privilege, under the terms of the act, being conferred only when "not in contravention of the state or local law." The information was brought by the attorney general of the state in his own name, and charges that the bank's exercise of the privilege is "in contempt of the people of the state," by which it is meant, as the record discloses, first, that the exercise of the privilege by the bank is in contravention of the law of the state, and, second, that the act of Congress under which the privilege is claimed transcends the power of Congress and is void. The state court dealt with both grounds. The first was overruled and the second sustained. The judgment rendered enjoins and excludes the bank from exercising the privilege.

The writ of quo warranto was a prerogative writ, and the modern proceeding by information is not different in that respect. When it is brought to exclude the exercise of a franchise, privilege, or power claimed under the United States, it can only be brought in the name of the United States and by its representative, or in such other mode as it may have sanctioned. *Wallace v. Anderson*, 5 Wheat. 291, 5 L. ed. 91; *Nebraska v. Lockwood*, 3 Wall. 236, 18 L. ed. 47; *Newman v. United States*, 238

U. S. 537, 59 L. ed. 1446, 35 Sup. Ct. Rep. 881. As is said in the *Lockwood* case: "The right to institute such proceedings is inherently in the government of the nation." This is particularly true of national banks, for they not only derive all their powers from the United States, but are instrumentalities created by it for a public purpose, and "are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the government may permit." *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 283, 40 L. ed. 700, 701, 16 Sup. Ct. Rep. 502; *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 557, 49 L. ed. 1161, 1162, 25 Sup. Ct. Rep. 775, 3 Ann. Cas. 1154. Indeed, they are upon much the same plane as are officers of the United States, because their conduct can only be controlled by the power that created them. *McClung v. Silliman*, 6 Wheat. 598, 605, 5 L. ed. 340, 342. If it were otherwise, the supremacy of the United States and of its Constitution and laws would be seriously imperiled. *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169; *Tarble's Case*, 13 Wall. 398, 20 L. ed. 597; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *State ex rel. Wilcox v. Curtis*, 35 Conn. 374, 95 Am. Dec. 263.

Thus much, as I understand it, is conceded in this court's opinion, the conclusion that the state court could entertain the information and proceed to judgment thereon, as was done, being rested upon an implied authorization by Congress. This authorization is thought to be found in the provision stating that the privilege claimed is given only "when not in contravention of state or local law," and in the provision in the Act of June 3, 1864, chap. 106, § 57, 13 Stat. at L. 116, now in Rev. Stat. § 5198, Comp. Stat. 1916, § 9759, which makes suits against national banks cognizable in certain state courts. I do not find any such authorization in either provision.

The first does no more than to withhold the privilege in question from national banks located in states whose laws are opposed to or not in harmony with the possession and exercise of such a privilege on the part of the banks. It says nothing about judicial proceedings,—nothing about who shall bring them or where they shall be brought. There is in it no suggestion that quo warranto proceedings were in the mind of Congress. Had there been a purpose to do anything so unusual as to authorize a state officer to institute and conduct such a proceeding in a state court against a Federal corporation, is it not reasonable to believe that Congress would have given expression to that purpose? As before indicated, it said nothing upon the point,

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—just as it would have done had no such purpose been in mind. But if the words “when not in contravention of state or local law” could be regarded as giving any warrant for a quo warranto proceeding by a state officer in a state court, I should say they would do no more than to permit such a proceeding to determine whether the privilege was in contravention of the state law. There is nothing in them which points even remotely to a purpose to sanction a proceeding to determine the power of Congress under the Constitution to clothe a national bank with the privilege indicated. That would be without any precedent in the legislation relating to Federal corporations, and I submit that it is most improbable that Congress either did or would entertain such a purpose.

The provision cited from the Act of 1864 has been in the statutes for fifty-three years, and no one seems ever to have thought until now that it was intended to authorize a proceeding such as this against a national bank. I think its words do not fairly lend themselves to that purpose. They have

hitherto been regarded, and in practice treated, as referring to ordinary suits such as may be conveniently prosecuted against a bank in its home town and county. Besides, the terms of the provision show that it can have no application here. After providing for suing a national bank in the Federal or territorial court of the district in which it is established, the provision adds, “or in any state, county or municipal court in the county or city in which said association is located.” This bank, as the record discloses, is located in Bay City, Bay county. The proceeding was begun and had in the supreme court of the state at the capital, which is Lansing, Ingham county. Therefore the provision can give no support to the proceeding.

For these reasons I think the judgment⁶¹ should be reversed, with a direction to dismiss the information for want of jurisdiction.

Mr. Justice Day authorizes me to say, that he concurs in this dissent.

FOLLOWING ARE MEMORANDA

OF

CASES DISPOSED OF AT OCTOBER TERM, 1916,

WITHOUT OPINIONS AND NOT ELSEWHERE OR OTHERWISE DISPOSED OF IN THIS EDITION.

LAZARUS, MICHEL, & LAZARUS et al., Petitioners, v. **W. P. G. HARDING et al.**, Trustees, etc. [No. 227.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Girault Farrar for petitioners.

No counsel appeared for respondents.

April 25, 1917. Dismissed for want of prosecution.

DAVID E. SOWERS et al., Plaintiffs in Error, v. **FRANK T. JOHNSON et al.** [No. 244.]

In Error to the Supreme Court of the State of Colorado.

Messrs. Ernest Knaebel and William W.

Grant, Jr. for plaintiffs in error.

No counsel appeared for defendants in error.

April 26, 1917. Dismissed with costs, pursuant to the Tenth Rule.

EX PARTE: IN THE MATTER OF BERNIE J. BERNHARD, Petitioner. [No. 29, Original.]

Mr. Charles J. Gillson for petitioner.

No appearance for respondent.

June 4, 1917. Per Curiam: Rule discharged and petition dismissed upon the authority of § 2 of the Act of Congress of July 30, 1894 (28 Stat. at L. 160, chap. 172), § 3, Rule VIII. of the court of appeals of the District of Columbia.

LASER GRAIN COMPANY, Plaintiff in Error, v. **UNITED STATES OF AMERICA**. [No. 658.]

In Error to the District Court of the United States for the Eastern District of Missouri.

Messrs. Walter H. Saunders, John S. Leahy, and Irvin V. Barth for plaintiff in error.

Mr. Solicitor General Davis for defendant in error.

June 4, 1917. Per Curiam: Dismissed for want of jurisdiction, upon the authority

of *Hannis Distilling Co. v. Baltimore*, 216 U. S. 285, 54 L. ed. 482, 39 Sup. Ct. Rep. 326; *Hendricks v. United States*, 223 U. S. 178, 184, 56 L. ed. 394, 396, 32 Sup. Ct. Rep. 313. See *Re Palliser*, 136 U. S. 257, 265-268, 34 L. ed. 514, 517-519, 10 Sup. Ct. Rep. 1034; *Horner v. United States*, 143 U. S. 207, 214, 36 L. ed. 126, 130, 12 Sup. Ct. Rep. 407; *Benson v. Henkel*, 198 U. S. 1, 15, 49 L. ed. 919, 924, 25 Sup. Ct. Rep. 569; *United States v. Thayer*, 209 U. S. 39, 44, 52 L. ed. 673, 675, 28 Sup. Ct. Rep. 426; *Hyde v. United States*, 225 U. S. 347, 361, 56 L. ed. 1114, 1123, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614.

ALBERT PICK & COMPANY, Plaintiff in Error, v. **FRANK C. JORDAN**, Secretary of State of the State of California. [No. 184.]

In Error to the Supreme Court of the State of California.

Mr. W. I. Brobeck for plaintiff in error.

Messrs. U. S. Webb and Raymond Benjamin for defendant in error.

June 4, 1917. Per Curiam: Judgment affirmed with costs, upon the authority of *Kansas City, Ft. S. & M. R. Co. v. Botkin*, 240 U. S. 227, 60 L. ed. 617, 36 Sup. Ct. Rep. 261.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY, Plaintiff in Error, v. **WILLIAM INGRAM**. [No. 601.]

In Error to the Supreme Court of the State of Arkansas.

Mr. Troy Pace for plaintiff in error.

Messrs. J. H. Ralston and William E. Richardson for defendant in error.

June 4, 1917. Per Curiam: Judgment affirmed with costs, upon the authority of *Chicago Junction R. Co. v. King*, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; *Seaboard Air Line R. Co. v. Padgett*, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; *Baltimore & O. R. Co. v. Whitacre*, 242 U. S. 169, 61 L. ed. 228, 37 Sup. Ct. Rep. 33.

EX PARTE: IN THE MATTER OF CORNELIA G. GOODRICH et al., Petitioners. [No. —, Original.]
 Motion for leave to file petition for Writ of Prohibition.
 Messrs. Hannis Taylor and William D. Gordon for petitioners.
 No counsel appeared for respondent.
 June 4, 1917. Denied.

EX PARTE: IN THE MATTER OF J. S. KILGORE, SR., and L. K. Hunter, Petitioners. [No. —, Original.]
 Motion for leave to file petition for Writ of Mandamus.
 Mr. W. E. Breese for petitioners.
 No appearance for respondent.
 June 4, 1917. Denied

ROBERT D. KINNEY, Petitioner, v. ELMER C. RICE. [No. —.]
 Motion for leave to file petition for Writ of Certiorari without certified copy of transcript of record.
 Mr. Robert D. Kinney, petitioner, pro se.
 No appearance for respondent.
 June 4, 1917. Denied.

J. KNOX GREER, Petitioner, v. UNITED STATES. [No. 1126.]
 Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
 Messrs. James C. Denton and Frank Lee for petitioner.
 Mr. Solicitor General Davis for respondent.
 June 4, 1917. Granted.

RALPH K. BLAIR and Thomas Addis, Petitioners, v. **UNITED STATES.** [No. 1086.]
 Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
 Messrs. J. J. Dunne, Allen G. Wright, T. E. K. Cormac, and F. R. Coudert for petitioners.
 Mr. Solicitor General Davis for respondent.
 June 4, 1917. Denied.

MAINE NORTHWESTERN DEVELOPMENT COMPANY, Petitioner, v. NORTHWESTERN COMMERCIAL COMPANY. [No. 1097.]
 Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
 Mr. William H. Goham for petitioner.
 Messrs. W. H. Bogle and Carroll B. Graves for respondent.
 June 4, 1917. Denied.

H. A. A. SMITH, Petitioner, v. GOVERNMENT OF THE CANAL ZONE EX REL. WILLIAM C. MACINTYRE. [No. 1098.]
 Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
 Messrs. Jackson H. Ralston, William E. Richardson, and Frank Feuille for petitioner.
 No appearance for respondent.
 June 4, 1917. Denied.

UNION PACIFIC RAILROAD COMPANY, Petitioner, v. ERBA J. PHILLIPS, as Administratrix, etc. [No. 1115.]
 Petition for a Writ of Certiorari to the Supreme Court of the State of Nebraska.
 Messrs. Nelson H. Loomis and Alfred G. Ellick for petitioner.
 Messrs. John J. Halligan and C. Petrus Peterson for respondent.
 June 4, 1917. Denied.

WILLIAM P. ELLISON, Inc., Petitioner, v. MARSHALL S. HAGAR, as Trustee, etc. [No. 1124.]
 Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
 Mr. Jacob J. Lesser for petitioner.
 Mr. Oscar W. Jeffery for respondent.
 June 4, 1917. Denied.

DAISY B. JAMES, Petitioner, v. DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY. [No. 1135.]
 Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
 Mr. Alexander Simpson for petitioner.
 No appearance for respondent.
 June 4, 1917. Denied.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error, v. EDGAR E. HODGE, a Minor, etc. [No. 526.]
 In Error to the Supreme Court of the State of Oklahoma.
 Mr. W. F. Evans for plaintiff in error.
 No appearance for defendant in error.
 June 4, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant, v. W. H. McLAUGHLIN et al., Constituting, etc. [No. 568.]
 Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.
 Messrs. Edward A. Haid and William T. Wooldridge for appellant.
 Messrs. W. E. Hemingway, G. B. Rose, J. F. Loughborough, and V. M. Miles for appellees.
 June 4, 1917. Dismissed per stipulation.

UNITED STATES OF AMERICA EX RELATIONE
ANTY REYNOLDS, Plaintiff in Error, v.
FRANKLIN K. LANE, Secretary of the In-
terior. [No. 937.]

In Error to the Court of Appeals of the
District of Columbia.

Messrs. James W. McNeill and Norman
R. Haskell for plaintiff in error.

Messrs. Charles D. Mahaffie and C. Ed-
ward Wright, for defendant in error.

June 4, 1917. Dismissed with costs, on
motion of counsel for the plaintiff in
error.

AEOLIAN COMPANY, Petitioner, v. VICTOR
TALKING MACHINE COMPANY. [No.
1149.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Third Circuit.

Mr. Arthur C. Rounds for petitioner.

Messrs. Thomas E. French and Samuel
H. Richards for respondent.

June 5, 1917. Denied.

JOSEPH HENRY BASH et al., Plaintiffs in
Error, v. WILLIAM HOWARD. [No. 657.]

In Error to the Supreme Court of the
State of Oklahoma.

Mr. P. C. Simons for plaintiffs in error.

Mr. J. B. Ferguson for defendant in
error.

June 11, 1917. Per Curiam: Dismissed
for want of jurisdiction upon the authority
of *Deming v. Carlisle Packing Co.* 226 U.
S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct.
Rep. 80; *Consolidated Turnp. Co. v. Nor-
folk & O. V. R. Co.* 228 U. S. 596, 600, 57
L. ed. 982, 983, 33 Sup. Ct. Rep. 609;
Parker v. McLain, 237 U. S. 469, 59 L. ed.
1051, 35 Sup. Ct. Rep. 632; *Stewart v.
Kansas City*, 239 U. S. 14, 60 L. ed. 120,
36 Sup. Ct. Rep. 15; *Re Neagle*, 135 U. S.
55, 34 L. ed. 68, 10 Sup. Ct. Rep. 658; *Re
Delgado*, 140 U. S. 586, 588, 35 L. ed. 578,
11 Sup. Ct. Rep. 874.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error, v. LOUISVILLE & NASH-
VILLE RAILROAD COMPANY. [Nos. 1035,
1036, 1037, and 1038.]

In Error to the Supreme Court of the
State of Alabama.

Messrs. Rush Taggart, Ray Rushton,
Forney Johnston, and William M. Williams
for plaintiff in error.

Messrs. Henry L. Stone and E. Perry
Thomas for defendant in error.

June 11, 1917. Per Curiam: Judgments
affirmed with costs, upon the authority of
*Pensacola Teleg. Co. v. Western U. Teleg.
Co.* 96 U. S. 1, 24 L. ed. 708; *Western U.
Teleg. Co. v. Ann Arbor R. Co.* 178 U. S.
239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867;

*Western U. Teleg. Co. v. Pennsylvania R.
Co.* 195 U. S. 540, 49 L. ed. 312, 25 Sup.
Ct. Rep. 133, 1 Ann. Cas. 517; *Western U.
Teleg. Co. v. Richmond*, 224 U. S. 160, 56
L. ed. 710, 32 Sup. Ct. Rep. 449; *Louisville
& N. R. Co. v. Western U. Teleg. Co.* 237
U. S. 300, 59 L. ed. 965, 35 Sup. Ct. Rep.
598.

Petitions for Writs of Certiorari denied.

CAROLINA, CLINCHFIELD, & OHIO RAILWAY,
Plaintiff in Error, v. GEORGE W. STROUP.
[No. 1122.]

In Error to the United States Circuit
Court of Appeals for the Sixth Circuit.

Mr. John W. Price for plaintiff in error.

Messrs. Isaac Harr and Robert Burrow
for defendant in error.

June 11, 1917. Per Curiam: Dismissed
for want of jurisdiction upon the authority
of § 3 of the Act of Congress of September
6, 1916 (39 Stat. at L. 727, chap. 448,
Comp. Stat. 1916, § 1120a).

OMAHA BAUM IRON STORE Co., formerly
Omaha Iron Store Co., Appellant, v.
MOLINE PLOW COMPANY. [No. 1029.]

Appeal from the District Court of the
United States for the District of Nebraska.

Mr. Otto Raymond Barnett for appellant.

Messrs. Samuel W. Banning and Thomas
A. Banning for appellee.

June 11, 1917. Per Curiam: Dismissed
for want of jurisdiction upon the authority
of *Aspen Min. & Smelting Co. v. Billings*,
150 U. S. 31, 37, 37 L. ed. 986, 988, 14 Sup.
Ct. Rep. 4; *Brown v. Alton Water Co.* 222
U. S. 325, 56 L. ed. 221, 32 Sup. Ct. Rep.
156; *Metropolitan Water Co. v. Kaw Val-
ley Drainage Dist.* 223 U. S. 519, 56 L. ed.
533, 32 Sup. Ct. Rep. 246; *Union Trust
Co. v. Westhus*, 228 U. S. 519, 57 L. ed.
947, 33 Sup. Ct. Rep. 593; *Shapiro v.
United States*, 235 U. S. 412, 59 L. ed. 291,
35 Sup. Ct. Rep. 122.

P. C. O'BRIEN, County Treasurer of Cuya-
hoga County, Appellant, v. JOHN D.
ROCKEFELLER. [No. 1102.]

Appeal from the United States Circuit
Court of Appeals for the Sixth Circuit.

Messrs. Samuel Doerfler and Thomas S.
Dunlap for appellant.

Messrs. W. B. Sanders and A. E. Clemen-
ger for appellee.

June 11, 1917. Per Curiam: Dismissed
for want of jurisdiction upon the authority
of: (1) *Weir v. Rountree*, 216 U. S. 607,
54 L. ed. 635, 30 Sup. Ct. Rep. 418; *Bagley
v. General Fire Extinguisher Co.* 212 U. S.
477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341;
G. & C. Merriam Co. v. Syndicate Pub. Co.
237 U. S. 618, 59 L. ed. 1148, 35 Sup. Ct.
Rep. 708; *Norton v. Whiteside*, 239 U. S.

144, 146, 147, 80 L. ed. 186, 187, 36 Sup. Ct. Rep. 97; (2) *Arbuckle v. Blackburn*, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

Petition for Writ of Certiorari denied.

EX PARTE: IN THE MATTER OF DONN M. ROBERTS, Petitioner [No. —, Original]; and **EX PARTE: IN THE MATTER OF DENNIS SHEA**, [No. —, Original.]

Motions for leave to file petitions for Writs of Habeas Corpus.

Mr. Frans E. Lindquist for petitioners.
No appearance for respondent.

June 11, 1917. Denied on the authority of *United States v. Mosley*, 238 U. S. 383, 59 L. ed. 1355, 35 Sup. Ct. Rep. 904.

EMPIRE MILL COMPANY, Plaintiff in Error, v. **BLACKWELL LUMBER COMPANY**. [No. 786.]

In Error to the Supreme Court of the State of Idaho.

Mr. Charles W. Beale for plaintiff in error.

Mr. John P. Gray for defendant in error.

June 11, 1917. Per Curiam: Dismissed for want of jurisdiction upon the authority of *Luxton v. North River Bridge Co.* 147 U. S. 337, 37 L. ed. 194, 13 Sup. Ct. Rep. 356; *Southern R. Co. v. Postal Teleg.-Cable Co.* 179 U. S. 641, 45 L. ed. 355, 21 Sup. Ct. Rep. 249; *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.* 243 U. S. 251, 61 L. ed. 702, 37 Sup. Ct. Rep. 295.

EX PARTE: IN THE MATTER OF AVASTA HUGHES, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writs of Prohibition and Mandamus.

Mr. Benjamin Patterson for petitioner.

No appearance for respondent.

June 11, 1917. Denied.

SIDNEY HENRY et al., v. **A. B. DICK COMPANY**. [No. 20, October Term, 1911.]

Motion for leave to file bill of review in the District Court of the United States for the Southern District of New York.

Messrs. Arthur von Briesen and Hans von Briesen for complainants.

No appearance for defendant.

June 11, 1917. Granted.

CITY OF RICHMOND, Petitioner, v. **Elizabeth W. BIRD et al.** [No. 1139.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. George Wayne Anderson for petitioner.

No appearance for respondents.

June 11, 1917. Granted.

JOSEPH FREEDMAN, Petitioner, v. **UNITED STATES**. [No. 820.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Charles T. Gallagher and William H. Taylor for petitioner.

Mr. Solicitor General Davis for respondent.

June 11, 1917. Denied.

W. P. TUCKER, Petitioner, v. **CRAWFORDSVILLE STATE BANK**. [No. 1062.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. J. C. Davant for petitioner.

Mr. Peter O. Knight for respondent.

June 11, 1917. Denied.

INDIAN LAND & TRUST COMPANY et al., Petitioners, v. **ROBERT L. OWEN**. [No. 1110.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Mr. Lewis C. Lawson for petitioners.

Mr. W. W. Noffsinger for respondent.

June 11, 1917. Denied.

HARRIET L. BIGGS, Petitioner, v. **GEORGE E. MORRIS et al.** [No. 1113.]

Petition for a Writ of Certiorari to the Court of Errors and Appeals of the State of New Jersey.

Mr. Donald H. McLean for petitioner.

Mr. Benjamin F. Edsall for respondents.

June 11, 1917. Denied.

CRANE COMPANY, Petitioner, v. **FIDELITY TRUST COMPANY**, Trustee, etc. [No. 1114.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. C. W. Fulton for petitioner.

Mr. Randolph W. Childs for respondent.

June 11, 1917. Denied.

CALEB B. RIGGS et al., Petitioners, v. **JOHN J. GILLESPIE**. [No. 1123.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Charles E. Hogg for petitioners.

No appearance for respondent.

June 11, 1917. Denied.

ILLINOIS CENTRAL RAILROAD COMPANY, Petitioner, v. UNITED STATES. [No. 1128.]

Petitioner for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

Messrs. Blewett Lee and W. S. Horton for petitioner.

Mr. Solicitor General Davis for respondent.

June 11, 1917. Denied.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY, Petitioner, v. ROBERT H. MADDEN. [No. 1129.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. William S. Jenney for petitioner.

Mr. Clayton R. Lusk for respondent.

June 11, 1917. Denied.

MAX JAFFE et al., Petitioners, v. J. A. E. PYLE, as Trustee, etc. [No. 1131.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. George T. Hogg for petitioners.

No appearance for respondent.

June 11, 1917. Denied.

STANDARD GAS LIGHT COMPANY OF THE CITY OF NEW YORK, Petitioner, v. R. G. PACKARD COMPANY. [No. 1132.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. John A. Garver for petitioner.

Mr. Mark Ash for respondent.

June 11, 1917. Denied.

JOHN FREDERICK WALLACH et al., Petitioners v. CORNELIUS K. G. BILLINGS. [No. 1133.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

Messrs. Jacob Newman, C. H. Poppenhusen, and H. L. Stern for petitioners.

Messrs. Jesse J. Ricks and J. F. Meagher for respondent.

June 11, 1917. Denied.

FELT & TARRANT MANUFACTURING COMPANY, Petitioner, v. BURROUGHS ADDING MACHINE COMPANY. [No. 1136.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Henry Love Clarke for petitioner.

Messrs. Edward W. Rector and Robert H. Parkinson for respondent.

June 11, 1917. Denied.

FRANK WELCH, Petitioner, v. G. W. ELLIS et al. [No. 1141.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma. Mr. William P. Thompson for petitioner.

No appearance for respondents.

June 11, 1917. Denied.

W. H. LYON, Petitioner, v. JOHN P. BLEEG, Trustee, etc. [No. 1143.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Park Davis, C. C. Caldwell, and Thomas Sterling for petitioner.

Messrs. C. O. Bailey and J. H. Voorhees for respondent.

June 11, 1917. Denied.

M. F. WITTE, Petitioner, v. W. A. SHELTON, as United States Marshal, etc. [No. 1146.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Paul A. Ewert, Norman R. Haskell, and Henry C. Lewis for petitioner.

Mr. Solicitor General Davis for respondent.

June 11, 1917. Denied.

C. H. TIEDEMANN, Petitioner, v. W. A. SHELTON, as United States Marshal, etc. [No. 1147.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Norman R. Haskell, E. G. McAdams, and Henry C. Lewis for petitioner.

Mr. Solicitor General Davis for respondent.

June 11, 1917. Denied.

JOSEPH E. WISE et al., Petitioners, v. CORNELIUS C. WATTS et al. [No. 1151.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Selim M. Franklin, G. H. Bre-villier, and James W. Vroom for petitioners.

Messrs. Joseph W. Bailey and Weldon Bailey for respondents.

June 11, 1917. Denied.

BARRETT COMPANY, etc. et al., Petitioners,
v. THOMAS EWING, Commissioner of Pat-
ents. [No. 1153.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

Messrs. W. H. Swenarton and T. D. Mer-
win for petitioners.

No appearance for respondent.

June 11, 1917. Denied.

SAMUEL M. KINTNER et al., Receivers, etc.,
Petitioners, v. ATLANTIC COMMUNICA-
TION COMPANY et al. [No. 1154.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

Mr. Frederick W. Winter for petitioners.

Messrs. Frederick P. Fish, Harry E.
Knight, and Harrison F. Lyman for re-
spondents.

June 11, 1917. Denied.

END OF CASES IN VOL. 37

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